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[Weekly Reporter, Oct. 29, 1904.]

THE

WEEKLY REPORTER,

1903-1904

(FIFTY-SECOND YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL

FROM THE 24TH OF OCTOBER, 1903, TO THE 12TH OF AUGUST, 1904.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. LII.

EDITED BY
MARTIN JOSEPH BLAKE,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

LONDON: 27, CHANCERY LANE, W.C.

1904.

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PREFACE.

In the fifty-second volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest contains a summary of the cases published from the 7th of November, 1903, to the 27th of August, 1904 (both inclusive), in the WEEKLY REPORTER, and from the beginning of September, 1903, to the end of August, 1904, in the Law Reports, the Law Journal Reports, and the Law Times Reports.

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FROM THE 24TH OF OCTOBER, 1903, TO THE 12TH OF AUGUST, 1904.

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1903–1904.

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BARRISTER-AT-LAW.

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(BANKRUPTCY CASES)	PAUL M. FRANCKE, Barrister-at-Law.
PROB., DIV., and ADM. DIVISION	GWYNNE HALL, Barrister-at-Law.

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THE

WEEKLY REPORTER,

1903-1904.

Court of Appeal.

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) — April 7, 8; May 22, 1903.

NIGHTINGALE *v.* REYNOLDS. (a.)

Mortgage—Priority—Portion—Mortgage pursuant to order of court to raise two out of three portions charged on real estate.

Under the will of a testator, who died in 1851, *three sums of* £5,000, *for children's portions, were charged on his real estate. In* 1880 *two of the portions had become raiseable, and in an action brought for the purpose of clearing the estate from charges an order was made in* 1882 *directing that the two portions should be raised by a mortgage of the estate to a person who was willing to lend the money, such mortgage to be settled by the judge. The proposed mortgagee was aware of all the circumstances and of the purposes for which the money to be advanced was required. The mortgage as settled contained recitals of the title to the portions and of the proceedings in the action, and was expressed to be without prejudice to any charge which might be subsisting in the mortgaged hereditaments under the will. The money was paid by the mortgagee into court, and was afterwards distributed among the persons interested. In an action by the mortgagee claiming priority over the persons interested in the third portion,*

Held, that, having regard to the circumstances of the action and the actual terms of the mortgage, the mortgagee was only entitled to a charge on the estate for the two sums of £5,000, pari passu *with the third sum of like amount.*

Decision of Kekewich, J. ([1902] 2 *Ch.* 117), *affirmed.*

This was an appeal from a decision of Kekewich, J. (reported 1902, 2 Ch. 117, 50 W. R. Dig. 120).

The facts were as follow:

Henry Muskett had three daughters, Emily Louisa Dashwood, Clara Hannah Reynolds, and Julia Matilda Etheridge. The first two married before he made his will, but the other was then a spinster. On the marriage of Mrs. Dashwood, in 1847, he secured to her by bond, given to the trustees of her marriage settlement, a sum of £5,000, and on the marriage of Mrs. Reynolds, in 1848, he secured a like sum of £5,000 by covenant. The sum of £5,000, which was in each case made payable after the death of Henry Muskett, was also in each case settled on the children of the marriage attaining twenty-one. In each case two life annuities were also secured as a provision for the daughter and her husband until the £5,000 became payable.

Henry Muskett made his will, dated the 16th of April, 1849. He thereby gave to his daughter Mrs. Etheridge (then unmarried) an annuity of £200 for her life, and in case she should marry and leave children he gave for the portions of such children attaining twenty-one the sum of £5,000. He subjected and charged specified real estate (which was in fact all his real estate) with the annuity to his said daughter, as also with an annuity given to his wife, and with the said sum of £5,000. He referred to the bond given on the marriage of Mrs. Dashwood, and the settlement of the £5,000 thereby secured; and after confirming the bond and settlement in every respect, he exonerated his personal estate from the payment of the several annuities and sums of money so secured and made payable, stating his intention that the same should be charged upon and payable out of his real estate only. He referred to the settlement made on the marriage of Mrs. Reynolds, confirmed that also, exonerated his personal estate from the payment of the several annuities and sums of money thereby secured and made payable, and stated his intention that the same should be charged upon and payable out of his real estate only. He gave the residue of his personal estate to his son, Henry Joseph Muskett, subject nevertheless to and after payment of his just debts and his funeral and testamentary expenses, and certain legacies which he had given to his wife and daughters respectively, and he provided that in case his personal estate should be insufficient for the payment of his debts and funeral and testamentary expenses and the legacies thereinbefore last mentioned, the same should be a charge upon and payable out of his real estate, which he thereby gave to his said son for his life, with remainder to his children.

Henry Muskett died in 1851. His daughter Julia Matilda married Mr. Etheridge in 1856, and died in 1858, leaving one child, who attained twenty-one in October, 1879. Mrs. Dashwood died in 1880. She had two children, who attained twenty-one before May, 1882. Mrs. Reynolds had several children, one of whom at least attained twenty-one before May, 1882. Mrs. Reynolds was still alive, and was the first defendant to the action.

In 1880 Henry Joseph Muskett, the testator's son and devisee for life of the real estate, commenced an action of *Muskett* v. *Muskett*, in the Chancery Division in order to get the real estate cleared of the charges thereon. The action was properly constituted for this purpose, such of the parties interested as were not made defendants in the first instance being served with notice of the decree, and therefore equally bound by the proceedings as if they had been named defendants. There was a statement of claim, and on the 3rd of July, 1880, a decree was made by Hall, V.C., directing numerous inquiries mainly concerned with the parties interested in the real and leasehold estates passing by

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the will and the charges thereon. The first and thirteenth inquiries were in the following terms:

1. An inquiry whether the debts of the testator other than the bond debt of £5,000 to the plaintiff and to William Collett Reynolds and Robert Fickling, and other than the sum of £5,000 secured by the testator's covenant with Charles Burton Dashwood and the said Robert Fickling in the said will respectively mentioned, and whether the funeral and testamentary expenses of the tetsator and the pecuniary legacies given by his said will, other than the portion of £5,000 bequeathed to the child or children of his daughter Julia Matilda, have been respectively paid.

13. An inquiry whether any and which of the several portions of £5,000 and £5,000 in the said will respectively mentioned and thereby charged upon the testator's real estate in exoneration of his personal estate are now raisable, and to whom such of the said portions as are now raisable ought to be paid.

The decree gave liberty to apply in chambers for raising by sale or mortgage what was necessary for the purpose of satisfying such, if any, of the testator's debts as remained unpaid, and were then raisable out of his real estate, and also what should be certified to be due in respect of the principal of such of the said portions respectively as should for the time being be raisable, together with the costs of action.

This decree was based on a statement of claim which set forth the will at length, and stated that the plaintiff, to whom administration with the will annexed had been granted, had long since received and got in the personal estate of the testator, and had paid thereout the testator's debts and funeral and testamentary expenses and the legacies given by his will other than the said portion of £5,000 for the child or children of his daughter Julia Matilda. It also stated that Mrs. Etheridge and Mrs. Dashwood, and Mrs. Holmes, one of the latter's children who had attained twenty-one, had respectively applied to the plaintiff and had required payment of their portions of £5,000 and £5,000. The plaintiff claimed inquiries respecting the said several sums of £5,000, £5,000, and £5,000, and that such (if any) of them as were then due and payable might be ordered to be raised by mortgage of the real estate, and that provision might be made for raising the other or others of the said portions when the same became payable.

The chief clerk's certificate, in answer to the inquiries directed by the decree, was made on the 17th of February, 1882. The answer to the inquiry No. 13 commenced thus: "Of the several portions of £5,000, £5,000, and £5,000, in the said will respectively mentioned, and thereby charged upon the testator's real estate, only the following are now raisable, that is to say," and it then proceeded to find that the portion of £5,000, given for the children of Mrs. Etheridge, and also the portion of £5,000 given or secured to the children of Mrs. Dashwood, were then raisable, and ought respectively to be paid to the persons in the certificate mentioned in that behalf.

The decree did not reserve further consideration, but an application was made in chambers under the liberty to apply, and on that application an order was made dated the 17th of May, 1882. It provided for the taxation of costs, and, after reciting that it appeared by the chief clerk's certificate that the sums of £5,000 and £5,000 were raisable in respect of the portions of the children of Mrs. Etheridge and Mrs. Dashwood, it was ordered that the said sums and costs should be raised by a mortgage of the real estate to one Samuel Nightingale, who was willing to lend the same, and that such mortgage should be settled by the judge. Provision was made for the execution of the mortgage, and the money lent was ordered to be paid into court, and after directing payment thereout of the taxed costs, it was further ordered that thereout also the said sums of £5,000, and £5,000, and £185 19s. 10d., which had been expended in the enfranchisement of copyholds, should be paid to such persons as should be certified to be entitled to receive the same, and in such proportion as should be also certified.

The mortgage was settled and executed as directed by the order. The moneys lent, including the taxed costs and the enfranchisement moneys, amounting altogether to £10,862 12s. 3d., were paid into court, and on the 2nd of August, 1883, there was a further certificate finding to whom the moneys were payable. For the present purpose it is sufficient to say that £5,000 was certified to be payable and was paid to the trustees of Mrs. Etheridge's only child, and £5,000 was found payable and was paid to the children of Mrs. Dashwood or those claiming through them.

The mortgage was dated the 21st of July, 1883, the parties being Henry Joseph Muskett (the person appointed by order of the court to convey) and Samuel Nightingale. It was a lengthy document, and contained many recitals, including, of course, all the Chancery proceedings. There were recitals to the effect that the portions of Mrs. Etheridge and Mrs. Dashwood were raisable by reason of those ladies having had children who attained twenty-one, and that Mrs. Reynolds was still living and had had several children, but their ages were not mentioned. The operative part was as follows: "Now this indenture witnesseth, that in further pursuance of the said recited order, and by virtue thereof, and in consideration of the said sum of £10,862 12s. 3d. so paid by the said Samuel Nightingale as aforesaid, he, the said Henry Joseph Muskett, as beneficial owner, so far as relates to his estate and interest for life under the said recited will of the said Henry Muskett in the hereditaments intended to be hereby assured, and so as to pass the full benefit of the charge created by the same will in priority to the said life estate or interest, for the purpose of raising the portions of £5,000, and £5,000 provided respectively for the child or children of the said Julia Matilda Etheridge and for the children of the said Charles Burton Dashwood and Emily Louisa his wife, and the interest on the same portions respectively, and as trustee so far as relates to the estate or interest of the persons entitled in remainder in the same hereditaments, hereby grants and conveys unto the said Samuel Nightingale all and singular the manor or lordship, or reputed manor or lordship, advowson, capital and other messuages, farms, lands, tenements, and hereditaments specified and particularized in the schedule hereunder written, being part of the hereditaments and premises mentioned in the first schedule to the chief clerk's certificate made in the said action, to hold unto and to the use of the said Samuel Nightingale in fee simple and particularly as to the premises specified and particularized in the second part of the said schedule hereto, with the full benefit and advantage of the enfranchisement intended to be made thereof as aforesaid, but as to the premises specified and particularized in the third part of the same schedule according to the custom of the same manor of Burgh Vaux, and by and under the rents, suits, and services therefor due and of right accustomed, and subject as to the life estate or interest of the said Henry John Muskett to the mortgage thereon hereinbefore mentioned, and as to all the said hereditaments and premises without prejudice to any charge which may be subsisting therein under the said will of the said Henry Muskett, subject to the proviso for redemption hereinafter contained." The proviso for redemption in effect was that on the principal and

interest being paid the property should be conveyed to the then subsisting uses or limitations of the will.

The mortgagee, Samuel Nightingale, died in 1886, having by his will appointed his son, the plaintiff, Samuel Nightingale, and two other persons his executors, and by an indenture of the 14th of March, 1890, the mortgage was duly transferred to the plaintiff, who now brought this action, claiming a declaration that he was entitled in respect of his security to priority as against the hereditaments comprised therein over the Reynolds portion of £5,000, and foreclosure, accounts, and other relief.

The defendants were Mrs. Reynolds and her children, the seven children of Henry Joseph Muskett (deceased), and the National Reversionary Investment Co., who were assignees of the share of one of the children of Mrs. Reynolds.

Kekewich, J., held that the plaintiff could only claim a charge for the two sums of £5,000 *pari passu* with the third sum.

The plaintiff appealed.

P. O. Lawrence, K.C., and *J. K. Young*, for the appellant.

Warrington, K.C., and *Tyssen*, for the Reynolds family.

W. A. Peck, for the National Reversionary Investment Co.

The following authorities were referred to: *Sheppard* v. *Wilson*, 4 Hare 392; *Morley* v. *Morley*, 5 Ves. 248; Davidson's Precedents in Conveyancing, vol. 3, part 1 (3rd ed.), p. 457; Seton's Judgments and Orders, vol. 2 (6th ed.), p. 1736.

Cur. adv. vult.

ROMER, L.J., read the following judgment, in which Collins, M.R., concurred: The question we have to decide is to what extent the mortgage to Mr. Nightingale—hereafter called the mortgagee—has prejudiced or affected the charge created by the will of the testator Henry Muskett in favour of the annuities to Mr. and Mrs. Reynolds and of the portion of £5,000 for their children. For brevity I shall hereafter refer to these annuities as "the annuity" and to the portion as "the Reynolds portion." At the date when the action of *Muskett* v. *Muskett* was commenced the annuity and the Reynolds portion were charged by the will on the testator's real and leasehold estate *pari passu* with the two other portions of £5,000 each. The annuity and the Reynolds portion and one of the two other portions were secured by the covenant of the testator in his lifetime, and in respect of these there was a debt due from his estate at his death. The two last-mentioned portions, hereafter called the two portions, had become payable, but the Reynolds portion was not payable. The plaintiff in that action, hereafter referred to as the plaintiff, was under the will legal tenant for life, and the defendants were legal tenants in remainder of the estate subject to the above-mentioned charges. In the will there was no provision enabling the tenant for life or any other person to free the estate or any part of it from the charges. In this state of things I think it is advisable, in order to properly determine this appeal, in the first place to carefully consider the proceedings in the action of *Muskett* v. *Muskett*—hereafter called the action—which resulted in Mr. Nightingale's mortgage, and then to discuss the terms of that mortgage on which the mortgagees' rights must ultimately depend. Now it is clear from the statement of claim in the action that its sole object was to have the portions that were then due and payable raised and paid out of the settled estate and to have the remaining portion raised and paid when it became payable. The only parties to the action were the persons legally entitled to the estate subject to the charges; there were no trusts to be administered. The statement of claim alleged, as the facts were, that the plaintiff, who was the sole legatee of the residuary personal estate under the will, had paid all the debts and legacies of the testator, other than portions, and had kept down the annuities bequeathed by the will. The statement of claim further alleged that those entitled to the two portions required payment, and the claim was only to have an inquiry what portions were then due and payable and to have them raised by mortgage of the estate. The action as constituted in no wise appears to contemplate any interference with the charge of the Reynolds portion or with the rights of those interested therein. Still less does it appear in any way concerned with or to relate to the annuity, and the persons entitled to that annuity were in no wise concerned in that capacity with the raising of the portions. In short, the action appears only to relate, so far as concerns the immediate action of the court, to the enforcement of a right claimed on behalf of the tenant for life of the estate subject to its charges as against those entitled in remainder to have the two charges that were then due and payable raised out of the corpus of the estate belonging to the parties to the action, that is to say, the estate subject to its charges. But in such an action it was obviously right and proper, were it not actually necessary, especially as the plaintiff was the legatee of the testator's residuary personal estate, that it should be shown to the court that the testator's debts and pecuniary legacies and funeral and testamentary expenses were paid, and that the annuities charged against the estate were not in arrear. Accordingly when the action came on for judgment in default of defence on the 3rd of July, 1880, there are inquiries and accounts directed to bring out the above facts. Also, as was right and proper, there was an inquiry whether any and which of the three portions were then raisable and an account was directed of what was then due for interest and principal in respect of each of such of the portions as were then raisable. I need scarcely say that there is nothing in these inquiries and accounts to alter or enlarge the nature of the action or to prejudice the annuity or the Reynolds portion, but there are parts of the judgment which confirm the view of the action that I have previously indicated. After the above-mentioned inquiries it is ordered that what, if anything, should be certified was then due in respect of the said annuities, and also the future payments of the then subsisting annuities should be paid and kept down by the plaintiff during his life out of the rents and profits of such parts of the estate as was subject to the said payments respectively. Then follows the following significant provision: [His lordship referred to the order, and continued:] Now this last provision seems to me to show clearly that the court was only considering for the purpose of raising the necessary moneys the beneficial estate belonging to the parties to the action at the time of the judgment, for it not only includes as part of the moneys to be raised any sum necessary to discharge any unpaid debts of the testator, which as between the then parties to the action and those entitled to the charges on the estate would have to be borne by the former, but it also includes in the moneys to be raised the costs of the action. It is almost incredible that the court should have contemplated that the plaintiff and defendants to the action should obtain payment of their costs by a charge to take precedence over the charges in favour of the annuity and of the Reynolds portion. With reference to the liberty to apply for a sale as well as for a mortgage contained in the last-

mentioned provision, it does not appear to me to militate against the view I am taking. A sale of part of the estate might have been made subject to the annuity, and if necessary also subject to the Reynolds portion. And even if for the purposes of raising the two portions payable, the court might have had jurisdiction as against the Reynolds portion to order a sale of part of the estate it would never have done so without inquiry as to value in order to see that a part of the estate sufficient in value was left for the Reynolds portion, and no such inquiry was ever directed or, so far as I can see, ever really contemplated. And as against the annuity I do not see what right the court would have had in this action, and in the circumstances existing to order a sale of any part of the estate freed from the annuity. Looking, then, at the action as framed and to the judgment obtained, having regard to its form and to the circumstances under which it was given, it appears to me that so far no interference with the charge of the annuity and of the Reynolds portion was contemplated or authorized.

Although it may not have been actually necessary that this judgment should be served on the members of the Reynolds family, it was obviously convenient and proper that that should be done, and that they should have an opportunity of appearing, and should be bound by the result of the proceedings. They were interested in several of the inquiries and accounts directed, and moreover, through their trustees they were interested as ordinary creditors of the testator, and should they have thought it right to insist on their rights as such creditors difficulties might have ensued, and those difficulties would be removed by their being served and appearing and raising no claim. Accordingly they were served with the judgment and became bound by the proceedings, but it is clear that so far nothing had been done which had in any way prejudiced or affected their charges or had indicated any suggested right or any intention on the part of the court to prejudice or affect them. Then followed the chief clerk's certificate. It answered the inquiries and found *inter alia* that there were no outstanding ordinary debts of the testator and no arrears of the annuity, and stated the position of affairs with regard to the portion and set forth in the schedule the particulars of the estate and found that there was no incumbrance affecting it other than the charges created by the will. Then came the order on further consideration of the 17th of May, 1882; that order on the face of it appears to me also to bear out the view that the court throughout the action was not contemplating or sanctioning anything to the prejudice of the charge for the annuity and the Reynolds portion. It made an order for taxation of the further costs of the plaintiff and defendants to the action and of the costs of the parties served with the judgment and having liberty to attend, and found that a sum of £185 19s. 10d. was needed for the enfranchisement of a copyhold portion of the estate required by the lord of the manor. It then stated that Mr. Nightingale was willing to advance the two sums of £5,000 and £5,000 required for the two portions raisable and the enfranchisement money and the taxed costs on a mortgage of the estate mentioned in the schedule to the chief clerk's certificate, or a competent part of the estate. And it was ordered that the said sums and costs be raised by mortgage accordingly, such mortgage to be settled by the judge. Then comes an important part of the order: "And it is ordered that the plaintiff be and he is hereby appointed to execute the same for the purpose of conveying the real estate so to be mortgaged for all the estate and interest of the infant defendants or other the persons entitled in remainder." That is to say, the order contemplates that the plaintiff would convey in respect of his own life interest and in respect of those entitled in remainder, and not (so far as expressed) on behalf of any other persons. It is difficult to suppose from this that the court contemplated any conveyance except by and on behalf of those entitled to the estate as settled by the will—that is to say, the estate subject to the charges. The order then gives leave to Mr. Nightingale to pay into court to the credit of the action the total of the said sums and costs, and then directs that thereupon the said mortgage should be executed by all proper parties as the judge shall direct and be delivered to the mortgagee, and then directs payment out of court of the costs and of the two portions raised and the enfranchisement money to the parties entitled to the same. It is to be noticed that Mr. Nightingale was made aware of the exact position of affairs. He knew of the charges by the will. He knew what the action was for and the various proceedings in it, and he knew that he was asked to lend moneys in respect of the different items that had been raised and he knew the purposes for which they were raised, and to whom when raised they would go after his mortgage was executed. There was nothing in the proceedings in the action to lead Mr. Nightingale to suppose that he was to receive a security which would prejudice in any way the charge in favour of the annuity and of the Reynolds portion, and if he desired to obtain such a security he should have made his desire plain, and if he did not do so and did not in fact obtain such a security then he has only himself or his advisers to blame. It follows from the above observation that, looking to the order on further consideration as a whole, it is perfectly consistent with the original object and scope of the action and with all the other proceedings in the action, and shows no intention whatever to interfere with or prejudice or affect the charges of the annuity and of the Reynolds portion. This brings me to a consideration of the mortgage deed itself, for the subsequent proceedings in the action so far as material were merely an approval by the court of the form of mortgage to be executed and an ascertainment by taxation of the costs to be raised, payment into court by Mr. Nightingale of the necessary moneys, and then the mortgage to him was executed. From these proceedings I should have expected to find that the mortgage in favour of the mortgagee approved of by the court and executed would be one that did not in any way enlarge or in any way prejudice the right of those entitled to the annuity and to the Reynolds portion. And on perusal and consideration of that mortgage it fulfils my expectation and in my opinion on its construction its effect is what I have above indicated.

The only parties to the mortgage deed are the plaintiff and the mortgagee. The recitals are full, and show clearly all the material facts, and the rights of all persons interested in the mortgage property and the proceedings in the action and what moneys had to be raised and advanced by the mortgagee and for what purposes. There is, however, a recital of a fact which did not appear from the proceedings in the action and which is of some materiality. It appeared from this recital that the plaintiff as tenant for life had mortgaged his life estate to one George Durrant (who was in no wise party or in any way bound by the proceedings in the action) and that this mortgage was still effective as against some parts of the estate, though what parts is not stated. Then, coming to the assurance by the plaintiff, it is important to notice the form in which he conveys. It is as follows: "He, the said Henry Joseph Muskett, as beneficial owner

so far as relates to his estate or interest for life under the said recited will of the said Henry Muskett in the hereditaments intended to be hereby assured, and so as to pass the full benefit of the charge created by the same, will in priority to the said life estate or interest for the purpose of raising the portion of £5,000 and £5,000 provided respectively for the child or children of the said Julia Matilda Etheridge and for the children of the said Charles Burton Dashwood and Emily Louisa, his wife, and the interest on the same portions respectively and as trustee so far as relates to the estate or interest of the persons entitled in remainder in the same hereditaments hereby grants and conveys unto the said Samuel Nightingale."

Now, two points for observation arise from this. The first concerns the assurance by the plaintiff "so far as relates to his estate or interest for life under the . . . will," and "as trustee so far as relates to the estate or interest of the person entitled in remainder." That carried out the order on further consideration in that behalf and tends strongly to show that the plaintiff was only authorized to convey the estate on behalf and in respect of the interests of those entitled to it, subject to the charges created by the will, and not on behalf or in respect of the interests of those entitled to the annuity and the Reynolds portion. The second point which gives rise to observation is that the plaintiff is made to assure so as to pass the full benefit of the two charges in respect of the two portions of £5,000 each which were being raised, and not so as to pass any right in respect of the Reynolds portion or of the annuity. The assurance in this respect is curiously framed from a strict conveyancing point of view, but the object of it is clear and its effect is undoubted. The charges in favour of the two portions paid off were clearly intended to be kept alive in favour of the mortgagee and there is no difficulty in giving effect to the clear intention. This was of practical importance to the mortgagee having regard to the mortgage on the life estate in favour of George Durrant; and Mr. Nightingale as against Durrant would have had to rely on the charges in respect of the two portions. Now these two charges only ranked *pari passu* with the charges in favour of the annuity and the Reynolds portion, and could only be set up by the mortgagee as ranking *pari passu*, and it seems clear from this, as well as from the reference to the two raised portions, that it was contemplated that all the charges were to remain unaffected by the mortgage deed. Then comes the *habendum* showing that the lands conveyed were to be held by the mortgagee with the full benefit of the enfranchisement intended to be made, and subject as to the life estate or interest of the plaintiff to the mortgage thereon and as to all the lands "without prejudice to any charge which may be subsisting therein under the said will," "subject to the proviso for redemption hereinafter contained (that is to say)," and then followed the proviso for redemption.

Now, on the construction of this part of the deed I think its meaning and effect is that Mr. Nightingale was to hold subject to the existing charges, and not that the reference to those charges was merely made part of the proviso for redemption to be treated as if it had been put in at the end of the proviso. This view is, in my opinion, in accordance with the words employed when read according to their *primâ facie* and natural meaning. And it is borne out by the position and wording of the clause referring to the charges and by the difficulty of treating that clause as intended to come in at the end of the proviso for redemption, where it would be difficult to read in the exact words used in the clause—viz., "and as to all the said hereditaments and premiums without prejudice," &c. But still more strongly it is borne out by the other part of the deed, and also by the difficulty of supposing that in such an action as that in which the mortgage was authorized, and after the proceedings in that action to which I have called attention the court intended to sanction or did sanction a mortgage which would interfere with the charge of the Reynolds portion, and still less one which would interfere with the annuity, which was in no wise concerned with the portions.

I have now completed my examination of the deed, which in my opinion carefully and properly preserves the rights of those interested in the annuity and Reynolds portion without in any way enlarging them, but I will add a few words on the argument on behalf of the appellant, which was much pressed upon us, and was based on the inconvenient nature of the security obtained by Mr. Nightingale, and on the alleged difficulty of supposing that he could have been expected to lend his money on such a security. In the first place, even admitting this to the full, yet it affords no sufficient ground for altering the view I have taken as to the effect of the deed, or for prejudicing or affecting those interested in the annuity and in the Reynolds portion. The mortgagee was, as I have already pointed out, made fully aware of all the circumstances of the case, and the deed was approved of on his behalf before he parted with his money, but in my opinion the inconvenience arising from the nature of his security has been much exaggerated. He obtained a mortgage on the whole estate subject only to such rights therein as existed in respect of the annuity and the Reynolds portion. It is not suggested that at the time he made his advance that security was not ample. It is the subsequent diminution in the value of the lands which has rendered the present question important. In respect of the security he obtained he could have sold the estate subject to the right I have mentioned under his power of sale, and could otherwise have enforced all the rights of a mortgagee. That he was not obtaining a security altogether free from difficulty is perfectly free from doubt, seeing that he knew of the mortgage of the life interest and the necessity of having the benefit of the charges of the two portions that were being raised. And it seems to me that any argument based upon the exact amount of difficulty in the nature of his security is entitled to little weight. It only remains for me to say a word as to the enfranchisement money. I have pointed out that the rights of those interested in the annuity and in the Reynolds portion were in no way enlarged by the mortgage. Now there was good ground (which I need not further enter into) for saying that so far as the mortgagee's money went to pay for the enfranchisement he could support a claim to a first charge over the estate, or at any rate over the enfranchised portion. And so far as the respondents are concerned it would not matter much whether that first charge was only on the enfranchised lands or on all the lands, and accordingly they appear not to have objected to the view that in respect of the enfranchisement money the mortgagee obtained a first charge, at any rate there is no appeal by them from this part of the order. But that in no wise prejudices them in saying that as to the rest of his moneys the mortgagee has only the ordinary rights given to him by his deed. He knew exactly, and the proceedings and mortgage set forth what moneys he was advancing, and for what purposes, and any special security he may have obtained by reason of the purpose to which part was applied cannot enlarge his security in respect of the other moneys. It appears to me that the order of Kekewich, J., has at

least given to Mr. Nightingale all the rights he was entitled to, assuming that the mortgage deed did not prejudice the rights of the respondents. As to the sum advanced for costs, those costs were clearly not chargeable in front of the charges of the respondents, but were payable by those entitled to the estate subject to the charges. I am not sure that the order so far as it covers the sum advanced for costs is not too favourable to the appellant, but as there is no counter-appeal on this head I need not further consider the point. I think, therefore, the appeal should be dismissed with costs.

COZENS-HARDY, L.J.—I agree that this appeal must be dismissed for the reasons stated by Romer, L.J., in the judgment which he has read. But I desire to add a few words on the nature and frame of the action of *Muskett* v. *Muskett*. The sole plaintiff was the legal tenant for life and the sole defendants were the legal remaindermen in fee, though the plaintiff was also the legal personal representative of the testator. No person interested in the annuity and portion charged upon the property was made a party. I doubt whether such an action could be maintained except on the footing that it was an action for the administration of the unadministered estate of the testator. It was treated as falling within ord. 16, r. 40, the annuitant or portioners being all served with notice of the judgment, and thus treated as being bound by the proceedings in the same manner as if they had originally been made parties. In short they were regarded as legatees whose legacies were payable out of and charged upon the testator's real estate solely. In this view the court had jurisdiction to direct the two legacies, which were then raisable to be raised by mortgage or sale and to give a mortgagee or purchaser a good title free from the claims of the Reynolds family. The court was not bound to raise all the portions or legacies at once, and probably would not have done so against the wish of the claims of the Reynolds family.

But I agree with Romer, L.J., that it rests upon the appellants, who assert that that which was originally a *pari passu* charge has been postponed, to establish the proposition, and that there is no presumption in their favour. I have reluctantly come to the conclusion that there is nothing either in the orders of the court or in the form of the mortgage settled by the court which justifies us in giving the appellants any better or larger security than they have obtained under the judgment of Kekewich, J. Nightingale or his advisers had all the documents before them, and it is not for us to consider how far their true operation and effect may have been misapprehended.

Appeal dismissed.

Solicitors, *Pasco Daphne; J. M. Yetts; Iliffe, Henley, & Sweet.*

From Chan. Div. (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) } Feb. 6, 16, 18, 1903.

DEVONPORT CORPORATION v. TOZER. (a.)

Local government—Bye-laws—Infringement—Erection of houses abutting on public highway—Laying out new street—Urban authority—Statutory remedy—Attorney-General, Absence of—Jurisdiction.

The defendants were the owners of a triangular piece of land within the plaintiffs' borough. Two sides of the triangle abutted upon public highways within the borough. The defendants, in pursuance of a building scheme, erected houses on their land fronting the highways. The plaintiffs alleged that the defendants were laying out the highways as new streets which did not comply with the requirements of the borough bye-laws as to width, and they claimed, first, an injunction, and, secondly, a declaration that the plaintiffs were entitled to remove or pull down any work begun or done by the defendants in contravention of the bye-laws. The bye-laws, which were framed under the Public Health Act, 1875, prescribed a penalty for infringement, to be recovered by summary proceedings, and provided that the plaintiffs might, subject to any statutory provision in that behalf, remove, alter, or pull down any work begun or done in contravention of the bye-laws.

Held, (1) *that the plaintiffs could not maintain an action in the absence of the Attorney-General;* (2) *that the facts did not justify the inference that the defendants were laying out a "new street" within the meaning of the bye-laws.*

Decision of Joyce, J. ([1902] 2 *Ch.* 182, 50 *W. R. Dig.* 97), *affirmed.*

Attorney-General *v.* Ashborne Recreation Ground Co., 51 *W. R.* 125, [1903] 1 *Ch.* 101, *approved.*

Appeal from the decision of Joyce, J. (reported [1902] 2 Ch. 182, 50 W. R. Dig. 97).

The facts were as follows: The defendants were the owners of a triangular piece of land, containing about three acres, one side of which abutted upon a public highway known as Ham-lane, and another side of which abutted on a public highway known as Tavistock-road. The roadway of Ham-lane was within the borough of Devonport, but the defendants' land, together with the portion of Tavistock-road upon which it abutted, was, down to November, 1900, within the rural district of Plympton St. Mary.

Within this rural district were certain bye-laws, with respect to new streets, framed under section 157 of the Public Health Act, 1875. They provided, *inter alia*, as follows: "With respect to the width and construction of new streets.—Every person who shall lay out a street which shall be intended for use as a carriage-road shall so lay out such street that the width thereof shall be 36 feet at the least." "Every person who shall construct a new street which shall exceed 100 feet in length shall construct such street for use as a carriage-road, and shall, as regards such street, comply with the requirements of every bye-law relating to a new street intended for use as a carriage-road." Bye-law 90 provided that every person who should intend to lay out a street should give to the sanitary authority certain notices and deliver plans and sections of such intended street; and bye-law 97 provided that "every person who shall offend against any of the foregoing bye-laws shall be liable for every such offence to a penalty of £5, and, in the case of a continuing offence, to a further penalty of 40s. for each day after written notice of the offence from the sanitary authority. Provided nevertheless that the justices or court before whom any complaint may be made or any proceedings may be taken in respect of any such offence may, if they think fit, adjudge the payment as a penalty of any sum less than the full amount of the penalty imposed by this bye-law." Bye-law 98 was as follows: "If any work to which any of the bye-laws relating to new streets and buildings may apply, be begun or done in contravention of any such bye-law, the person by whom such work shall be so begun or done, by a notice in writing, which shall be signed by the clerk of the sanitary authority, and shall be duly served upon or delivered

(a.) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

to such person, shall be required, on or before such day as shall be specified in such notice, by a statement in writing under his hand or under the hand of an agent duly authorized in that behalf and addressed to and duly served upon the sanitary authority, to show sufficient cause why such work shall not be removed, altered, or pulled down; or shall be required on such day and at such time and place as shall be specified in such notice to attend personally or by agent duly authorized in that behalf before the sanitary authority and show sufficient cause why such work shall not be removed, altered, or pulled down. If such person shall fail to shew sufficient cause why such work shall not be removed, altered, or pulled down, the sanitary authority shall be empowered, subject to any statutory provisions in that behalf, to remove, alter, or pull down such work."

By Part V. of the Devonport Corporation Act, 1900, it was enacted that as from the 9th of November, 1900, the boundaries of the borough and parish of Devonport should be extended so as to comprise the triangular piece of land in question. It was also enacted by section 43 of that Act in conjunction with Art. xii. of the Devonport Extension Order, 1898, which order was confirmed by the Local Government Board's Provisional Order Confirmation (No. 10) Act, 1898, that all bye-laws in force in the existing borough should thenceforth apply to the borough so extended, and that all bye-laws made by the council of the said rural district should as from the 9th of November, 1900, cease to have any effect in any part of the added area, but without prejudice to anything duly done thereunder, and provided that any porceedings which might have been taken against any person for any offence against the said bye-laws before the 9th of November, 1900, might be taken by the plaintiffs as if those bye-laws had remained in force.

The bye-laws of the Borough of Devonport were, so far as material to this case, virtually the same as the bye-laws of Plympton St. Mary.

The defendants, whose land was at a considerable distance from any town, had some time before the commencement of the Devonport Corporation Act, 1900, began to build on their land. Proper plans were deposited with the rural authority and proper notices given as required by the bye-laws. The rural authority had neither approved nor disapproved of the plans, nor had they instituted any proceedings for penalties under the bye-laws. On the commencement of the said Act the rights of the rural authority to take proceedings in the matter, if any, were transferred to the plaintiffs.

The plaintiffs had not taken any proceedings before the justices, but instituted this action, in which they claimed an injunction and other relief, without joining the Attorney-General as plaintiff.

Joyce, J., held, (1) that the defendants were not laying out or intending to lay out the highways as new streets within the meaning of the bye-laws; (2) that the bye-laws could not be enforced by action for an injunction, but only by the special remedies thereby provided, or by way of information by the Attorney-General; (3) that no such declaration as asked for ought to be made.

The plaintiffs appealed.

Macmorran, K.C., Hughes, K.C., and *R. J. Parker*, for the appellants.—There is abundant evidence of an intention on the part of the defendants to turn an old highway into a new street. If a person begins to build with an intention of going on with his buildings, the moment he begins to build he lays out a new street: *Robinson* v. *Barton-Eccles Local Board*, 32 W. R. 249, (1883) 8 App. Cas. 798; *Williams* v. *Powning*, (1883) 48 L. T. 672, 31 W. R. Dig. 113; *Gozzett* v. *Maldon Urban Sanitary Authority*, [1894] 1 Q. B. 327; and *St. George's Local Board* v. *Ballard*, 43 W. R. 409, [1895] 1 Q. B. 702. If a man intends to lay out a new street, he must provide for its width as required by the bye-laws. [They also cited on this point *Attorney-General* v. *Rufford & Co.*, 47 W. R. 405, [1899] 1 Ch. 537.] Further, the appellants are entitled to proceed by an action for an injunction. By sections 157, 158, and 183 of the Public Health Act, 1875, the local urban authority is given authority with regard to new streets. It has power to pull down what it disapproves. It may, if it so chooses, make bye-laws imposing penalties. There is a duty cast on an urban authority to enforce its bye-laws, and the power to bring an action for an injunction is an implication from this duty.

They referred to *Attorney-General* v. *Ashborne Recreation Ground Co.*, *ante*, p. 125, [1903] 1 Ch. 101; *Tottenham Urban Council* v. *Williamson & Sons*, 44 W. R. 676, [1896] 2 Q. B. 353; *Wallasey Local Board* v. *Gracey*, 35 W. R. 694, (1887) 36 Ch. D. 593; *Attorney-General* v. *Logan*, [1891] 2 Q. B. 100, 39 W. R. Dig. 115; *Hendon Local Board* v. *Pounce*, 38 W. R. 377, (1889) 42 Ch. D. 602; *Bromley Local Board* v. *Lloyd*, (1892) 66 L. T. 462, 40 W. R. Dig. 134; *Grand Junction Waterworks Co.* v. *Hampton Urban Council*, 46 W. R. 644, [1898] 2 Ch. 331; *Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347; and *Barraclough* v. *Brown*, [1897] A. C. 615, 45 W. R. Dig. 152.

Danckwerts, K.C., and *A. Glen*, for the respondents.—The defendants have not constructed or laid out a new street. They could not construct either of these roads without committing a trespass upon the highway: *Harrison* v. *Duke of Rutland*, 41 W. R. 322, [1893] 1 Q. B. 142. They have not infringed the bye-laws: *Gozzett* v. *Maldon Urban Sanitary Authority*; *Williams* v. *Powning*; *Reg.* v. *Fulford*, (1864) 33 L. J. M. C. 122. The defendants have committed no offence under the bye-laws. But even if they have, the plaintiffs cannot enforce them by such an action as this without the intervention of the Attorney-General. The plaintiffs have no proprietary right of any sort. They can only enforce their bye-laws in the proper statutory manner: *Barraclough* v. *Brown*; *Grand Junction Waterworks Co.* v. *Hampton Urban Council*; *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A. C. 387, 46 W. R. Dig. 106. Disobedience to bye-laws is a criminal matter: *Mellor* v. *Dewham*, (1880) 5 Q. B. D. 467, 28 W. R. Dig. 163; *Wallasey Local Board* v. *Gracey*; *Tottenham Urban Council* v. *Williamson & Sons*. [They were stopped by the court.]

COLLINS, M.R.—This is an appeal from a decision of Joyce, J., who decided two questions: First of all, he held that the particular bye-laws in this case did not apply under the circumstances; but, secondly, he held that this was an action which could not be maintained by the local authority otherwise than in the name of the Attorney-General; that the Attorney-General was not a party to the cause, and that that in itself was a complete answer. If the learned judge is right in holding that this was not an action that could be maintained by the local authority without the Attorney-General, this appeal must fail.

These proceedings are not taken for the penalty imposed by the bye-laws, they are taken on the general right of a public body who are trying to put in suit a claim for the breach of a statute. Buckley, J., in a very elaborate judgment in the case of the *Attorney-General* v. *Ashborne Recreation Ground Co.*, has covered the whole of the law, as it seems to me, upon this point. I do not think I could usefully add

anything to the reasons there given—namely, that when there is a public wrong, and when the local authority, who have certain special rights to sue in their own name for certain special remedies, but have not done so, and are trying to put in suit a public wrong, they must do it in the recognized way—namely, at the suit of the Attorney-General. In this case the plaintiffs have attempted to do it without the intervention of the Attorney-General, and that is really enough to dispose of this case.

With regard to the other part of the case, I do not think it necessary to say more than that I see no reason for differing from Joyce, J. The question is purely one of fact—namely, whether we are bound to draw an inference from the acts done by these particular owners, the defendants, who are building on the land in question, that they are making or laying out a new street. It seems to me that the learned judge was perfectly justified in drawing the inference that he did draw—namely, that the facts are not sufficient in a matter of this kind, involving such large consequences, to enable the court to arrive at the conclusive inference of fact that these defendants are laying out a new street. We find a plan which, if carried out, will undoubtedly involve the construction of a large number of houses in a row; we find that three houses are practically finished, but not finished in the sense of being ready for occupation, nor is there as yet any occupier, and we find that those houses are separated from the existing highway by a strip of land which belongs to the building owners, which is fenced off from the highway, and through which there is no aperture for persons to pass out from the houses, except through such gaps in the fence as were made for introducing building materials for the purpose of carrying out the building scheme. Under those circumstance it seems to me it is quite impossible to say that the strip in front of these houses has, in any sense, become a street. It may hereafter, for all I know, become a street, or part of a street, but we are asked at the present moment to say the defendants are engaged in forming a new street. The learned judge has come to the conclusion that they are not, and it seems to me that the difficulties of holding that they are are greater than the difficulties of drawing the inference that they are not.

For these reasons I think the appeal must be dismissed with costs.

ROMER, L.J.—I am of the same opinion. It is to be borne in mind that the plaintiffs here have no proprietary rights which are being interfered with by what is being done by the defendants. The plaintiffs, no doubt, have powers conferred on them to make bye-laws, but that alone gives them no special rights over other bodies, or other members of the public, as to initiating proceedings to enforce those bye-laws. Such powers as the plaintiffs (the public body) have to enforce bye-laws must be conferred upon them by special powers given to them by statute, and, in fact, you do find special powers here given; and, except in so far as special powers are given, they have no inherent right to take proceedings. And I think it is rather to be deprecated that public bodies such as the plaintiffs in this case should be at liberty, without the leave of the Attorney-General, to commence expensive proceedings such as these at their own will. The fact that you do find a special power given to a public body such as the plaintiffs to initiate proceedings at law, or in equity, in certain special cases is an additional proof that the Legislature never contemplated that, apart from special legislative permission they should have a right to take any proceedings they might think fit for the purpose of enforcing the bye-laws apart from the special power conferred upon them by statute.

With regard to the other point, I think Joyce, J., also came to a right conclusion. It appears to me, especially with respect to the bye-law as to laying out a new street, that if you look at that bye-law, coupled with the other bye-laws which refer to laying out a new street, it is clear that the bye-law in question is dealing with something in the nature of a physical laying-out, and not what I may call a metaphorical laying-out. These bye-laws relate to something to be done, or contemplated to be done, on the land in question which is to be the street. It is to be borne in mind that these bye-laws have to be very carefully construed, because any infringement of them is in the nature of a criminal offence; and if the plaintiffs wish to assert that an offence has been committed or is threatened by the defendants, they must show clearly which bye-law it is which is said to have been or to be about to be infringed. The defendants are not, to my mind, within the meaning of the terms of the bye-laws relied upon by the plaintiffs, either laying out, or threatening at present to lay out, a new street at all. On that ground also I think the decision of Joyce, J., was perfectly right, and that this appeal must be dismissed.

COZENS-HARDY, L.J.—I agree. On the point on which alone we are really deciding this appeal I do not think I can with advantage add anything to the very careful judgment of Buckley, J., in the case of *Attorney-General* v. *Ashborne Recreation Ground Co.*, but, if necessary, I think a very strong argument in support of his judgment is found in section 107 of the Public Health Act, 1875. On the other point, upon which we are really not deciding this appeal, speaking for myself, I see no reason whatever to differ from the conclusion at which Joyce, J., arrived.

Appeal dismissed.

Solicitors, *Cunliffes & Davenport*, for *A. B. Pilling*, Devonport; *Surr, Gribble, & Oliver*, for *J. Walter Wilson*, Plymouth.

High Court of Justice.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) July 6, 7, 1903.

ROBINSON BROTHERS (*Appellants*) v. DIXON (*Respondent*). (a.)

Inland revenue — Grogging spirit casks — Extracting spirit from wood of casks—Spirit exuding from the wood—Liability—Finance Act, 1898 (61 & 62 *Vict. c.* 10), *s.* 4, *sub-section* 1 (b).

By the Finance Act, 1898, *section* 4, *sub-section* 1, *it is provided that "a person shall not* (a) *subject any cask to any process for the purpose of extracting any spirits absorbed in the wood thereof; or* (b) *have on his premises any cask which is being subjected to any such process, or any spirits extracted from the wood of any cask."*

Held, the words "process for the purpose of extracting" do not include a natural exudation, and that, therefore, the section does not include, as an offence, the innocent possession of spirits which have exuded without any active or permissive process to lead to such exudation.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Case stated by justices for the county of Durham.

An information was laid by the respondent under section 4 of the Finance Act, 1898, against the appellants charging that they on the 27th of May, 1902, at Houghton-le-Spring, had on their premises certain spirits extracted from the wood of certain casks in contravention of the statute. Section 4 (1) of the above Act provides that "A person shall not (*a*) subject any cask to any process for the purpose of extracting any spirits absorbed in the wood thereof; or (*b*) have on his premises any cask which is being subjected to any such process or any spirits extracted from the wood of any cask."

At the hearing of the information the following facts were proved. An Inland Revenue supervisor on the 27th of May, 1902, visited the premises of the appellants, who carry on business at Houghton-le-Spring as brewers and wine and spirit merchants; he there found two casks bunged and standing under a tree in the yard where they had been placed to be screened from the sun, but where it was admitted the sun might reach them during some part of the day. One of the casks which had originally contained 101·6 gallons of rum of the strength of 32·2 degrees over proof then contained a little over an imperial quart of rum 27·2 degrees over proof; the other cask which had originally contained 107·8 gallons of whiskey 22·9 degrees over proof then contained a little less than an imperial quart of spirit of the strength 9·0 degrees over proof. An Inland Revenue analyst analyzed the said spirits and found them to contain a greater amount of tannin than is found in ordinary commercial spirits, and also compound ethers which came from substances absorbed in the wood casks, and he had no doubt that the said spirits had been extracted from the wood of the casks. The two casks found by the inspector, after being pumped out and turn upside down to drain for a few minutes, had been placed where found in the ordinary course of business, and were intended to remain there until an opportunity arose for returning the cask which had contained whisky to the distillery from which it had been received, and until a customer was found to purchase the cask which had contained rum. The former cask had been where found for about three weeks, the latter for about six weeks, and they had not been subjected by the appellants to any process for the purpose of abstracting spirit from the wood thereof.

After consideration of the whole of the evidence the justices found as facts that the casks were placed where found to await removal or disposal as aforesaid, and that neither the appellants nor their servants or agents had subjected the casks or either of them to any process for the purpose of extracting spirits from the wood thereof; but having regard to the evidence of the inspector that the spirits found in the casks, or some part thereof, had come from the wood of the said casks, and to the fact that the said spirits had been found by the inspector in the two casks on the premises of the appellants, they convicted the appellants of the offence charged against them in the information.

The question of law for the opinion of the court was whether the words "extracted from the wood of any cask" were meant to cover the accumulation in the cask of spirit which had exuded from the wood of such cask after the same had been emptied in the usual course, without active or permissive process on the part of the appellants.

Bruce Williamson (*Danckwerts, K.C.*, with him), for the appellants.

Sir R. B. Finlay, A.G. (*H. Sutton* and *S. A. T. Rowlatt* with him), for the respondent.

Lord ALVERSTONE, L.C.J.—I am of opinion that this appeal must be allowed. The first point is the construction of the section itself. Now, the offence created by this section is a criminal offence, and a serious offence, of course, having regard to the fine inflicted of £50. The section deals in the first place with subjecting any cask to any process for the purpose of extracting any spirits absorbed in the wood. Extracting in its natural meaning I understand to mean drawing out, and not a natural exudation or sweating; it is a process for the purpose of extracting. Then the section goes on to say: "If a person has on his premises any cask which is being subjected to any such process, or any spirits extracted from the wood of any cask." It is contended by the learned Attorney-General that that means exuding in fact, or having exuded in fact by atmospheric or climatic influences whether subjected to a process or not. I think that is not so, and I further think that that proposition is negatived by the use of the same or corresponding language in sub-section 3: "All spirits extracted in contravention" — that means extracted by something which the section forbids—"shall be deemed to be spirits unlawfully kept or deposited within the meaning of the Spirits Act, 1880, and every cask which is being subjected to any such process, or which being upon premises upon which spirits so extracted"—that means extracted in contravention of this section—"are found has been subjected to any such process, shall be forfeited." I therefore come to the conclusion that the section did not mean to include as an offence the innocent possession of spirits which had exuded without any active or permissive process to lead to the extraction of the spirits.

Now when the case was before us in the first instance the fact that the appellants had not used an active or permissive process was negatived, but it was suggested very properly by the learned Attorney-General that their servants might have known all about it, and accordingly the case went back, and the further case finds two things which I think are very important—first, that the casks were placed to await removal or disposal; secondly, "That neither the appellants nor their servants or agents had subjected the said casks or either of them to any process for the purpose of extracting spirits from the wood thereof." I understand that to negative the suggestion with regard to the servants, and to put the servants in the same position as the appellants.

I only wish to add one further observation upon the facts as stated, which, I think, make the meaning clear. Everything in the case, I think, negatives any knowledge or process intentionally applied, or applied with knowledge to make the stuff exude, or to extract it. The casks are placed in a place screened from the sun, although it was admitted that sometimes the sun would reach them. They were there, one for the purpose of being delivered to the distillery, and the other for the purpose of being sold, and the spirits are not found to have been taken out of the casks. The case would be a very different case if the result had been that the spirit had been taken out and used, and I think there is a great deal in the argument used by counsel for the appellants, that if some limit is not to be put on the meaning of the word "extracted," a person who is in possession of a cask innocently, upon which the sun plays, which causes the stuff to exude from the wood, would be liable to a penalty under the section. I am of opinion that, adopting the construction which I put upon the word "extracted," which means not exuding, but extracting the spirit by some process, either a natural process or an artificial process, there was no offence committed here, and I think any inference of guilt from the fact

that the spirits had come out of the wood and were in the cask is negatived by the finding of the magistrates both in the original case and in the present case. I think, therefore, this appeal should be allowed.

WILLS, J.—I have come to the same conclusion. The case is not at all free from difficulty, and many suggestions may be made to show that either on the one hand or the other inconveniences or an injustice may follow upon whatever decision is given. The decision which we give here may possibly leave it open to people to put these things where they know the spirit will be extracted from the casks without it being possible to convict them of any offence under this section. On the other hand very great inconvenience, as has been pointed out by Mr. Williamson, would arise if a contrary meaning were given to the word "extract," and it would undoubtedly subject the carrier or a railway company to prosecutions, if these casks should remain in the warehouse of the carrier or on the premises of the railway company for a sufficient length of time for exudation to take place. Therefore it is not a case in which one can judge much what the construction should be with reference to the consequences of it. It seems to me the consequences are not unfairly balanced on the one side or the other, and, if that is so, there is no other ground than that the natural meaning of the language is the best guide, and the first guide that ought to be resorted to. Now "extract" in all ordinary understanding, I think, means something more than exude, and I think if it should be felt that there is any serious inconvenience to the Revenue in the construction which we are putting upon this section, the proper remedy is for the Government to go to Parliament and to get the word "exude," or some word of that kind, put into the Act, so that there may be no doubt about it. But I think it would be straining an enactment, which is a criminal enactment after all, to say that such a word as "extract" really covers that which is merely exudation, therefore I come to the same conclusion as my lord.

CHANNELL, J.—I am of the same opinion, and I confess, for myself, I think the words are quite clear. I do not think there is any difficulty about them. There is a little difficulty in this particular case in saying whether or not the facts bring the appellants within the statute, because I think there is no doubt that if somebody in the employment, for instance, of the appellants, without any knowledge on the part of the appellants at all, had put these casks in a place where they could get a little sun upon them instead of being entirely in the shade, knowing that the effect of that would bring out some of the spirits, that then the spirits would have been extracted and it would not signify under the words of this section whether they would have been extracted by the appellants — they would be extracted and not merely exuded, and consequently the appellants would be liable to be convicted. That is the point which we sent the case back upon. I do not know whether the magistrates heard any further evidence, or whether they have sent it back to us upon the former evidence; possibly they had not their attention directed very fully to this point, and they were unable to decide the object of the particular individual or person, or whoever it was on the premises who actually put the casks there; consequently they came to the conclusion that it was not done intentionally by anybody. That being so, it seems to me the statute does not apply. I should think our decision that it is not necessary that the persons in whose possession it was should themselves have been parties to the extraction would be enough to satisfy the purposes of the Crown in all ordinary cases, and that most likely when they are prosecuting in another case, and point out to the tribunal that a man who knows anything about these things must know the effect of putting a cask in the sun, they will be able to prove in point of fact that it was extracted, although they have not proved it in this.

Appeal allowed; conviction quashed.

Solicitors for appellants, *Cunliffes & Davenport*, for *J. G. Wilson, Ornsby, & Cadle*, Durham.

Solicitor for respondent, *Solicitor of Inland Revenue.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — May 20, 1903.

REX v. HIGH BAILIFF OF WESTMINSTER.
Ex parte LONDON COUNTY COUNCIL. (*a.*)

Lands Clauses Acts — Compensation — Sealed offer — Allegation that premises to be acquired were unsanitary —Jury discharged after giving verdict as to unsanitary condition of premises, but before they found as to the value of the premises—Right of claimant after verdict to accept "sum previously offered"—Lands Clauses Act, 1845 (8 *&* 9 *Vict. c.* 18), *ss.* 38, 51—*London County Council (Improvement) Act,* 1899 (62 *&* 63 *Vict. c. cclxvi.*), *s.* 20.

A "sealed offer" for the purchase price of land to be acquired, made under section 38 *of the Lands Clauses Act,* 1845, *is a continuing offer, which may be accepted at any time before the verdict of the jury assessing the amount of compensation has been given.*

Cause shown against a rule *nisi* for a writ of *mandamus* commanding the high bailiff at Westminster to summon a special jury to settle the amount of money to be paid to the claimants in respect of their estate or interest in certain premises by reason of the taking of such premises by the London County Council under 62 & 63 Vict. c. cclxvi., an Act to empower the London County Council to make a new street from Holborn to the Strand and other street improvements.

On the 4th of March, 1902, the London County Council gave notice to the claimants, Elizabeth S. Burgis and Jane Croft, for the purchase of their estate and interest in 19, Vere-street, St. Clement Dane's, and they alleged that the premises were in an insanitary condition.

The claimants on the 27th of March, 1902, served on the council a notice of claim. The council on the 5th of November, 1902, delivered to the claimants an offer of £1,600 under seal, which was declined on the 18th of November.

The council, on the 22nd of November, 1902, issued their warrant to the high bailiff requiring him to summon a special jury to determine whether the premises were insanitary or not and what compensation should be paid by the council to the claimants.

On the 12th of December, 1902, the case was heard before the deputy high bailiff and a special jury. The question whether the premises were insanitary was first tried, and after hearing evidence on behalf of both sides the jury found that the property was insanitary. The claimants then stated they would accept the sealed offer, and withdrew the case from the jury and asked to have the jury discharged. The council objected, on the grounds that the case was

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

in the hands of the jury and that the amount of compensation to be paid must be determined by them, and, further, that the claimants had by letter on the 18th of November, 1902, refused the sealed offer.

The deputy bailiff held that the claimants were then entitled to accept the offer made, and he discharged the jury without their giving a verdict as to the amount of compensation. No verdict or judgment was recorded.

The London County Council thereupon obtained the present rule.

Danckwerts, K.C. (*R. C. Glen* with him), for the claimants, showed cause against the rule.—It is open to the claimants to accept the offer at any time up to verdict. This has been the practice, and section 51 of the Lands Clauses Act, 1845, shows that such an offer under seal is a standing offer until the verdict of the jury has been given, because it is treated for the purposes of costs as a payment into court: *Reg.* v. *Manley Smith*, 32 W. R. 275, 12 Q. B. D. 481.

Dickens, K.C. (*Corrie Grant* with him), for the council, in support of the rule.—By the London County Council (Improvement) Act, 1899, s. 3, the Lands Clauses Act, 1845, is substantially incorporated, and by section 20 the council may claim in their notice to treat that the property to which the notice refers is unfit for human habitation or is insanitary. In that case "the court or person settling the same shall determine whether such lands fall wholly or in part within the above descriptions, and if they so decide, then, in assessing compensation payable" certain evidence is to be received. If the court or person be satisfied by such evidence, then the the purchase-money and compensation is to be determined and assessed according to the principles indicated in section 21 of the Housing of the Working Classes Act, 1890. There is nothing which sets aside the provisions in section 38 of the Lands Clauses Act, 1845, that the offer must be accepted within ten days. The whole object of the legislation was to give the claimants an opportunity to accept an offer to save themselves from the expense of litigation. If the offer could be accepted up to verdict, the object of the provision would be rendered nugatory, for the promoters would be put to all the expense of the trial. In *In re Heywood and Metropolitan Railway Co.*, 12 W. R. 577, 4 B. & S. 787, it was held that, the jury having given the same sum as the amount of the amended offer, the claimant was not entitled to costs under section 51. There, however, the amended offer was made within ten days of the date when the final offer was made and refused, and is therefore not applicable here on the question of time.

Danckwerts, K.C., replied.

Lord ALVERSTONE, L.C.J.—It is obvious that if the view taken by the London County Council is the right one, a very large number of cases have been decided upon the contrary view, and if the offer does not bind the purchasing authority, so that it could be withdrawn in order that they might have to pay less than the sum offered, it is remarkable that nothing of the kind has been referred to in any of the decisions. Now what are the facts? The offer was made under section 38 of the Lands Clauses Act, 1845, which enacts that before the promoters of the undertaking shall issue their warrant for a jury they shall give not less than ten days' notice to the other party, and in such notice they shall state what sum they are willing to give in compensation. We were pressed by Mr. Dickens to say that the offer must be accepted within ten days, because, he said, if it was not accepted, the promoters would incur costs in getting the case ready for trial; but the necessity of his argument forced him to overlook the position of the vendor, who was not intended to be put in a worse position than the promoters. The vendor had to incur the costs of trial and knew that if he went to trial and the jury found a verdict for less than the amount of the offer he would not only have to bear his own costs, but some portion of what might be called the joint costs. That is quite clear from section 51. [His lordship read the section, and continuing said:] That was part of the burden that the vendor took upon himself. The *dictum* of Lord Coleridge, L.C.J., in *Reg.* v. *Smith* to the effect that he agreed with the expression of opinion by Blackburn, J., in *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.*, L. R. 7 Q. B., at p. 785, appears to me to be a correct enunciation of the law applicable to this particular point, although, as Mr. Dickens contended, it was a mere expression of opinion which did not bind us. Therefore, in my opinion, under the Lands Clauses Act, 1845, the offer was intended to stand as an offer down to the time when the verdict of the jury was given. The claimant therefore was entitled to say that he would accept that offer at any time subject to this, that he could not be in a better position than if the jury had given a verdict to the amount of the offer. That being so, the only question left to be determined is whether section 20 of the Act of 1899 has made any difference. I see some difficulty as to the way that section was to be worked out. There was to be a first issue tried as to whether the property in question was unfit for human habitation or was insanitary, and then whether such lands in the opinion of the court or "such person" fell wholly or in part within that description. The Act of 1899 incorporated the Lands Clauses Acts, and in my opinion the only difference that section 20 of the Act of 1899 makes is that it sets up two standards of compensation. The promoters here gave notice with their notice to treat that they would submit that the premises were insanitary, therefore the promoters had brought about a state of things that would entitle the owner, if they succeeded in showing that the premises were insanitary, to receive compensation only at the lower scale. It is impossible to suggest that they had a greater right to withdraw an offer under section 20 of the Act of 1899 than they had under the Act of 1845. Mr. Dickens said that it would be a hardship if this view were adopted, because in these offers there was a considerable margin allowed. In my opinion that argument applies just as strongly to the Lands Clauses Act as to the Act of 1899. For the purposes of section 51 of the Act of 1845 there would have to be a margin allowed, and therefore a margin would have to be allowed under one Act or the other. For these reasons I think the decision of the deputy bailiff was right and the rule must be discharged.

WILLS and CHANNELL, JJ., concurred.

Rule discharged

Solicitors, *Lewis & Lewis; W. A. Blaxland.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — May 6, 1903.

CRANE v. ORMEROD. (*a.*)

County Court—Distress—Sale—Power of bailiff to give title to goods—County Courts Act, 1888, *s.* 156.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

A piano, the property of A., was seized by the bailiff of the county court in execution of a judgment against B., and was sold at auction to C. A. had no notice of, and made no claim to the goods prior to, the sale.

Held, that A. was entitled to recover the piano from C., as the bailiff of the county court could only give to C. by a sale made without any claim on the part of A., a title to the goods of the judgment debtor.

Goodlock v. Cousens, 45 *W. R.* 367, [1897] 1 *Q. B.* 508, *distinguished.*

Appeal from His Honour Judge Coventry, sitting at the Chorley County Court.

The facts of the case are as follows:

The plaintiff had deposited with a man called Woodward a piano on the hire system. In August, 1902, an action was brought against Woodward and judgment recovered against him. The piano in question was taken in execution by the bailiff. It was advertised, and was ultimately sold to the defendant. In December, 1902, the plaintiff heard of the sale, and brought this action against the defendant to recover the piano.

The county court judge gave judgment for the plaintiff on the ground that the sale by the bailiff gave no title to the defendant.

The defendant appealed.

Compton Smith, for the defendant.—I admit that if this piano had been sold by the sheriff the plaintiff would have been entitled to succeed in this action, but the case is different in the county court. The case of *Goodlock* v. *Cousins*, 45 W. R. 367, [1897] 1 Q. B. 348 and (C. A.) 508, decides that in a case where the bailiff has sold under section 156 of the County Courts Act, 1888, the purchaser gets a good title, and the principle of that case applies here.

Rigby Swift, for the plaintiff, was not called upon.

Lord ALVERSTONE, L.C.J.—The proposition put forward in this case was an alarming one. Section 147 of the County Courts Act, 1888, directs the bailiff to seize the goods and chattels of the judgment debtor, and then follow a number of sections dealing with the goods seized. By section 156 it is provided that where a claim is made to goods taken in execution the claimant shall deposit their value or give security for their value, otherwise the bailiff shall sell such goods. It was held in *Goodlock* v. *Cousins* that the purchaser under such circumstances acquired a good title as against the real owner, but that case was dealing with the rights of the purchaser who purchased under section 156 where a claim had been made and the goods sold, and is no authority for the proposition that the bailiff can give a good title where no claim has been made. I think that the judgment of the county court judge was right and this appeal must be dismissed.

WILLS, J.—I agree. There is no reason why sale by the bailiff of the county court should give a title when a sale by the sheriff would give none. No doubt in cases under section 156, where the claimant to the goods is unable to give security, there may be a sale by the plaintiff of goods which do not belong to the judgment debtor. In *Goodlock* v. *Cousins* the court of first instance and the Court of Appeal laid down that the unqualified direction to sell contained in section 156 gave the purchaser a good title as against the true owner. But that decision has no application to a case where the owner to whom the goods belonged has never made any claim.

CHANNELL, J.—I am of the same opinion. I cannot find any words in any section which give the bailiff an authority to sell goods which do not belong to him, except those contained in section 156, where a claim has been made to the goods seized. In cases under that section the purchaser gets a good title and the proceeds of the sale are paid into court, and by section 157 the judge is adjudicator between the parties—that is to say, the claimant and execution creditor. But a purchaser, where no claim has been made, does not come within these sections.

Appeal dismissed.

Solicitors for defendants, *E. C. Rawlings & Butt*, for *J. H. Neville*, Chorley.

Solicitors for plaintiffs, *Norris, Allens, & Chapman*, for *J. M. Quiggin & Co.*, Liverpool.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — April 24, 1903.

LISTER v. LANCASHIRE AND YORKSHIRE RAILWAY CO. (*a.*)

Railway Company—Common carrier—Liability—Inherent unfitness of thing carried.

A railway company contracted with the plaintiff to carry an engine from the plaintiff's premises to a station on their line. The engine was on wheels and fitted with shafts, but one of the shafts contained a latent flaw. The railway company had it carried by horses, that being the mode of carriage contemplated by both parties. While the engine was on the road the shaft which contained the flaw broke, the horses bolted, and the engine was upset and damaged.

Held, that the railway were not liable for the damage caused, as it arose from an inherent vice in the thing contracted to be carried.

Appeal from county court of Bradford.

The following are the facts of the case: The defendants were employed by the plaintiff to carry an engine from his yard to a neighbouring yard on their line. The defendants sent two men, two boys, and two horses for that purpose. The engine was on wheels with shafts to draw it. The horses were harnessed to the engine, which was drawn out of the yard, and whilst proceeding along the road one of the shafts broke, the horses took fright, and the engine was upset and sustained damage. The breaking of the shaft was due to an inherent defect and would not have been discovered by any ordinary examination.

The county court judge gave judgment for the plaintiff on the ground that the rule which exonerates a common carrier from liability to damage if it be caused by the inherent vice of the thing carried, is limited to cases in which the inherent vice itself directly causes the damage and without any contributory act done by the carrier, and he accordingly held that as the shaft could not have broken but for the strain put upon it by the defendants' own act, its defective condition afforded no excuse to the defendants.

The defendants appealed.

Scott Fox, K.C., and *R. Watson*, for the defendants.—The county court judge limited the rule unduly. The carrier is bound to carry the thing in the ordinary way, but is not liable if an accident occurs through an inherent defect in the thing carried. It was intended here that the engine should be taken through in the way in which the defendants did take it—by harnessing the horses to the shafts, and therefore the inherent defect was the sole cause of the loss.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

They cited *Nugent* v. *Smith*, 1 C. P. D. 423; *Kendal* v. *London and North-Western Railway*, 7 Exch.

Lush, K.C., and *Edge*, for the plaintiff.—The immediate cause of the loss here was not the act of the consigner or due to any default on his part, but was due to the act of the carrier. The loss was therefore not due to the well-known exception as laid down in Story on Bailment, s. 492.

Lord ALVERSTONE, L.C.J.—I am of opinion the county court judge has put a limitation on the rule which is not justified by any authority. The engine was being conveyed as the common carrier would naturally have carried it, and therefore it cannot be said that there was an alternative and safer way of carriage. Of course, if a common carrier having a safe mode of conveyance chooses to carry it in another, a different rule would apply. Here, however, all parties intended it should be conveyed to the station on wheels, as it in fact was. The limitation on the rule put by the learned county court judge to cases in which the damage would equally have occurred if the thing had not been carried at all is inconsistent with the rule as laid down in *Nugent* v. *Smith*. When once you arrive at the conclusion that the thing is being carried in the ordinary way, and that the common carrier has taken every reasonable precaution, and the accident happens from the unfitness of the thing for that mode of carriage, the carrier is not responsible.

WILLS, J.—I agree.

CHANNELL, J.—I also agree. I think the proposition may be stated thus: The inherent unfitness for the carriage contemplated, although not known to either party, is inherent vice within the meaning of the exception that has been established by the decided cases.

Appeal allowed.

Solicitors for the plaintiffs, *Gordon, Hunter, & Macmaster*, Bradford.

Solicitors for the defendants, *C. Moorhouse*, Manchester.

K. B. Div. (Wright, J.) April 23, 1903.

STOCKDALE *v.* ASCHERBERG. (*a.*)

Landlord and tenant—Agreement—Covenant by tenant to pay "outgoings in respect of the premises"—Reconstruction of drains by order of sanitary authority—Liability of tenant.

By an agreement entered into between the plaintiff and the defendant, the plaintiff agreed to let and the defendant agreed to take certain premises for three years at an annual rent, and the defendant agreed, inter alia, *to pay all rates, taxes, assessments, and outgoings of every description for the time being payable in respect of the premises as they became due, except landlord's property tax. During the tenancy created by the agreement the sanitary authority for the district served a notice, under the Public Health Act,* 1875, *upon the plaintiff requiring the abatement of a nuisance, and for that purpose the reconstruction of the drains of the house. This work the plaintiff had carried out, and now sought to recover the cost of such work from the defendant under his agreement to pay outgoings of every description in respect of the premises.*

Held, that the works executed by the plaintiff, as required by the sanitary authority, were outgoings within the meaning of the agreement entered into by the defendant, and that he was liable to re-pay the plaintiff the cost of such work.

Decision of Farwell, J., *in* Valpy *v.* St. Leonard's Wharf Co., 1 *L. G. R.* 305, *not followed.*

This was an action tried by Wright, J., without a jury.

In this case the landlord claimed to recover from his tenant, under an agreement by the latter to pay all outgoings in respect of the premises, a sum of money paid by the landlord in carrying out certain works required by the sanitary authority.

By an agreement in writing entered into between the plaintiff and the defendant the plaintiff agreed to let and the defendant agreed to take a certain house known as 52, Brondesbury-villas, Kilburn, for a term of three years from the 25th of March, 1902, and then from year to year, subject to six months' notice to quit by either party, at the rental of £55 per annum, payable quarterly on the usual quarter days, free of all deductions except landlord's property tax.

The defendant also agreed to pay all taxes, rates, assessments, and outgoings of every description for the time being payable in respect of the premises as they became due, landlord's property tax only excepted as aforesaid.

The tenant further agreed to keep and leave the premises in good condition, reasonable wear and tear excepted, and to keep, *inter alia*, the water-closets, cisterns, internal pipes and taps clean and in good repair.

During the occupancy by the defendant under the above agreement, the Willesden Urban District Council, being the sanitary authority, served a notice under the Public Health Act, 1875, upon the plaintiff requiring her to abate a nuisance arising upon the premises, and for that purpose to reconstruct the drains of the house.

The plaintiff in compliance with such notice had the necessary work executed at the cost of £83 10s., which sum she now sought to recover from the defendant under his agreement to pay all outgoings in respect of the premises.

The defendant refused to pay on the ground that it was never contemplated at the time the agreement was entered into that he should incur a liability of such a nature.

Hohler, for the plaintiff.—The expense of these repairs is an "outgoing" within the meaning of the covenant: *Aldridge* v. *Ferne*, 34 W. R. 578, 17 Q. B. D. 212. Further, these expenses were incurred "in respect of the premises": *Butt* v. *Rogers*, 45 W. R. 334, [1897] 1 Q. B. 525, and *Farlow* v. *Stevenson*, 48 W. R. 213, [1900] 1 Ch. 128.

Edgar Foa, for the defendant.—The effect of recent decisions is to establish the doctrine that in construing the meaning of such a word as "outgoings" in a lease all the surrounding circumstances are to be taken into consideration. The most recent decision is that in *Valpy* v. *St. Leonard's Wharf Co.*, 1 L. G. R. 305. Previous decisions are *Wilkinson* v. *Collyer*, 32 W. R. 614, 13 Q. B. D. 1; *Arding* v. *Economic Printing Co.*, 79 L. T. 622; *Batchelor* v. *Bigyar*, 60 L. T. 416; *Crosse* v. *Raw*, 23 W. R. 6, L. R. 9 Ex. 209; *Gardner* v. *Furness Railway*, 47 J. P. 232; *In re Bettingham*, 9 Times L. R. 48; *Antil* v. *Godwin*, 15 Times L. R. 462; *Weld* v. *Clayton-le-Moors Urban Council*, 86 L. T. 584; and *Hill* v. *Edward*, 1 Times L. R. 253. In *Foulger* v. *Arding*, 50 W. R. 417, [1902] 1 K. B. 700, Collins, M.R., states the principle for measuring the liability of the tenant as being what might reasonably be supposed to have been contemplated by the parties as being within the purview of the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

contract. In the present case the shortness of the term, the amount of the rent as compared with the required outlay, and the restricted nature of the repairing covenant all point to the conclusion that it was never contemplated by the parties at the time of the contract that the tenant should possibly be liable to execute these permanent improvements. In all these sort of cases the length of the term, the amount of rent, the nature of the premises, and the nature and cost of the work required must all be taken into consideration.

Hohler did not reply.

WRIGHT, J.—Notwithstanding the argument of counsel for the defendant I am of opinion that I am bound by the decisions in *Farlow* v. *Stevenson* and *Brett* v. *Rogers* except as to two points—namely, as to the effect of the words "as they become due" as applied to outgoings, and as to the bearing of the facts that the rent is small and the term short.

As to the first point I am of opinion that the construction sought to be put on the words "as they become due" by counsel for the defendant cannot be supported. I think they merely mean "as they become payable and have to be met," and that the words "for the time being" do not carry the matter any further.

As regards the second point, which is the more serious, there has no doubt been for some years a tendency to qualify the operation of these covenants according to the circumstances of each particular case, but I agree with what was said by Kay, J., in the case of *Batchelor* v. *Biggar*, 60 L. T., at p. 418—namely, that "it is extremely difficult to say that a covenant, the words of which would, in the case of a term of twenty-one years, include a payment by the tenant, must be construed not to include it because the term is only for three years. I quite agree in thinking the length of the term is a thing which ought to be taken into consideration; but it would be rather a violent construction to say that in the one case it is included and not in the other." This doctrine has been carried further in the recent case of *Valpy* v. *St. Leonard's Wharf Co.*, 1 L. G. R. 305. Farwell, J., there says at p. 309, "So far, therefore, as regards the paving of the back yard, I do not think it can be held to have been within the reasonable contemplation of the parties to a tenancy from year to year, at £20 a year, that the tenant should pay for the paving of the yard. . . . Accordingly, on the view I take of the matter, I am of opinion that the paving of the back yard by the tenant was not within the reasonable contemplation of the parties, nor was the laying down of new drains by the tenant within their reasonable contemplation, for it cannot be reasonable that the tenant under this agreement should be at the expense of new drains." I do not think, however, that that case can be held to govern the present, as it does not lay down any grounds on which, on the facts of the present case, I can decide in favour of the defendant, though the principle is to be applied where it is applicable.

That principle is to be found in the case of *Foulger* v. *Arding*, [1902] 1 K. B. 760, where Collins, M.R., at p. 706, says: "If the matter were unincumbered by authority and could be looked at with clear eyes, regardless of the labyrinth of cases on the subject, I think that no one could doubt that an obligation such as that in the present case, imposed upon a landlord in respect of a structural defeat, which he was bound by statute to remedy or to pay the cost of remedying, might properly be described as an imposition charged or imposed upon the landlord in respect of the premises. It seems to me that, if the matter were clear of authority, the obligation imposed on the plaintiff in this case would come within the plain meaning of the words of the covenant. The only possible answer appears to me to be that which was indicated by an observation of my brother Romer during the argument. It may be asked, if so wide a meaning is to be given to the word 'imposition,' where is the line to be drawn? If it is to be construed as capable of covering this case, must it not be equally capable of covering such a case as one in which demised premises were built beyond the building line of a street, and there was a consequent obligation on the landlord to pull down part of the premises and rebuild in conformity with the building line? It is said that it could not possibly be contended that such an obligation was within the meaning of the term 'imposition' as used in a covenant of this kind. This argument may, as it seems to me, be met by pointing out that underlying the whole matter is the consideration that we are dealing with a contract of demise between landlord and tenant, and the covenant must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the purview of such a contract; and such an extreme case as that of an obligation to pull down and rebuild the premises is so far outside of anything that can possibly be conceived of as being within the contemplation of the parties that it is necessarily excluded from the meaning of the words which might otherwise have been wide enough to include it."

In my opinion the case of *Valpy* v. *St. Leonard's Wharf* does not govern this case, nor does the principle laid down in *Foulger* v. *Arding* apply to it. The possibility of owners or occupiers being called upon to reconstruct the drains of their premises cannot be said to be so far outside of anything that can be conceived of as being within the contemplation of the parties as to come within that principle. The natural meaning of the words used must be taken to have been intended by the parties, unless such construction would lead to an outrage on common sense, in which case the principle laid down by Collins, M.R., in *Foulger* v. *Arding* might apply; but if the parties when using the expression "outgoings" might have contemplated such outgoings as including the expenses of the reconstruction of drains, then that expression ought not to be construed in any different sense when it occurs in a lease of three years from the sense in which it is construed when it occurs in a lease of twenty-one years. In my opinion a possible liability in respect of drainage repairs may well have been within the contemplation of the parties when the agreement was signed, and there must therefore be judgment for the plaintiff.

Judgment for plaintiff.

Solicitors for the plaintiff, *Sharpe, Parker, & Co.*, for *Henry Fielding*, Canterbury.

Solicitors for the defendant, *Potter & Heath.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) April 6, 1903.

COMMISSIONER OF POLICE FOR THE METROPOLIS v. DONOVAN. (*a*.)

Justices—Habitual drunkard—Proof of previous conviction—Register of convictions in court of summary

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

jurisdiction—Summary Jurisdiction Act, 1879 (42 & 43 *Vict.* c. 49), *s.* 22—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 14—*Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112), *s.* 18—*Jurisdiction —Consent of accused to being dealt with summarily—Inebriates Act*, 1898 (61 & 62 *Vict. c.* 60), *s.* 2, *sub-section* 1—*Licensing Act*, 1902 (2 *Ed.* 7, *c.* 28), *s.* 6 (1).

The respondent was convicted at Bow-street police-court of one of the offences mentioned in the first schedule to the Inebriates Act, 1898, *and the appellant requested the magistrate to make an order under section* 6 (1) *of the Licensing Act*, 1902. *The appellant tendered in evidence the register which was kept at the police-court, and called the gaoler for the purpose of proving that the respondent had been convicted of offences mentioned in the first schedule to the Inebriates Act*, 1902, *on three occasions within the preceding twelve months at that court.*

Held, that the register of the minutes or memorandum of convictions of a court of summary jurisdiction, kept under section 22 *of the Summary Jurisdiction Act*, 1879, *by the clerk of the court, was sufficient evidence to enable the magistrate to be satisfied of the three previous convictions mentioned in the register.*

Held, further, that the consent of the respondent to be tried summarily under section 2 *of the Inebriates Act*, 1898, *was necessary before the magistrate could make an order under section* 6 (1) *of the Licensing Act*, 1902.

Case stated by Sir A. de Rutzen, chief magistrate of the police-courts of the Metropolis, raising two questions of law on the construction of section 6 of the Licensing Act, 1902, and section 2 of the Inebriates Act, 1898.

The Licensing Act, 1902, by section 6 (1) provides "that where upon the conviction of an offender, the court is satisfied that an order of detention could be made under section 1 or section 2 of the Inebriates Act, 1898, then, whether an order of detention is made or not, the court shall order that notice of the conviction, with such particulars as may be prescribed by a Secretary of State, be sent to the police authority (within the meaning of the Police Act, 1890) for the police area in which the court is situated."

By section 2 of the Inebriates Act, 1898 (61 & 62 Vict. c. 60), it is provided as follows:

"(1) Any person who commits any of the offences mentioned in the first schedule to this Act, and who within twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and is a habitual drunkard, shall be liable upon conviction on indictment, or if he consents to be dealt with summarily on summary conviction, to be detained for a term not exceeding three years in any certified inebriate reformatory the managers of which are willing to receive him. (2) The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), shall apply to proceedings under this section as if the offences charged were specified in the second column of the first schedule to the said Act."

On the 7th of January, 1903, the respondent, Catherine Donovan, was charged by the Commissioner of Police with being guilty while drunk of riotous and disorderly behaviour in a highway on the 6th of January, 1903, one of the offences mentioned in the first schedule to the Inebriates Act, 1898 (61 & 62 Vict. c. 60). The said charge was proved, and Catherine Donovan was convicted, but the learned magistrate postponed passing sentence in respect thereof. On the 22nd of January, 1903, the respondent appeared before the learned magistrate remanded on the said charge. The appellant thereupon requested the magistrate to make an order under section 6 (*a*) of the Licensing Act, 1902. The appellant tendered in evidence the register which is kept at Bow-street police-court for the purpose of proving that the respondent had been convicted of offences mentioned in the first schedule to the Inebriates Act, 1898, on three occasions within twelve months of the 3rd of January, it being proved that the respondent was the person referred to in the register.

It was contended by the appellant that the production of the register and the evidence of the assistant gaoler was sufficient evidence at common law, or under the Summary Jurisdiction Act, 1879, s. 22, to enable a court of summary jurisdiction to be satisfied of the three convictions mentioned in such register, and of the fact that the respondent was an habitual drunkard within the meaning of section 2 of the Inebriates Act, 1898, so that if the other requirements of the section were fulfilled an order of detention could be made under that section, and that therefore the learned magistrate could and ought to make an order under the Licensing Act, 1902, s. 6 (1). It was also contended by the appellant that upon the language of the Licensing Act, 1902, s. 6 (1), formal and strict proof of the said convictions was unnecessary, and that the said register was admissible for the purpose of informing the mind of the court in exercising jurisdiction under the said section.

The appellant also contended that the consent of the respondent to be dealt with summarily by the magistrate was not necessary to the exercise of his jurisdiction under the Licensing Act, 1902, s. 6 (1).

The magistrate was of opinion that before sending the notice of conviction to the police authority referred to in section 6 (1) of the Licensing Act, 1902, it was necessary that he should be satisfied of the following matters: (1) That the respondent was an habitual drunkard; (2) that the respondent within twelve months preceding the 6th of January, 1903, has been convicted at least three times or more of one of the offences mentioned in Schedule I. of the Inebriates Act, 1898.

Upon the material before him, and subject to the question of law hereinafter stated, he was in fact satisfied that these conditions had been fulfilled, and that an order of detention could be made under the Inebriates Act, 1898, s. 2 (1).

He was also of opinion that such convictions require to be formally proved and can only be proved (*a*) by production of the record of the conviction or an examined copy of it (see *Hartley* v. *Hindmarsh*, L. R. 1 C. P. 553), or (*b*) by a copy of the conviction signed as provided by section 18 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112).

He was further of the opinion that the respondent's consent to be dealt with summarily was a condition precedent to the exercise of his jurisdiction under the Licensing Act, 1902, s. 6 (1), and therefore declined to make an order under the Licensing Act, 1902, s. 6 (1), and postponed passing sentence upon the respondent pending the decision of this court on the question of law herein stated.

Danckwerts, K.C., and *A. Gill*, for the appellant.—Two questions are raised by this case—first, whether the previous convictions mentioned in section 2 of the Inebriates Act, 1898, are to be proved strictly under the Licensing Act, 1902, s. 6 (1), and, secondly, whether the magistrate can act summarily under section 2 of the Inebriates Act, 1898, without the consent of the respondent. We submit that the previous convictions were sufficiently proved by reference to the court register, at any rate where offences are committed in the same jurisdiction: see Taylor on Evidence, p. 1571, and Starkie on Evidence (3rd ed.), vol. 1, 303. *Rex.* v. *Hains*, (1696)

Comb. 337, and *R.* v. *Horne Tooke*, (1794) St. Tr., vol. 25, 447, show that minutes of a previous conviction before the same tribunal are sufficient evidence of such conviction. That view is also supported by decisions given in *Reg.* v. *Inhabitants of Yeovil*, (1838) 8 A. & E. 806, *Doe* v. *Mew*, (1837) 7 A. & E. 240, and *Reg.* v. *Newman*, (1852) 2 Den. C. C. 390. There are also later authorities to the same effect. For instance, *London School Board* v. *Harvey*, 27 W. R. 786, 4 Q. B. D. 451, and *Reg.* v. *Hutchins*, 28 W. R. 595, 5 Q. B. D. 353. Those cases stand in just the same position with regard to proof as a criminal matter, and that was so held in *Mellor* v. *Denham*, 5 Q. B. D. 467, and the same rule was laid down in substance in *Fisher* v. *Lane*, (1772) 3 Wils. 297, and *Dyson* v. *Wood*, (1824) 3 B. & C. 449. The magistrate relied on *Hartley* v. *Hindmarsh*, 14 W. R. 862, L. R. 1 C. P. 553, but that case did not apply, because it could be distinguished on its facts from the present case. For the same reason *Giles* v. *Siney*, 13 W. R. 92, was not an authority against the appellant's contention. Therefore, the last two cases not applying, on the authority of the *London School Board* v. *Harvey*, which was a later decision than either, the magistrate was wrong in holding that he had no jurisdiction to make the order required without the consent of the respondent to be dealt with summarily.

H. Sutton (by leave), for the magistrate.—In *Rex* v. *Smith*, (1828) 8 B. & C. 341, an indictment for conspiracy alleged "at the court of quarter sessions . . . an indictment against A. B. was preferred and found by the grand jury that this allegation must be proved by a *caption*, regularly drawn up, of record, and that the minute book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had in fact been drawn up."

He cited on the first point also rule 3 of the Summary Jurisdiction Rules, 1886, section 116 of the Larceny Act, 1861, and section 18 of the Prevention of Crimes Act, 1871. He also referred to Paley on Summary Convictions (7th ed.), p. 439.

Danckwerts, K.C., replied.

Lord ALVERSTONE, L.C.J.—Both points raised in this case are points of importance, though I am not sure that our decision upon the first point in favour of Mr. Danckwerts has any far-reaching effect, because my present opinion is that the use of the register to which I am about to refer must be confined to the same court. The point is whether the Bow-street magistrate, in dealing with a case under section 6 of the Licensing Act, is allowed to refer for the purpose of that section to, and to act upon, the minute and memorandum which is directed to be kept under section 14 of the Act of 11 & 12 Vict. c. 43. Perhaps it may be put in another way, that he is also entitled to act upon the register of the minute or memorandum which has to be kept under section 22 of the 42 & 43 Vict. c. 49. Now it seems to me, to a large extent for the reasons urged by Mr. Danckwerts, that the magistrate, at any rate in the court in which he is sitting and with reference to the minute and memorandum kept in that court, and the register thereof, is entitled to act on the information contained therein. Section 14 of the 11 & 12 Vict. c. 43 provides that: "If he or they"—speaking of the justices—"convict or make an order against the defendant, a minute or memorandum thereof shall then be made, for which no fee shall be paid, and the conviction or order shall afterwards be drawn up by the said justice or justices in proper form, under his or their hand and seal or hands and seals, and he or they shall cause the same to be lodged with the clerk of the peace, to be by him filed." Now I have no doubt, for the reasons which Mr. Danckwerts mentioned, and possibly for other reasons, it was considered desirable that these convictions should go to quarter sessions and be filed there, and be on record for all future purposes and for Crown purposes; but I think that a minute or memorandum directed to be drawn up then and there, and apparently to be used by the party, because no fee is to be paid, is meant to be for that court in the nature of a formal record or minute of proceedings of what goes on in that court. The fact is that by section 22 of the 42 & 43 Vict. c. 49, it is stated: "A register of the minutes or memorandums of all the convictions . . . shall be *primâ facie* evidence of the matters entered therein for the purpose of informing a court . . . acting for the same county borough or place as the court whose convictions, orders and proceedings are entered in the register." That is to say, there is a direct enactment that they shall be *primâ facie* evidence for the purpose of informing those courts, and this enactment would certainly tend in the direction that they are to have more effect than a mere record at the time which could not be used afterwards. I agree that there is a great deal in other statutes to which Mr. Danckwerts and Mr. Sutton have called attention. As, for instance, section 18 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), which shows that for the purpose of proving both a conviction on indictment and conviction on summary conviction where they have to be proved in other courts and for other purposes, more may be required to be done than to produce the register kept under the one Act and the minute or memorandum kept under the other. Then, as regards the information, it may be supplemented or added to by the rules made under the statute from time to time. It is to be said this register does contain the name of the complainant, the name and age of the defendant, the nature of the offence, the punishment, or, in other words, the date of the conviction. So that for the purpose which the magistrate has to consider it does contain the same information as would be supplied by the certified copy of the conviction or the minute or record which is mentioned in section 18 of the Act of 1871. Speaking for myself, I think the case of *London School Board* v. *Harvey* is an authority in favour of this view. There there had been an order on a summons ordering the attendance of the child in September, 1877; the order not being obeyed the man was summoned for non-compliance on the 27th of March, and fined 3s. and 2s. costs, or in default five days. He was summoned again on the 15th of June for a second non-compliance with the order, and it was in the third proceedings, to use that expression, they attempted to prove the conviction of disobedience of the first order, and the fine, by a minute which, for all substantial purposes, applies to the minute in this case, and was kept under an earlier statute which had the same provision as section 14. It was there held by Cockburn, L.C.J., and Lopes, J., acting, as I think Mr. Danckwerts has satisfied me, on the common law authorities, that in that proceeding those minutes could be referred to for the purpose of proving a previous conviction. I can see no mischief that follows from this decision; on the contrary, I think there will be very substantial gain. Mr. Sutton has said that on conviction in all cases of this kind the practice has not been to draw up these convictions, and though some statutory duty may have been neglected, yet it seems a grave thing to say in such a case as this before the court itself, they must hold their hand unless a certified copy of the conviction is obtained and put in evidence. I therefore come to the conclusion upon the point on which our guidance is asked, that the magistrate sitting in his court would

be entitled to act upon the memorandum and minute of the conviction to which I have referred.

Then as to the point as to whether this order can be made without the consent to be dealt with summarily of the person charged. It has been strenuously urged upon us that the meaning of sub-section 1 of section 6 of the Licensing Act, 1902, "Where upon the conviction of an offender the court is satisfied," includes a conviction for any offence whatever which he was being tried for. The statute might have said that, and if it did we should have to give effect to it; but when you come to look at the words of the section and the previous legislation, it seems to me that that is not the object of the section or the legislation intended to be carried out by the enactment. The Inebriates Act, 1898, s. 1, provided for certain offences: "Where a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the court is satisfied from the evidence that the offence was committed under the influence of drink or that drunkenness was a contributing cause of the offence, and the offender admits that he is or is found by the jury to be an habitual drunkard" certain consequences follow. The second section of the Act provides: "Any person who commits any of the offences mentioned in the first schedule of this Act, and who within the twelve months preceding the date of the offence has been convicted summarily at least three times of any offences so mentioned, and who is an habitual drunkard, shall be liable upon conviction on indictment or if he consent to be dealt with summarily on summary conviction, to be detained for a term not exceeding three years." Now what is the practical operation of that section? A person is being summoned by summary process for one of the offences of the drunkenness which are specified in the schedule. There are some twelve or thirteen of them, all dealing with people who in liquor under certain circumstances do certain acts. That person being about to be summarily tried, it comes out in the course of the proceedings that the evidence shows, or it is suggested to show, he was one of the persons contemplated by section 2, who, in addition to being guilty of the offence in Schedule I., falls within the description I have read. He need not consent to be tried. He can say he will not be tried summarily, and then he will have to be tried on indictment, and will come under the category of persons already dealt with by the section.

Now, that being so, remember a person is being tried on indictment for certain classes of offences, or summarily for one of the offences mentioned in the schedule, and it is to that state of things that section 6 of the Licensing Act, 1902, relates. It says: "Where upon the conviction of an offender the court is satisfied that an order for detention could be made under section 1 or section 2 of the Inebriates Act, 1898, then whether an order for detention is made or not . . . ," &c. Now, we are pressed to say, having regard to the object of the section, it means that, assuming the circumstances are such that, if the proceedings had been under the Act of 1898, an order could with the consent of the defendant have been made summarily, the magistrate may make the order referred to in section 6 of the Act of 1902, whether the defendant consents or not. In my opinion that is not the meaning of the section. In my opinion, on the face of the section, it points to the court that has the jurisdiction to make the order, and it says whether the court thinks fit to make the order or not it shall send certain particulars to the police authorities with a view to the consequences mentioned in sub-sections 2 and 3 of section 6. Therefore the object of section 6 is plain, and evidently it means to say that in addition to making the order either under section 1 or section 2 of the Act of 1898 whether the court makes the order or not, these particulars at any rate shall go to the police with the consequences which follow from it. I think to say that the section means that whatever the man is being tried for, if in the course of that trial, whether he has given his consent or not, it turns out there are circumstances which, if he was being tried for some other offence—namely, under Schedule I.—that in such a case the magistrate would have the duty of sending particulars to the police authority, is reading into the section words the Legislature had not in view when they enacted it. In my opinion the magistrate was right in saying, no consent being given, he ought not to put in force the provisions of the Act.

WILLS and CHANNELL, JJ., gave judgments to the same effect.

Danckwerts, K.C.—Does your lordship mean the same court within the meaning of the Act of 1879?

Lord ALVERSTONE, L.C.J.—Yes.

Appeal dismissed.

Solicitors for the appellant, *Wontner & Son.*

Solicitor for the magistrate, *Solicitor to the Treasury.*

House of Lords.

From C. A. (England). May 11, 1903.

GARDNER v. HODGSON'S KINGSTON BREWERY CO. (a.)

Easement—Right of way—Annual payment—Uninterrupted enjoyment for forty years—Evidence of user—Lost grant—Prescription Act (2 & 3 *Will.* 4, c. 71), *ss.* 2, 82.

Parol evidence is admissible in answer to an allegation of enjoyment of a way as of right, and a payment of an ambiguous character must be shown by a claimant not to be inconsistent with the claim.

Where, therefore, a right of way has been enjoyed openly for over forty years, but a payment annually made to the owners of the servient tenement, though whether for a licence or for what purpose was not determined by the evidence, the inference will be made that the annual payment was for a yearly licence, and the Prescription Act will consequently not apply.

Judgment of the Court of Appeal, 49 W. R. 421, [1981] 2 Ch. 198, *affirmed.*

Appeal from an order of the Court of Appeal (Vaughan Williams and Romer, L.JJ., Rigby, L.J., dissenting) (49 W. R. 421, [1901] 2 Ch. 198), reversing a decision of Cozens-Hardy, J. (48 W. R. 469).

The action was brought for a declaration that the appellant was entitled to a right of way through a gateway at the back of certain freehold hereditaments.

The facts are given in some of their lordships' judgments.

Coumbe and *M. H. Robertson,* for the appellant.

Macnaghten, K.C., and *Cave,* for the respondents.

Earl of HALSBURY, L.C.—The appellant in this case claimed a right to pass through premises belonging to the respondents. The only proof given in support of the right claimed was the fact that for many years the appellant and those who preceded

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

her in the ownership of the premises had crossed the respondents' yard along the same way to get to her own yard with carts and horses; the respondents' premises were occupied as a public-house, and the appellant could not get to her own yard with carts and horses from her own premises. No evidence was given as to any change in the premises, or any definite evidence when what I will call the yard opening of the Red Lion was first made use of as a convenient access to the appellant's premises. But what is conclusive to my mind against the appellant is that during the whole period during which this convenient access was used, a sum of 15s. a year was regularly paid in respect of the user of the way. One of the most common modes of preventing such a user growing into a right is to insist upon small periodical payment; and if such evidence as we have here were permitted to be evidence of a right not only to the user upon terms of payment, but of a right to make the payment and continue the user in perpetuity, it would be a very formidable innovation indeed. Those who drafted the Prescription Act knew well what they were about when, in dealing with the consequences which have to follow from long-continued user, they used the words "as of right." I cannot help thinking there has been a certain play upon words in commenting upon them. In a certain sense a man has a right to enjoy what he has paid for; and, therefore, if the appellant here at any time during the year when she had paid for the right to use this way had been hindered, she would have a right to complaim that what I will call her contract had been broken, and that during the year she had a right to use the way. I do not think that this would have established a right in the proper sense, because, being but a parol licence, it might be withdrawn, and her action would be for damages, but she would have no right to the way. And in no sense could the right be the right contemplated by the Act. That right means a right to exercise the right claimed against the will of the person over whose property it is sought to be exercised. It does not and cannot mean a user enjoyed from time to time at the will and pleasure of the owner of the property over which the user is sought. At any time after the first year the owner of the Red Lion might refuse to renew the permission to use this way. I think, therefore, that there is no evidence whatever of a user as of right. Although I do not think much importance should be attached to the appellant's view of her own rights, it is not immaterial to see what she thought she was paying 15s. a year for, and she thought it was paid for, what I think, it manifestly was paid for—namely, the annual permission to use this access to her yard. If this was a permission paid for, it was not the less a permission, and a permission to use a way cannot establish a right. There was no pretence for suggesting a joint reparation of the road by the parties, and I am of opinion that this appeal should be dismissed with costs, and I move your lordships accordingly.

Lord ASHBOURNE.—The facts in this case are meagre and inconclusive. They can be very shortly stated.

For some seventy or eighty years the plaintiff's house has been occupied for business purposes with a yard and stables at its back. The only access to the yard and stables has been through a gateway from the plaintiff's yard opening into the Red Lion yard, and across that yard into High-street. During this period, at all events, the right of way has been openly, regularly, and uninterruptedly enjoyed. For the greater part of that time—it may possibly be for the entire period—the sum of 15s. a year has been paid by the plaintiff and her predecessors to the owner or occupier of the Red Lion. The payment has been proved to have been actually made since 1855. The plaintiff asserts that the payment has been made for the repair of the yard through which the way passed, but the evidence on the subject is very slender, indeed Cozens-Hardy, J., says, "there is nothing to support the assertion." The defendants, on the other hand, allege that this payment has been made by way of rent in respect of the right of way.

On the 31st of March, 1898, the defendants served notice in writing upon the plaintiff, requiring her to give up the use of the yard of the Red Lion, and to close the gate. After some correspondence, on which the defendants placed no undue or unfair reliance, on the 16th of February, 1899, the defendants served notice to quit and discontinue the user of the yard "on the expiration of the year of your tenancy, which shall expire next after the end of one half-year from the service of this notice."

The plaintiff, on the 11th of August, 1899, instituted this action, claiming a declaration that she is entitled to the right of way I have referred to.

The case would be perfectly clear in favour of the plaintiff but for the payment of the 15s. a year, and to my mind the whole question in the case turns upon the meaning and significance of this payment. The plaintiff claims that she is entitled to succeed under the Prescription Act, or to have a lost grant presumed, and a great number of authorities have been discussed here and in the courts below to suggest to your lordships how the facts of the case should be regarded. But everything turns on the one fact, what is the annual payment of 15s. to be ascribed to? But for this payment the case of the plaintiff would be clear. It now stands distinctly in her way. The onus of getting rid of its obvious significance rests on her. The view of the evidence taken by Cozens-Hardy, J., does not, I think, weaken or displace the obligation which rested on the plaintiff.

In the absence of direct evidence, all that can be said is that the payment is consistent with inferences which have been drawn by both sides. The defendants insist that the most obvious and natural inference is that it was made for rent, or for a series of annual licences, given possibly by implication. The plaintiff, on the other hand, urges that it was more probably a perpetual payment attached to some original grant of the right of way. Rigby, L.J., has speculated with persuasive force on the probability of such a hypothesis. If I felt free to speculate on the possible and probable origin of this payment, I would be glad to draw the same inference. The onus of explanation is, however, I think, on the plaintiff. Her counsel were asked what liability they admitted to the continued payment of the 15s. a year, and they did not give any direct answer. I would be disposed to think that their main argument would require them to contend that their obligation to make this annual payment was as strong as the plaintiff's claim against the defendants to enjoy the right of way. The case must be taken as a whole—a long used right of way with a long continued payment, both most probably to be referred to the same origin. If this be so there must be reciprocity. If the plaintiff is entitled to get the declaration she asks for, would the defendants not be entitled with the same force to insist on the continuance of this annual payment of 15s.? I am of opinion, however, that defendants would not succeed if they relied on any such contention, and that no court would presume in their favour a lost grant establishing their right to this yearly sum. I agree with Romer, L.J., on this important point.

I do not say that the case is free from difficulty,

but I am unable to arrive at the conclusion that the plaintiff has discharged the onus which lay upon her of satisfactorily explaining that this payment of 15s. a year was consistent with her claim. I therefore think that the appeal should be dismissed.

Lord MACNAGHTEN.—If it had not been for the difference of opinion in the courts below I should have thought this an extremely simple case.

The appellant, Miss Gardner, who was plaintiff in the action, is the owner of certain premises in High-street, Sutton, consisting of a shop and a yard at the back. The respondents are owners of adjoining premises, also facing High-street, and known as the Red Lion Inn.

For forty years and more the appellant and her predecessors in title have used the yard of the Red Lion as the way to their back premises for carts and horses; at present there is no means of access to these premises for carts and horses except through the Red Lion yard. But there is nothing to show what was the condition of things when the way across the yard was first used by the then owner of the appellant's premises.

For forty years and more the appellant and her predecessors in title using the way through the Red Lion yard have regularly, year by year, and every year paid the sum of 15s. to the respondents and their predecessors in title. The evidence as to this payment does not go back so far as the evidence as to the use of the way. But there is nothing to show or suggest that the way was ever used without payment.

Those are the only materials upon which your lordships' decision must be founded. There is no other fact proved or admitted throwing light upon the question. The connection between a certain pump in one corner of the Red Lion yard and the alleged right of way across the yard on which so much stress was laid in argument, is, I think, purely imaginary. Why a person who has an admitted right to take water from his neighbour's well should found upon that right a claim to cross his neighbour's yard with carts and horses for purposes unconnected with the well is beyond my comprehension. Nor is there, I think, the slightest evidence to show that the payment of 15s. a year was merely a contribution towards the cost of repairing the way. The suggestion was rejected by Cozens-Hardy, J., who saw and heard the witnesses.

On the bare facts with which your lordships have to deal, there arise, as it seems to me, two questions: (1) What was the sum of 15s. a year which was paid regularly year by year paid for? Well, I think any layman and most lawyers would answer, "For the use of the way, of course." Then comes the only other question—(2) Can a person who uses a way across his neighbour's land and pays for the use of it year by year be said to use the way "as of right"? Again, I think every layman and most lawyers would answer "Certainly not."

If the way in question has not been used "as of right" there is nothing to attract the provisions of the Prescription Act. The case of the appellant, so far as it is founded on that Act, must fail. It was for the plaintiff to make out her case. If she cannot show that the user of the way was "as of right," the essential condition of success is wanting.

The suggestion of a lost grant burdening the respondents' property with a servitude which would so greatly diminish its value, and charging the appellant's property with a rent-charge in perpetuity is, I think, out of the question. It seems to me a most unlikely hypothesis. But it is enough to say that, apparently, no trace of such an arrangement can be found in any of the deeds of either party, and that nothing is known of the circumstances which existed when the premises which now belonged to the appellant, and the premises which now belong to the respondents, if they ever formed one property, became separated. There is certainly no need to resort to the presumption of a lost grant when the facts of the case, so far as they are known, suggest a much simpler and a more natural explanation.

I think the fallacy in the judgments of the learned judges who were in favour of the appellant comes from the manner in which they have looked at the facts of the case. I do not think that you can legitimately separate the use of the way from the payment made in respect of the way. The use of the way explains the payment. The payment explains and qualifies the use. But the learned judges appear to sever two things which seem to me to be inseparable. They first take the way. They say, "Here is a way which has been used for forty years without interruption. That gives an indefeasible right under the Prescription Act." Then they look at the payment and they ask, how is that to be explained, and various hypotheses are suggested which seem to me mere guess-work. Cozens-Hardy, J., goes further. He would hold that an annual licence (for such he takes it to be), coupled with an annual payment, if the arrangement originated more than forty years ago and is continued for forty years, confers an indefeasible right, provided there is no break or change or new departure, but things are just left to go on as they did before. This view seems to give the go-by to the words, "claiming right thereto," and "as of right," which are certainly not the least important words in the Prescription Act.

I do not think that the cases which were cited at some length, most of which are reviewed in the judgment of Cozens-Hardy, J., throw any light upon this case, which must depend on its own circumstances, and I may add with all deference that I think the Prescription Act has very little to do with it. I rather doubt whether the scope and effect of the Prescription Act have been always rightly apprehended. The Act was passed, as its preamble declares, for the purpose of getting rid of the inconvenience and injustice arising from the meaning which the law of England attached to the expressions "time immemorial," and "time whereof the memory of man runneth not to the contrary." The law as it stood put an intolerable strain on the consciences of judges and jurymen. The Act was an Act "for shortening the time of prescription in certain cases." And really it did nothing more. A person who claims a right of way and invokes the protection of the Act must claim "as of right." But when the way in question has been used without interruption as defined in the Act, for forty years, "as of right," whether the claimant is really entitled as of right or not, the claim cannot be defeated except by showing that the right claimed was enjoyed "by some consent or agreement expressly given or made for that purpose by deed or writing." No parol consent will do. I fail to understand how that provision helps the appellant. The respondents do not set up a parol consent given before the period of forty years. They rely on the acknowledgment and recognition of their dominion over the property—their right to grant or withhold the grant of the way in question—involved in and evidenced by the annual payment accompanying the use of the way, and they point out that no other reasonable explanation of that payment is forthcoming.

I am therefore of opinion that the appeal must be dismissed with costs.

Lord DAVEY.—I must confess that at the conclusion of the argument I was disposed to agree in the opinion of Cozens-Hardy, J., and Rigby, L.J., but further reflection has satisfied me that I ought not to do so, and I will shortly state why. The bare facts of the case are that for more than forty years, and it is said from the beginning of the last century, the appellant and her predecessors in title have enjoyed a way over the inn yard, now vested in the respondent, and for more than forty years have paid an annual sum of 15s. to the owners for the time being of the inn yard. Nothing is known as to the origin of the enjoyment of the way or of the annual payment, but both parties are agreed in connecting the latter in some way with the enjoyment of the way. The appellant says that it was a payment by way of composition for the expense of keeping the way in repair. There is a scintilla of evidence in favour of this allegation, but nothing which approaches proof of it. The respondent, on the other hand, says that it is paid as an annual acknowledgment for the permission to use the way.

The second section of the Prescription Act, so far as material, is in the following words:

"Where such way as last hereinbefore mentioned" (*i.e.*, a way to be enjoyed over the land of another) "shall have been so enjoyed as aforesaid" (*i.e.*, by a person claiming right thereto without interruption) "for the full period of forty years, the right thereto shall be deemed absolute and indefeasible unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

From the language of this section it is plain that a person cannot claim to have his enjoyment of an easement protected against defeat otherwise than by an agreement in writing unless he can first prove that his enjoyment has been that of a person claiming as of right. The case of *Tickell* v. *Brown*, 4 Ad. & Ell. 369, referred to in the courts below, is an important decision on the fifth section of the Act. It was there held that evidence of the payment of 1d. a year within the period of forty years by the occupiers of the land in respect of which the way was claimed was admissible for the purpose of showing that the enjoyment was not as of right, although the matter had not been specially pleaded as required by the fifth section. No such difficulty of pleading occurs in the present case. But if authority be wanting, *Tickell* v. *Brown* is an authority which shows that parol evidence is admissible in answer to an allegation of enjoyment as of right.

What, then, is the effect of the annual payment of 15s.? Rigby, L.J., thought that to treat it as an acknowledgment *de anno in annum* of the respondent's right to stop the way was an arbitrary assumption. Admitting that to be so, it is at least equally an arbitrary assumption to treat it (as Cozens-Hardy, J., did) as evidence of a parol agreement antecedent to the period of forty years to grant a perpetual licence in consideration of the annual payment or (which appears to me a more plausible hypothesis) as evidence of a prior grant of the right of way in consideration of an annual rent issuing out of the land to which the right of way is claimed as appurtenant. To put the case most favourably for the appellant, the payment is of an ambiguous character, and capable of either explanation. But one explanation is inconsistent with an enjoyment as of right, while the other is not so, and it is for the appellant to make out that she and her predecessors in title have enjoyed as of right, and for that purpose to show which is the true explanation of the annual payment, and this she has not done.

To quote the well-known formula, an enjoyment as of right must be *nec vi, nec clam, nec precario*. The appellant shows that the enjoyment has not been either *vi* or *clam*, but she fails to prove that it has not been *precario*.

I therefore agree that the appeal should be dismissed. The alternative claim by a lost grant is really the same thing in another form.

Lord ROBERTSON.—As the House will have heard five reasoned judgments in this case, I shall not say more than that I entirely concur, and have never had any doubt in the matter.

Lord LINDLEY.—In this case the following facts are admitted or proved and are not now open to controversy, viz.:

1. The plaintiff and her predecessors in title have for over eighty years sent their horses and carts to and from the yard at the back of their house across the yard of the defendants from and into the public road called High-street.

2. During all that time there has been no other access to the plaintiff's yard for horses or carts.

3. The origin of this user of the defendants' yard is unknown, as is also the state of the land owned by the plaintiff and the defendants respectively at the time of such origin.

4. During the whole of these eighty years the defendants' yard has been used as above mentioned openly and continuously and without interruption.

5. During the last forty-four years an annual payment of 15s. has been made by the plaintiff and her predecessors in title to the defendants and their predecessors in title.

This sum has been paid in September or October, but its origin is unknown, and the consideration for it is also unknown.

6. In the defendants' yard is a pump which has been used for many years by the plaintiff and her predecessors in title. Her right of access to this pump and right to obtain water from it are not now denied. The history of the pump and the origin of the plaintiff's right to use it are not known. But for many years it has been repaired alternately by the owners of the plaintiff's property and the owners of the defendants' property. The origin of this arrangement is not known.

So far there is now no controversy.

In March, 1898, the defendants served the plaintiff with notice to discontinue the use of the yard, and some letters passed between them. Two letters, written by the plaintiff in April, 1898, and in January, 1899, refer to the 15s. as paid for the use of the yard. She says she always thought the payments were really for repairs of the yard, although called the right of way. It is plain, however, from the plaintiff's evidence that she did not know what the payments were for. Counsel for the defendants naturally relied on these expressions in their favour, but they are not entitled to much if any weight with your lordships.

Two witnesses for the defendants say the 15s. was paid as rent—one says rent of gateway, he thinks; but the receipts are not forthcoming, and this evidence is very unsatisfactory.

The plaintiff's brother stated that when he was a boy eight or nine years old he heard a conversation between the tenant of the Red Lion (*i.e.*, the defendants' house) and his father about cutting up the ground in the defendants' yard, and his father said, "I pay for the repairs of the yard, you must repair it." The witness says the 15s. has been paid ever since by the owners of the plaintiff's property to the owners of the defendants' yard. The conversation, however, was with the tenant and judging from the witness's age must have taken place in 1854. But he

said on cross-examination that he could not recollect so long ago as that, and he cannot say when the payment began. It is impossible to rely on this evidence.

So the case stands. The question for your lordships' decision now is, do the facts or do they not establish a right of way across the defendants' yard for horses and carts going to or from the yard of the plaintiff.

Cozens-Hardy, J., and Rigby, L.J., thought they did, but Vaughan Williams and Romer, L.JJ. thought differently, and having carefully considered the evidence and the authorities, I have come to the conclusion that they are right.

The plaintiff's statement of claim is so drawn as to entitle her to succeed if she can bring herself within the Prescription Act, or, failing that, if the facts warrant the presumption of a lost grant. Cozens-Hardy, J., considered that she was entitled to succeed under the Prescription Act; but that if not, a lost grant in her favour ought to be presumed. It is necessary to consider both of these methods of establishing her right; for the Prescription Act has not taken away any of the modes of claiming easements which existed before that Act was passed: see *Aynsley* v. *Glover*, L. R. 10 Ch. 283.

I will take the Prescription Act first. Section 2 is the important section, and the last part of it is relied upon by the plaintiff. To bring herself within this enactment she must prove that she and her predecessors in title have enjoyed the way in question claiming right thereto without interruption for forty years. The difficulty is raised by the words "claiming right thereto," and by the payment of the 15s. a year.

The words "claiming right thereto" have been commented on in many cases, and especially in *Tickell* v. *Brown*, 4 A. & E. 369, and I understand those words, and the equivalent words "as of right" which occur in section 5, to have the same meaning as the older expression *nec vi, nec clam, nec precario*. A temporary permission, although often renewed, would prevent an enjoyment from being "as of right"; but a permanent irrevocable permission attributable to a lost grant would not have the same effect. The common law doctrine is that all prescription presupposes a grant. But if the grant is proved and its terms are known, prescription has no place.

A title by prescription can be established by long peaceable open enjoyment only: but in order that it may be so established the enjoyment must be inconsistent with any other reasonable inference than that it has been as of right in the sense above explained. This, I think, is the proper inference to be drawn from *Campbell* v. *Wilson*, 3 East 294, *Tickell* v. *Brown*, and *Bright* v. *Walker*. If the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established; and this, I think, is the real truth in the present case.

The enjoyment is equally open to explanation in one of two ways—viz., by a lost grant of a right of way in consideration of a rent-charge on the plaintiff's land of 15s. a year; or by a succession of yearly licences not, perhaps, expressed every year, but implied and assumed and paid for.

I do not think that the evidence about repairing the pump and repairing the yard justifies the conclusion that there was a right of way and that the 15s. a year was paid not for it but for repairs.

This conclusion also prevents the application to the present case of the doctrine of a lost grant. For that doctrine only applies where the enjoyment cannot be otherwise reasonably accounted for.

I wish to add that I do not concur in thinking that if the plaintiff had succeeded in establishing her claim the defendants could not have compelled her to pay the 15s. a year. I have no doubt myself that at common law a prescriptive payment could have been enforced by an action of debt, or, in early times, in some cases by assize (see Com. Dig., titles Dett and Rent).

For the reasons above stated, and after much consideration, I have come to the conclusion that the decision of the Court of Appeal is correct, and ought to be affirmed.

Solicitors, *J. H. H. Kidgell; Lovell & White.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew, L.J.) — Oct. 28.

THE GOLDSMITHS' COMPANY v. THE WEST METROPOLITAN RAILWAY CO. (*a.*)

Railway—Taking lands—Compulsory powers—Duration of—Computation of time—"Three years from the passing of this Act"—Exclusion of day of passing of Act—West Metropolitan Railway Act, 1899 (62 & 63 *Vict. c. ccl.*), *s.* 29.

By section 29 *of the West Metropolitan Railway Act,* 1899, "*the powers of the company for the compulsory purchase of lands for the purposes of this Act shall cease after the expiration of three years from the passing of this Act.*"

The Act passed on the 9*th of August,* 1899, *and notice to treat for part of the land was served on the* 9*th of August,* 1902.

Held, that in computing the three years the day of the passing of the Act must be excluded, and that therefore the compulsory powers of the company did not cease until midnight of the 9*th of August,* 1902.

Appeal from an order of Walton, J., at chambers.

The plaintiffs were the owners of land at Acton, and the defendants were a railway company incorporated under the West Metropolitan Railway Act, 1899.

This Act, which incorporated the Lands Clauses Acts, empowered the defendants to take compulsorily certain of the plaintiffs' land. The Act received the Royal Assent on the 9th of August, 1899.*

By section 29, "the powers of the company for the compulsory purchase of lands for the purposes of this Act shall cease after the expiration of three years from the passing of this Act."

On the 9th of August, 1902, the defendants served on the plaintiffs a notice to treat for the purchase of part of the plaintiffs' land which they were authorized by the Act to acquire compulsorily.†

The plaintiffs brought an action for an injunction to restrain the defendants from acting upon the

* By 33 Geo. 3, c. 13 the clerk of the Parliament shall endorse on every Act the date when it shall have passed and shall have received the Royal Assent, and such indorsement shall be taken to be part of the Act, and to be the date of its commencement, where no other commencement shall be therein provided.

† There was a dispute as to whether the notice to treat was duly served on the 9th of August, 1902, but for the purposes of the present question it was assumed that the notice was duly served on that day.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

notice alleged to have been so served, and for a declaration that the notice was not served in due time as required by the said Act, and that the compulsory powers of the Act had ceased in respect of the land referred to in the notice.

The plaintiffs applied at chambers for an interim injunction to restrain the defendants from acting upon the notice to treat until the trial of the action, or in the alternative that the question of law whether the notice was served in due time, and whether the compulsory powers of the defendants under the Act had ceased in respect of the land referred to in the notice should be set down for hearing forthwith.

Upon the hearing of this application the parties consented to treat it as the hearing of the preliminary question of law whether the notice to treat, if served as alleged, was served in due time, and Walton, J., held that the notice was served in time.

The plaintiffs appealed.

S. A. T. Rowlatt (*Micklethwait* with him), for the plaintiffs.—The West Metropolitan Railway Act, 1899, was passed and came into operation on the 9th of August, 1899, and therefore must be deemed to have come into operation on the first moment of that day, as the law does not in such a case recognize fractions of a day. A term of three years was set running by section 29 of the Act on a particular day, and that particular day must be reckoned as the first day of the three years. It is like the case of a lease for a term commencing on a particular day, where the day of the commencement is always included in the term. It is not like the case of the limitation of a term, from a certain date, within which an act has to be done. In this latter case the date from which the term is to start is to be excluded. The distinction is pointed out in *Lester* v. *Garland*, 15 Ves. 248, and *Russell* v. *Ledsam*, 14 M. & W. 574. The defendant's compulsory powers of taking land were set running on the 9th of August, 1899, and consequently came to an end at midnight on the 8th of August, 1902. The notice to treat was not, therefore, served in time.

He also referred to *In re North, Ex parte Hasluck*, [1895] 2 Q. B. 264, 43 W. R. Dig. 10.

Mulligan, K.C. (*A. F. C. Luxmoore* with him), for the defendants.—The "passing of the Act" means the time when the Royal Assent is given to it: *Ex parte Rashleigh, In re Dalzell*, 24 W. R. 495, 2 Ch. D. 9. Therefore the term of three years did not begin until after that time. Section 29 gave the defendants compulsory powers for three years "from the passing of this Act." That section fixed a term of three years from an event or date within which the defendants were to have power to serve the notices to treat. The day of that event or date must be excluded from the computation of the three years: *Williams* v. *Nash*, 28 Beav. 93; *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402, 39 W. R. Dig. 10. If the Act had said that the compulsory powers were to cease at the expiration of one day from the passing of the Act, it could not be contended that the powers would cease at the expiration of the day on which the Act passed. That shows that the day on which the Act passed must be excluded. The cases were reviewed by Chitty, J., in *In re Railway Sleepers Supply Co.*, 33 W. R. 595, 29 Ch. D. 204. Section 36 of the Interpretation Act, 1889, does not affect this question because that section only defines the "commencement" of an Act. The three years, therefore, did not expire until midnight of the 9th of August, 1902, and the notice was served in time.

S. A. T. Rowlatt replied.

COLLINS, M.R.—I am of opinion that this appeal fails. There is no doubt that the distinction is a somewhat fine one between the limitation of the duration of a term which is to commence on a particular day so as to involve the inclusion of that day, and the limitation of a period from a certain day for doing an act, in which case the first day is excluded. The distinction, however, is a well-established one. It is well stated by Parke, B., in *Russell* v. *Ledsam*, 14 M. & W., at p. 581: "The next question arises on a point reserved at the trial, on the evidence in support of the seventh plea. That plea was that the second or renewed letters patent were granted after the expiration of the term of fourteen years granted by the first letters patent; the replication took issue on that allegation; and the proof was that the original letters patent were dated on the 26th of February, 1825, the second on the 26th of February, 1839; and the question is whether the day of the date of the first letters patent was inclusive or exclusive. The usual course in recent times has been to construe the day exclusively, whenever anything was to be done in a certain time after a given event or date; and consequently the time for enrolling a specification within the six months given by the proviso is reckoned exclusively of the day of the date; and many other instances are collected in the cases of *Webb* v. *Fairmaner*, 3 M. & W. 473, and *Young* v. *Higgon*, 6 M. & W. 49." In the present case section 29 of the West Metropolitan Railway Act, 1899, provides that "The powers of the company for the compulsory purchase of lands for the purposes of this Act shall cease after the expiration of three years from the passing of this Act." That section fixes a certain time from the passing of the Act within which an act—namely, the service of the notice to treat for the land, has to be done. The passing of the Act was the event or date "from" which the time for the exercise of the compulsory powers of the company was to run. The Act was passed on the 9th of August, 1899, and the three years ran from the expiration of that day, as the law in such a case takes no notice of a fraction of a day. The company were entitled to three full years from that day, and therefore their compulsory powers did not expire until midnight of the 9th of August, 1902. The notice to treat was therefore served in time. I only wish, in conclusion, to refer to the observations of Rigby, L.J., in *In re North, Ex parte Hasluck*, where that learned judge takes a wider view—namely, that the question whether the day on which the act is done is to be included or excluded must depend upon whether it is to the benefit or disadvantage of the person primarily interested. Without expressing any opinion as to whether I should go that length, it is enough to say that the authorities support the conclusion to which we have come in this case. The appeal must therefore be dismissed.

MATHEW, L.J.—I am of the same opinion. The general rule has been laid down by Sir William Grant in *Lester* v. *Garland*, by Parke, B., who delivered the judgment of the court in *Russell* v. *Ledsam*, and by other judges in subsequent cases. The rule is that where the time within which an act is to be done is to run from a certain date or event, the day of the date or event must be excluded from the computation of the time. Here section 29 of the Act defines the time within which a notice to treat for the purchase of land is to be given. That is the act to be done, and it is to be done within three years "from the passing of this Act," namely, from the 9th of August, 1899. It is obvious that the intention of the Act is to allow three full years from the last moment of the 9th of August, 1899, during which the compulsory

powers of the company for the purchase of lands are to be in existence.

Appeal dismissed.

Solicitors for the plaintiffs, *Freshfields.*

Solicitors for the defendants, *Biggs-Roche, Sawyer, & Co.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) July 27, 1903.

MOLYNEUX *v.* HAWTREY. (*a.*)

Vendor and purchaser—Assignment of lease—Notice of unusual covenants—Constructive notice—Fair opportunity—Conveyancing Act, 1882 (45 & 46 *Vict. c.* 39), *s.* 3.

In the course of negotiations for the assignment of a lease by the plaintiff to the defendant the defendant's solicitor had an interview with the plaintiff's agent. The agent offered to show the solicitor a lease similar in terms to the lease proposed to be assigned. The solicitor being pressed with other business could not then examine the document. Without any further inquiries or any further information as to the terms of the lease, a contract for assignment was executed. The defendant, having subsequently discovered that the lease contained unusual covenants, repudiated the contract.

Held, in an action for breach of the contract, that the plaintiff had not discharged the onus which lay upon him of either disclosing or giving the defendant a fair opportunity of ascertaining the terms of the lease.

Appeal by the plaintiff from the judgment of Wright, J., at the trial of an action without a jury.

The action was brought to recover damages for breach of a contract to take an assignment of a lease.

The defence was that the lease was subject to unusual covenants, of which no notice was given to the defendant, and that therefore the contract was not binding on the defendant.

The plaintiff, being the lessee of a flat at 89, Ashley-gardens, for a term of seven years from the 25th of December, 1899, and being desirous of disposing thereof, instructed Messrs. Heron & Heron, a firm of house agents, to find a purchaser; and on the 9th of December, 1901, negotiations were commenced with the defendant, Mrs. Hawtrey, for an assignment of the lease to her.

On the 12th of December, the parties not having yet come to terms, Mr. Peckham, the defendant's solicitor, called at the office of Messrs. Heron & Heron and had an interview with Mr. Heron, a member of the firm.

In the course of conversation Mr. Peckham asked Mr. Heron to show him the lease. Mr. Heron said that it was impossible to show it then, as it was stored away elsewhere with a number of other things, but that he could procure it in a few days. Mr. Heron, however, produced a printed document, saying that it was the form of lease used for flats on the Ashley-gardens estate, and that its terms were similar to those of the lease which it was proposed to assign. Mr. Peckham thereupon said that he was pressed with other work, and that he could not look at the document then. Nothing more was said at the interview as to the terms of the lease.

Subsequently, without any further inquiries on the part of the defendant, and without any further information on the part of the plaintiff as to the terms of the lease, the contract sued upon was executed.

After the execution of the contract the defendant discovered that the lease contained unusual covenants, and she then repudiated the contract as not binding upon her.

The covenant on which the defendant mainly relied was a covenant by the lessee that he would not at any time during the term without the licence of the lessors make any objection on the ground of obstruction of light or for any other reason to the erection on the land situate in Ambrosden-avenue, on the side opposite to the premises known as blocks 1, 2, 3, 4, and 5, Ashley-gardens, of any cathedral or other ecclesiastical building, whatever might be the height of such building, or the practice of cathedral services, including the ringing of bells at all reasonable times, in any cathedral or other ecclesiastical building which might thereafter be erected upon the said last-mentioned land, or any other land then or lately belonging to Henry Edward Cardinal Manning, Daniel Gilbert, and James Bamber, or take any legal proceedings whatsoever for the purpose of restraining the erection of any such building or the holding of any such services or ringing of bells, or for obtaining damages for any injury caused by such erection, or services, or ringing of bells.

Wright, J., gave judgment for the defendant.

The plaintiff appealed.

Germaine, K.C., and *G. A. Scott*, for the plaintiff.—The plaintiff gave the defendant's solicitor a fair opportunity of ascertaining what the terms of the lease were. He thereby satisfied the obligation imposed on the seller of a lease with regard to giving notice of unusual covenants.

They cited the following cases: *Cosser* v. *Collinge*, 3 My. & K. 283; *Hyde* v. *Warden*, 26 W. R. 201, 3 Ex. D. 72; *Reeve* v. *Berridge*, 36 W. R. 517, 20 Q. B. D. 523; *In re White and Smith's Contract*, 44 W. R. 424, [1896] 1 Ch. 637.

G. Spencer Bower, K.C., and *Rose-Innes*, for the defendant.—The purchaser of a lease is not affected with constructive notice of the terms of the lease, unless by an act of gross or culpable negligence he has failed to avail himself of an opportunity of ascertaining them: *Ware* v. *Lord Egmont*, 3 W. R. 48, 4 De. G. M. & G. 460; *Bailey* v. *Barnes*, 42 W. R. 66, [1894] 1 Ch. 25. The learned judge was justified in finding as a fact that the defendant's solicitor had no fair opportunity in that sense of learning what the terms of the lease were.

COLLINS, M.R.—This is an appeal from a decision of Wright, J., in favour of the defendant in an action brought by the lessee of a flat to recover damages for breach of a contract to take an assignment of the lease. There was no doubt a concluded contract by the defendant to take an assignment of the lease in question, and the lease was in fact subject to covenants of an unusual and onerous character. The burden is always on the vendor to make out his title, and as Stirling, J., held in the case of *In re White and Smith's Contract*, it is *primâ facie* the duty of the vendor to disclose all that is necessary to protect himself, and not the duty of the purchaser to make inquiry before entering into a contract, and this is so whether the sale be by public auction or private contract. The same thing was said by Byrne, J., in the case of *In re Haedicke and Lipski's Contract*, 50 W. R. 20, [1901] 2 Ch. 666—viz., that it is the duty of the vendor of a lease to disclose the existence of onerous and unusual covenants contained in the lease, or at least to afford the purchaser an opportunity of inspecting the lease. We begin the discussion, then, with the principle that the burden is on the vendor.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

If the lease contains unusual covenants, it is the duty of the vendor to put the purchaser in possession of the fact that the covenants are unusual. [The learned Master of the Rolls then stated the facts of the case, and continued:] At the end of the interview of the 12th of December on whom did the onus rest? Had it been shifted from the vendor on to the purchaser? Had the vendor discharged it? The defendant's solicitor came away from the interview with the same information as he had when he went to it. Could the vendor say he had given the defendant's solicitor a fair opportunity of learning what the covenants were because he offered to show him a document containing similar covenants? The solicitor could not then avail himself of the offer, because he had no time to examine the document. The question is whether, under those circumstances, a fair and reasonable opportunity of ascertaining the existence of unusual covenants was given to the purchaser's solicitor. That question is a question of fact, and the learned judge has found that no opportunity was given such as would be sufficient to discharge the onus on the vendor.

The law as to "fair opportunity" is laid down in *Reeve* v. *Berridge*. There Fry, L.J., in delivering the judgment of the court, referred to the previous case of *Hyde* v. *Warden*, and said: "In that case the question arose whether the taking possession of property agreed to be underleased, with notice of the existence of the lease, was a waiver of all objections based on the terms of the lease. The question, therefore, so far as regards the question of notice, was the same as in the present case, and the court was pressed to decide that notice of the lease was notice of its contents, and that on the authority of various cases including *Cosser* v. *Collinge*. The court rejected the argument, and said: 'We think it may be considered as settled that the principle of that case can only be applied where (as, indeed, was the case in *Cosser* v. *Collinge*) the defendant had a fair opportunity of ascertaining for himself the provisions of the original lease.' It was argued before us that the question in *Hyde* v. *Warden* arose on a contract for a sub-lease, while in the present instance the question arises with relation to a contract for the assignment of a lease. But we are of opinion that there is no substance in such a distinction, because in both cases alike the purchaser must know that his vendor can confer on him no interest except one subject to the covenants contained in the lease, and the effect of notice must therefore be alike in both cases." Section 3 of the Conveyancing Act, 1882, which was passed after the case of *Hyde* v. *Warden*, seems to me to leave the law substantially as it was. It provides as follows: "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—(i) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."

The question, therefore, appears to me to be whether there was such a want of reasonable care on the part of the defendant's solicitor as to entitle the plaintiff to say that he gave the solicitor a fair opportunity. I have come to the conclusion that there was plenty of evidence to justify the finding of the learned judge that in this case there was no fair opportunity in that sense. The appeal therefore fails.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *A. J. Schweder.*

Solicitors for the defendant, *Valpy, Peckham & Chaplin.*

From Chan. Div. (Collins, M.R., and Vaughan Williams, Romer, Stirling, Mathew, and Cozens-Hardy, L.JJ.) — July 20, 1903.

WYNNE-FINCH v. CHAYTOR. (a.)

Practice—Appeal—Court of Appeal—Official referee—Reference of Chancery action—Application to set aside judgment—Jurisdiction—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 19—*Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 5—*R. S. C.*, 1883, *ord.* 40, *r.* 6.

Where an action in the Chancery Division is referred to an official referee, and judgment is entered by direction of the official referee, the proper course for the unsuccessful party is to apply in the Chancery Division to set aside the judgment, and not in the first instance to appeal to the Court of Appeal.

Serle *v.* Fardell, 38 *W. R.* 733, 44 *Ch. D.* 299, *not followed.*

Daglish *v.* Barton, 48 *W. R.* 50, [1900] 1 *Q. B.* 284, *overruled.*

Appeal from a judgment entered by the direction of an official referee.

The action was brought in the Chancery Division, and was assigned to Farwell, J.

The whole action was referred to an official referee.

At the trial the official referee directed that judgment should be entered for the plaintiff, and judgment was entered accordingly.

The defendants gave notice of appeal to the Court of Appeal.

The grounds of the appeal were that the decision of the official referee was wrong both in law and as to the facts.

The question was whether the appeal was rightly brought to the Court of Appeal, or whether the defendants ought not to have applied in the High Court to set aside the judgment.

Warmington, K.C., Manisty, K.C., and *Edward Morten*, for the defendants.

Levett, K.C., Page, K.C., and *Bryan Farrer*, for the plaintiff.

The following cases were cited: *Serle* v. *Fardell*, 38 W. R. 733, 44 Ch. D. 299; *Clark* v. *Sonnenschein*, 38 W. R. 717, 743, 25 Q. B. D. 226, 464; *Macalpine & Co.* v. *Calder & Co.*, [1893] 1 Q. B. 545; *Daglish* v. *Barton*, 48 W. R. 50, [1900] 1 Q. B. 284.

Cur. adv. vult.

July 20.—STIRLING, L.J., read the judgment of the court as follows: This action was commenced by a writ issued in the Chancery Division on the 28th of December, 1900, claiming damages for breach of covenants in a mining lease. The action was assigned to Farwell, J. On the 4th of March, 1901, an order was made on a summons for directions by which the whole action was referred to an official referee, who by the terms of the order was to have all the powers of certifying and amending of a judge of the High

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Court of Justice, and was to direct judgment to be entered and otherwise deal with the whole action pursuant to Order 36 of the Rules of the Supreme Court, 1883. On the 18th of February, 1903, the official referee gave a direction in the following terms: "In pursuance of the order of the Honourable Mr. Justice Farwell, dated the 4th of March, 1901, this cause has been tried before me, and I hereby direct that judgment be entered for the plaintiff for the sum of £3,289 6s. 4d., including the sum of £500 paid into court." A summons was afterwards taken out for further directions, and was dealt with by the official referee on the 13th of March. The judgment was subsequently drawn up, and bears date the 13th of March, and is headed, "In the High Court of Justice, Chancery Division, Mr. Justice Farwell." From this judgment an appeal has been brought to this court. The notice of appeal calls in question the decision of the referee both as to the law and as to the facts. The question has been argued before us whether the appeal lies direct to this court or whether the appellants ought not in the first instance to move the High Court to set aside the judgment.

Ord. 36, r. 55c, directs that the provisions of rules 48-55 of the same order shall apply where any cause or matter or any question or issue of fact is referred to an officer of the court or to a special referee or arbitrator. Rules 48-55 deal with the powers of official referees; and in particular rule 50 specifically provides that, subject to any order made by the court or judge ordering the same, "the referee shall have the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a judge of the High Court." Ord. 40, r. 2, provides that "every referee to whom a cause or matter shall be referred for trial shall direct how judgment shall be entered, and such judgment shall be entered accordingly by a master or registrar as the case may be." In the present case the official referee had by virtue of those orders full powers to do everything which a judge of the High Court could have done in the action. The judgment which has been entered pursuant to his direction appears to be as much a judgment of the High Court as if it had been made at the trial of the action by Farwell, J., whose name it bears.

Section 19 of the Judicature Act, 1873, confers on the Court of Appeal "jurisdiction and power to hear and determine appeals from any judgment . . . of her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this Act, and to such rules and orders of court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act." In the Act of 1873 itself there does not appear to be any provision which affects the point under consideration. Of the rules the most important to be considered is ord. 40, r. 6: "Where at a trial by a referee he has directed that any judgment be entered, any party may move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong: Provided that in the Queen's Bench Division such motion shall be made to a Divisional Court." The first question which arises on this rule is—In what court is such a motion to be made? Now, rules 3 and 4 of the same order confer the power of making similar motions where the trial has taken place before a judge either with or without a jury; and rule 5 provides that an application under rules 3 and 4 shall be to the Court of Appeal. There is no such direction with respect to an application under rule 6; and the inference is that the motion must be made in the High Court. This is confirmed by the concluding words of rule 6, which plainly indicate that the motion may be made in the Queen's Bench Division of that court, and provide that in such case it shall be made to a Divisional Court. But how is the application to be made in an action in the Chancery Division, in which there is no Divisional Court? The proviso just referred to provides no more than this—that when an application under rule 6 has to be made in the Queen's Bench Division it shall be made to a Divisional Court. Applications in Chancery actions not being expressly provided for are, in our opinion, to be made in accordance with the general practice applicable to that Division. Ord. 5, r. 9, provides that every cause or matter in the Chancery Division is to be assigned to, and marked with, the name of one of the judges thereof, before whom (speaking generally) all subsequent proceedings take place. In the present case, therefore, an application under ord. 40, r. 6, ought to be made before Farwell, J. In terms that rule only authorizes an application to set aside the judgment and enter another on the ground that on the finding as entered the judgment as entered is wrong, and does not expressly permit the finding itself to be questioned. It has, however, been decided by the Court of Appeal that this rule is to be read along with ord. 36, r. 52, and that, although the operation of the latter rule might seem to be limited to cases where the referee has submitted a question to the court, the powers conferred by it may be exercised by the court on an application under ord. 40, r. 6: *Clark* v. *Sonnenschein*. In that state of things it appears to us that an application to set aside the judgment and the findings on which it is based might have been made in the Chancery Division.

Order 58 deals with appeals to the Court of Appeal. Rule 1 provides that all such appeals are to be by way of rehearing, and to be brought by notice of motion. Rule 17 is as follows: "Whenever under these rules an application may be made either to the court below or to the Court of Appeal, or to a judge of the court below or of the Court of Appeal, it shall be made in the first instance to the court or judge below." Assuming, therefore, that the judgment of the 13th of March, 1903, is a judgment of the High Court to which section 19 of the Judicature Act, 1873, applies, and from which an appeal might be brought under ord. 58, r. 1, still, inasmuch as the same application might be made to Farwell, J., in the Chancery Division, we are of opinion that under ord. 58, r. 17, it ought to have been made to him, and that this court is precluded from entertaining it until he has dealt with it.

It was, however, contended that the proceedings on such an appeal as this are now regulated by the Judicature Act, 1894, s. 1, sub-section 5: "In all cases where there is a right of appeal to the High Court from any court or person, the appeal shall be heard and determined by a Divisional Court constituted as may be prescribed by rules of court; and the determination thereof by the Divisional Court shall be final, unless leave to appeal is given by that court or by the Court of Appeal." In our opinion this clause of the Judicature Act, 1894, has reference to appeals from inferior courts, and does not apply to an appeal from a judgment or order of the High Court itself, as the judgment in this action appears to us to be.

There, is however, a decision of the Court of Appeal in *Daglish* v. *Barton*, which is inconsistent with this view. The court on that occasion consisted of the late A. L. Smith, L.J., and Vaughan Williams, L.J., the latter of whom expressed doubt as to the true meaning of the sub-section, and now agrees with this judg-

ment. With the greatest respect we are unable to agree with *Daglish* v. *Barton*, and think that it ought not to be followed; and it is, therefore, overruled.

The present appeal to this court must, therefore, be dismissed, without prejudice to the making of a similar application to Farwell, J.; and, if necessary, the time for making such an application ought to be extended. The costs of the present appeal will follow the result of that application; and, in case none should be made, there will be liberty to apply to this court.

Appeal dismissed.

Solicitors for the plaintiff, *Nicholl, Manisty, & Co.*

Solicitors for the defendants, *Turry, Sherlock, & King.*

High Court of Justice.

Chan. Div. Farwell, J. — Oct. 27.

In re LANCASHIRE, DERBYSHIRE AND EAST COAST RAILWAY ACTS, 1891 TO 1895, AND *In re* LINCOLN AND EAST COAST RAILWAY AND DOCK ACTS, 1897 TO 1902. (*a.*)

Railway — Parliamentary deposit fund — Abandoned undertaking—Mortgage by sureties, owners of the fund —Payment out of court—Costs of owners having conduct of proceedings.

The sureties of a railway company, owners of the parliamentary fund deposited in court, mortgaged the fund. On the abandonment of the undertaking the usual inquiries were directed and the sureties had the conduct of the proceedings. On application for payment out,

Held they were not entitled to their costs incurred in the proceedings wherein the inquiries were directed.

Adjourned summons.

This was an application for payment out of court of the Parliamentary deposit fund of the Lincoln & East Coast Railway Co., an undertaking which had been abandoned. The applicants, Messrs. H. T. Anstruther, W. B. Davenport, and S. H. Ward, were the sureties of the company, and were entitled to the fund subject to its statutory obligations and to a mortgage made by them to Messrs. Coutts & Co. The inquiries usual on an abandonment and winding-up had been directed, and the applicants had the conduct of the proceedings. The questions decided related solely to costs and the only point needing report was as to whether the applicants were entitled to be allowed their costs incurred throughout the course of the proceedings.

R. J. Parker urged that the applicants were entitled to their costs as costs of administering a fund in court. They had acted for the benefit of the whole body of persons interested in the fund.

He cited *In re Wrexham, Mold, and Connah's Quay Railway Co.*, 48 W. R. 311, [1900] 1 Ch. 261, and *In re Fisher*, 42 W. R. 241, [1894] 1 Ch. 450, and referred to the Judicature Act, 1890 (53 & 54 Vict. c. 44, s. 5), and the company's special Acts, 1897 (60 & 61 Vict. c. ccxxxiv.) s. 14, and 1902 (2 Ed. 7, c. iii.), s. 6.

Upjohn, K.C. (*Clauson* with him), for a judgment creditor of the company, pointed out that the applicants were in the position, not of trustees or legal personal representatives having the conduct of proceedings, but of persons claiming an estate subject to incumbrances. Costs were never given in such a case.

Devonshire, for the two railway companies.

Bryan Farrer, for Messrs. Coutts & Co.

FARWELL, J.—This application is governed by the Lincoln and East Coast Railway Act of 1897 supplemented by that of 1902. The point raised is a curious one. Inquiries necessary to clear the fund in court were directed on the application of persons entitled to the deposit. They could only get this fund out when the claims of landowners and creditors had been cleared off, and possibly these might be reduced. Mr. Parker argues that the proceedings of which the applicants had the conduct were for the benefit of creditors, and that therefore the applicants ought to be allowed their costs before the fund is distributed.

Where you find a number of persons having similar interests and one of them does the work it may well be that he is entitled to his costs; but if such a party is a surety or a debtor he cannot require creditors to pay his costs. The true analogy is that of an incumbered fund where the person entitled comes to clear off the incumbrances before getting the residue. Mr. Parker relied on the *Wrexham case*, but that was decided on a different footing. There a receiver had been appointed under section 4 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), and the usual inquiries were directed. A contractor, who had an action pending against the company (which had been referred to arbitration) was given liberty to proceed, notwithstanding the receivership order, and the company had leave to continue to attend the arbitration proceedings an behalf of all parties interested in its assets. The result was a substantial reduction in the contractor's claim, and the Court of Appeal allowed the company the costs of defending the action on the ground that the costs ought to be treated as incurred in prosecuting the inquiries directed by the court and for the benefit of the debenture-holders and other creditors of the company. This can form no precedent for a surety or a mortgagor obtaining costs in priority to his creditor where, as is not denied to be the case, he has acted for his own benefit and not from motives of philanthropy. I must therefore refuse the application, though, as all parties consent, I allow the applicants their costs of the present summons.

Solicitors, *Collyer-Bristow & Co.; Lowe & Co.; Devonshire & Macole; Farrer & Co.*

Chan. Div. Buckley, J. — Aug. 12, 1903.

NATIONAL TELEPHONE CO. (LIMITED) v. MAYOR, &c., OF KINGSTON-UPON-HULL. (*a.*)

Practice—Costs—Taxation—Solicitor and client—Action against public authority—Action in respect of construction of contract—Act done in pursuance of an Act of Parliament or of public duty or authority—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

By an agreement a public authority had, in pursuance of statutory authority, given to the plaintiffs certain powers, reserving to itself the right, by duly giving notice, to determine those powers. The public authority gave notice to the plaintiffs to determine the powers. In an action by the plaintiffs against the public authority, seeking declarations that the notice to determine had not been duly given, and that, by reason of the subsequent passing of an Act of Parliament, the public authority

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

had become incapacitated from determining the powers, the plaintiffs were unsuccessful.

Held, that the act done by the public authority which gave rise to the action was not done in pursuance of an Act of Parliament or of any public duty or authortiy, and that the plaintiffs were liable to pay to the public authority costs taxed as between party and party only, and not as between solicitor and client.

Motion.

This was a motion on the part of the plaintiffs that the minutes of the judgment in this action as given out by the registrar might be varied by ordering that the costs of the defendants might be taxed as between party and party, instead of as between solicitor and client.

In their statement of claim the plaintiffs claimed (1) a declaration that they had by an agreement of the 18th of March, 1899, acquired powers to lay underground pipes in Hull within the meaning of the Telegraph Act, 1899, s. 3 (1), and that such powers were by virtue of that section continued and were in operation until a certain date; (2) a declaration that a certain notice given by the defendants to the plaintiffs purporting to determine the agreement of the 18th of March, 1899, was invalid and inoperative; and (3) an injunction to restrain the defendants from removing the plaintiffs' underground pipes.

The action (which is reported 51 W. R. 617, where the facts are fully stated) was dismissed with costs.

Astbury, K.C., and *H. H. Gaine*, for the plaintiffs.—The present case is not within the words of section 1 of the Public Authorities Protection Act, 1893, under which it is sought to make the plaintiffs liable to pay the costs of the defendants as between solicitor and client. The plaintiffs did not sue the defendants in respect of "any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority." All the acts of the defendants of which the plaintiffs complained were done by them in purported exercise of their powers under the agreement of the 18th of March, 1899. The action is, therefore, one to determine the construction of a contract, and in such a case the Act does not apply: *Milford Docks Co.* v. *Milford Haven Urban District Council*, 65 J. P. 483; *Clarke* v. *Lewisham District Council*, 19 Times L. R. 82.

Danckwerts, K.C., and *R. J. Parker*, for the defendants.—Neither of the cases cited applies, because the action was brought, not on the agreement of the 18th of March, 1899, but to obtain a declaration that by virtue of the Telephone Act, 1899, the authority given to the corporation by that agreement to determine the powers of the plaintiffs in regard to underground pipes had automatically ceased. It was in pursuance of an Act of Parliament and of a public duty or authority that the defendants had given the plaintiffs an authority to lay down underground pipes, and the same was the case in respect of the determination of that authority.

BUCKLEY, J.—In my opinion the Public Authorities Protection Act does not apply to this case. There had been executed on the 18th of March, 1899, an agreement between the corporation and the company, which in article 20 contained a provision enabling the corporation, after fulfilling certain formalities, in certain events, to determine the agreement on giving six months' notice. On the 28th of July, 1899, they gave a notice to the company. There were two questions to be determined in the action—first, whether effectual notice had been given, having regard to the formalities which were prescribed by the agreement; and, secondly, assuming the notice to have been good, whether the effect of section 3 (1) of the Telegraph Act, 1899, was to continue the powers possessed by the company? I held that good notice to determine the agreement had been given, and, secondly, that the powers of the company were not continued by the Act. That was all that was determined at the trial of the action.

Now, the Public Authorities Protection Act, s. 1, contains no words applicable to such a case, unless it be within the words "any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority." In a sense any act done by a corporation in respect of statutory powers is in pursuance of a public authority; but not everything done by a corporation is to be so treated for the purposes of the section. There was no duty imposed on the corporation to determine, under the power contained in article 20, the agreement of the 18th of March, 1899. In so determining it they were acting, not in execution of any public authority, but merely because they thought they ought to determine the particular contract under the clause by which they had reserved a power of revocation. The words of the Act of 1893 are "act done in pursuance or execution or intended execution of any Act of Parliament"—the act of the corporation was not that—"or of any public duty or authority" it was not that. It was simply that there being a power of revocation contained in a contract, the corporation thought it expedient to exercise it. The other words in the section, as to neglect or default of the local authority, are not material to the present case. I do not think that the Act applies to a case where the action is merely on the construction of a contract and the effect of acts done under that contract, so as to extend, in the case of such an action, the protection given to public authorities in respect of actions brought against them for acts done "in the execution of statutory and other public duties." I therefore allow the motion.

Solicitors, *W. E. L. Gaine; Sharpe, Parker, Pritchards, Barham, & Lawford*, for *E. Laverack*, Hull.

Chan. Div. } June 20, 30; Aug. 6, 1903.
Swinfen Eady, J. }

In re FLETCHER AND DYSON, SOLICITORS. (a.)

Practice—Costs—Lease by vicar and others acting by different solicitors—Lessee's liability—Error in taxation—Disallowed costs of additional solicitors excluded from one-sixth—Objections—Ord. 65, r. 27, sub-rules 39, 41—Costs of taxation.

Where a lessor can only grant a lease with the consent of third parties, and such parties act by different solicitors, the lessee is not, in the absence of agreement express or implied, liable to pay more than one set of costs. In taxing a solicitor's bill of costs, some of the items in which represent payments made by him to other solicitors, which the client is liable to pay and would have been entitled to tax if sent in to him direct by such other solicitors, any sums taxed off such items are, no less than sums taxed off the solicitor's own charges, to be reckoned as taxed off his bill for the purpose of ascertaining who is to pay the costs of taxation.

Ord. 65, r. 27 (sub-rules 39, 41), which requires objections to be carried in before the taxing-master, does not apply to objections raised against the principle adopted by the master in the taxation.

In re Remnant, 11 *Beav.* 603, *distinguished.*

This was a summons to review the taxation of the bill of costs of a lessor's solicitors, the question

(a.) Reported by R. HILL, Esq., Barrister-at-Law.

being whether the lessee was bound to pay the costs of certain concurring parties acting by separate solicitors; and, if so, whether those costs were properly included as disbursements in such bill.

The facts were as follows:

On the 30th of January, 1903, George Lindley obtained an order to tax certain costs relating to the grant to himself in the year 1902 of a mineral lease by the vicar of Kirkburton, with the concurrence of the Ecclesiastical Commissioners and the Bishop of Wakefield, the patron of the benefice, under the provisions of the Ecclesiastical Leasing Acts—a previous lease dated the 1st of October, 1892, being surrendered as part of the transaction. Messrs. Fletcher & Dyson, of Huddersfield (now practising as Laycock, Dyson, & Laycock), acted as solicitors for the vicar, and their costs amounted to £22 2s. 1d.; Messrs. Milles, Jennings-White, & Foster, of Whitehall-place, acted as solicitors for the Ecclesiastical Commissioners, and their costs amounted to £23 1s. 6d.; Messrs. Dixons & Horne acted as solicitors for the bishop, and their costs amounted to £7 7s.; the charges of Messrs. Abbey & Hanson, surveyors, were £14 3s. 6d., making a total of £66 14s. 1d. Messrs. Fletcher & Dyson sent in their bill of costs to the lessee at this entire sum of £66 14s. 1d., and they made it out as follows:

				£	s.	d.
Their own profit charges, of which detailed items were given in the usual way				17	17	8
Outpayments.	£	s.	d.			
Printers' charges	3	10	7			
Messrs. Dixons & Horne's charges	7	7	0			
Stamp and stamping and telegram	0	13	10			
Messrs. Milles & Co.'s charges ...	23	1	6			
Messrs. Abbey & Hanson's charges	14	3	6			
				48	16	5
				66	14	1

The order to tax was obtained under section 38 of the Solicitors Act, 1843, upon a petition of course.

The result of the taxation by the master was as follows: Taxed off Messrs. Fletcher & Dyson's costs, £1 15s. 8d., reducing the amount to £20 6s. 5d. Taxed off Messrs. Milles & Co.'s costs, £11 0s. 10d., reducing the amount to £12 0s. 8d. Nothing was taxed off Messrs. Dixons & Horne's charges of £7 7s., but £10 10s. was disallowed off the charges of Messrs. Abbey & Hanson, surveyors, reducing their fees to £3 13s. 6d. The entire bill of costs of £66 14s. 1d. was thus reduced to £43 7s. 7d.

The taxing-master, however, held that the applicant, George Lindley, must pay the costs of the taxation, as less than one-sixth had been taxed off Messrs. Fletcher and Dyson's own charges. The taxing-master treated the charges of Messrs. Dixons & Horne, Milles & Co., and Abbey & Hanson, as struck out of the bill, and as if included in a cash account. The result of this was that the disallowances from the costs of Messrs. Milles & Co. were not included in the calculation of the one-sixth. If the £11 0s. 10d. disallowed off such costs were added to the £1 15s. 8d. disallowed off Messrs. Fletcher & Dyson's costs, the sum of the disallowances—namely, £12 16s. 6d., would be more than one-sixth of £66 14s. 1d.

The summons was heard on the 20th and 30th of June, 1903, when judgment was reserved.

Rowland Rowlands, for the applicant.—By custom the lessee pays the lessor's costs of granting the lease, but the custom has never been shown to extend to the costs of third parties joining for the purpose of making a good title. For these the lessee cannot be liable in the absence of a special contract to pay them. A custom would be unreasonable which bound a lessee to pay the costs of five or six parties acting by different solicitors. If the lessor's position is such that he cannot grant the lease without their concurrence he must pay their costs. As to the costs of taxation the order provides that if more than one-sixth be taxed off the bill the respondents shall pay the costs, and the question is whether the master was right in refusing to take into account, for the purpose of calculating the one-sixth, the amounts he taxed off what he calls cash account, but what I call disbursements. The order was to tax the bill as a whole, including these disbursements; they cannot therefore be treated as cash items. The respondents having entered them as disbursements are estopped from calling them cash items for the purpose of evading their liability to pay the costs of taxation. The respondents take the technical objection that I cannot now object, not having done so before the master; but the rule on which he relies (ord. 65, r. 27, sub-rules 22, 39, 41) refers only to items, and has no application to any decision of the master in putting into effect the order under which he taxes. As to the surveyors' charges, they have not been sufficiently reduced. It may be that Messrs. Abbey & Hanson put the plan on the lease, and for this we do not object to pay their charge of £1 11s. 6d.; but there can be nothing else for which the lessee is liable, and there is therefore an excess of £2 2s., on the sum allowed by the master on that bill.

He cited: *Grissell* v. *Robinson*, 3 Bing. N. C. 10; *In re Gray*, 49 W. R. 298, [1901] 1 Ch. 239, 243; *In re Heather*, 18 W. R. 1079, L. R. 5 Ch. 694; *In re Castle*, 35 W. R. 621, 36 Ch. D. 194; Cordery on Solicitors, p. 70 (3rd ed.); Law Journal for 1883, p. 127.

E. P. Hewitt, for respondents.—The concurring parties were necessary parties. The statute (5 & 6 Vict. c. 108) requires their consent to be given and to be testified by their being made parties; but it makes no provision for payment of their costs. The Ecclesiastical Commissioners stipulated that the lessee should pay their costs, and the lessee knew what he would have to pay, for he had taken a previous lease from the vicar. It is true there is no evidence of this, but these facts were stated before the taxing-master and were not contradicted. We applied in chambers for leave to file evidence, but were told by the master that the proper time for the application would be before your lordship. I admit that no important case can be found, throwing on the lessee the liability to pay costs of third parties, in the absence of an agreement to do so. As to the costs of taxation the objection should have been made before the taxing-master; it cannot be raised now. The master has not taxed one-sixth off the bill so as to make the respondents liable to pay; he took each bill separately and "moderated" it—the effect being that the amounts which he disallowed were struck out as sums which should not have been in the bill at all. As to the surveyors' charges, the £2 2s. was no doubt a fee for checking the plan drawn by their clerks on the lease.

He cited *Ecclesiastical Commissioners* v. *Pinney*, 47 W. R. 136, [1899] 1 Ch. 99; *In re Gray*, 49 W. R. 298, [1901] 1 Ch. 239, 244; and *In re Remnant*, 11 Beav. 603.

Rowlands replied.

Cur. adv. vult.

Aug. 6, 1903.—SWINFEN EADY, J., after stating the facts as above set forth, said: The applicant

seeks to review the taxation on several grounds. The first ground is that, as lessee, he is only liable to pay the costs of the lessor acting by one solicitor, and that if the concurrence of two other parties, acting by separate solicitors, is necessary, there is not any custom which compels him, as lessee, to pay these additional costs. In the leading case of *Grissell* v. *Robinson*, 3 Bing. N. C. 10, Tindal, C.J., said: "The evidence shows that it is the custom for the landlord's attorney to draw the lease, and that it is paid for by the lessee," but in that case there was only one bill of costs in question, the lease being drawn by Mr. Taylor, the attorney for the executors of Mr. Peto. In the recent case of *In re Gray*, 49 W. R. 298, [1901] 1 Ch. 239, in which Cozens-Hardy, J., as he then was, had to consider the question of the lessee's liability, under a third-party order to tax the lessor's solicitor's costs, he said (p. 244): "On principle the lessee must be held to have implicitly contracted to indemnify the lessor against expenses properly incurred in preparing the lease." But the judge was there considering whether the fees of counsel for settling a draft lease might be properly allowed as part of the costs, and not whether, if there were several lessors, acting by different solicitors, the lessee was to pay several sets of costs. I have communicated with the taxing-master as to whether there is any settled practice in the taxing office on the subject, and he reports to me as follows: "None of my colleagues have ever had to consider the question, and consequently it cannot be said that there is any settled practice." In Cordery on Solicitors (3rd ed.), p. 70, the practice where there are several lessors is stated as follows: "In taking a lease from two or more persons who employ different solicitors, as, *e.g.*, mortgagor and mortgagee, tenant for life and remainderman, or tenants in common, in the absence of agreement the lessee pays one set of costs only," and this statement appears to be based upon an opinion of the Council of the Law Society as to the practice of solicitors and the understanding of the profession. Under these circumstances, I am unable to assume, in the absence of any evidence on the subject, that there is any general custom binding a lessee to pay several sets of costs, where there are several lessors represented by different solicitors. In all such cases the question must be considered whether there is any contract by the lessee to pay, either express or to be implied from the nature of the circumstances under which the arrangement for the new lease was arrived at. In the present case, having regard to the fact that it was part of the arrangement for the new lease that a subsisting lease between the same parties should be surrendered, and to the course of the negotiations, and to the letter of the Ecclesiastical Commissioners of the 11th of July, 1902—which (if necessary) can be strictly proved—there would probably be little difficulty in establishing such an agreement by the lessee; the question has not yet been raised in this form before the master, as the applicant applied to tax the whole bill delivered on or about the 11th of December, 1902, on the footing that he was liable to pay the same subject to taxation; but, if the applicant desires it, the matter must be referred back to the master to inquire whether there was any contract by the applicant, express or implied, to pay the three sets of lessors' costs.

The next ground for reviewing the taxation put forward by the applicant is that more than one-sixth has been taxed off, and so the costs of taxation should be borne by the respondents, and not by the applicant. It was not disputed that the costs of Messrs. Milles & Co. were properly subject to taxation, and were duly and regularly taxed by the master, and that more than one-sixth of the whole bill as delivered has been taxed off; but reliance was placed upon *In re Remnant*, 11 Beav. 603, as deciding that a professional payment by one solicitor to another was properly included in a cash account, and ought not to be taken into account for the purpose of calculating the one-sixth. I am of opinion that the costs of Messrs. Dixons & Horne, and Messrs. Milles & Co. do not come within this rule. In the first place, these costs are taxable items. In the next place, they are not disbursements made by Messrs. Fletcher & Dyson as agents on the order of the applicant; the payments were not made by them at the request of the applicant. Strictly speaking, Messrs. Fletcher & Dyson were under no liability to make the payments, and had no right to make them, so as to charge the applicant with the amount. If Messrs. Dixons & Horne and Milles & Co. had delivered their costs directly to the applicant, then (assuming that he was liable to pay them) he would have had the same right to tax them, and upon the same terms, as in the case of Messrs. Fletcher & Dyson's costs, and with the same consequences in the event of a sixth being taxed off; and his right cannot be prejudicially affected by Messrs. Fletcher & Dyson including the costs of these solicitors in their bill. For these reasons I am of opinion that the costs of taxation must be borne by the respondents, Messrs. Fletcher & Dyson, who have chosen to include other costs in their costs, as more than a sixth of the whole costs having been taxed off. It was urged by Mr. Hewitt that the question of the costs of the taxation was not open to the applicant, as it was not the subject of any objection; but ord. 65, r. 27 (sub-rules 39-41), only applies where particular items are objected to (*In re Castle*, 35 W. R. 621, 36 Ch. D. 194); but there is no rule which necessitates an objection being carried in, in such a case as the present, where more than a sixth of the bill of costs has been disallowed, but where, nevertheless, the master proceeds to tax and allow the costs of the respondents. In so doing he has acted on a wrong principle and not in obedience to the order, which in the event which has happened directed him to tax the costs of the applicant, and not the costs of the solicitors.

The remaining objection is to the allowance of £3 13s. 6d. for the charges of Messrs. Abbey & Hanson, surveyors. It was decided in *In re Gray*, 49 W. R. 298, [1901] 1 Ch. 239, by Cozens-Hardy, J., that the lessee is not liable to pay the fees of a mining expert employed by the lessor, and I cannot gather from the materials before me that the surveyors did any work, after the agreement for a lease had been arrived at, which the lessors are entitled to charge against the lessee. The taxing-master states in his answers to objections that he has disallowed all charges, whether of surveyors or solicitors, leading up to the agreement to take the lease; but I cannot find from the particulars of the surveyors' charges that they did any work after the agreement was arrived at for which the lessee is liable. The surveyors charged for "negotiating new lease, instructing solicitors, and generally engaged in this matter." The master has allowed an apportioned part of the amount charged. I have no particulars whatever of any work done by the surveyors for which the lessee ought to pay; the surveyors did not even put the plan on the lease; a tracing, coloured green, of the land to be let is referred to in the letter of the Ecclesiastical Commissioners of the 11th of July, 1902, before the agreement was come to, and the bill of costs of the solicitors contains in the item "printers' charges," the amount charged for placing the plan on the lease. Under these circumstances,

the £3 13s. 6d, surveyors' charges, must be disallowed. The matter must go back to the taxing-master to review his taxation accordingly. The costs of this application will be costs in the taxation.

Solicitors, *Joe Woodhouse; Iliffe, Henley, & Sweet.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) July 14, 1903.

WEST HAM UNION *v.* HOLBEACH UNION. (*a.*)

Poor law — Settlement — Illegitimate child — Mother's settlement acquired by three years' residence—Child born in another union — Acquiring a settlement — Derivative settlement—Divided Parishes Act, 1876 (39 *&* 40 *Vict. c.* 61), *ss.* 34, 35.

A woman, who was herself illegitimate and was born in the Wisbech Union Workhouse in 1879, *resided with her mother at West Ham, in the appellant union from the* 27*th of June,* 1890, *to the* 7*th of September,* 1893. *After* 1893 *the woman went into service away from West Ham, and has had since no settled residence. On the* 25*th of October,* 1899, *she gave birth to an illegitimate child in the Holbeach Union Workhouse in the respondent union. The justices made an order that the appellant union should receive and maintain the child.*

Held, that the mother between 1890 *and* 1893 *had acquired a legal settlement within the appellant union, because* Reg. *v.* Elvet, 8 *W. R.* 523, 2 *E. & E.* 266, *was an authority upon which they could decide that an effective settlement could be acquired by a person under the age of sixteen; and consequently that the order of the justices was right.*

The decision in Manchester Overseers *v.* Ormskirk Union, 38 *W. R.* 778, 24 *Q. B. D.* 678, *not followed.*

Case stated for the opinion of the court pursuant to the provisions of section 11 of 12 & 13 Vict. c. 45.

On the 3rd of December, 1901, the respondents obtained an order from two justices of the peace for the county of the parts of Holland, Lincolnshire, whereby it was adjudged that the parish of West Ham, in the West Ham Union, in the county of Essex, was the last legal settlement of George Ernest Neep, aged about two years, a pauper, and ordering that the appellants should receive and provide for the said pauper according to law. The appellants appealed to quarter sessions and the following special case was stated by agreement.

The case set out that George Ernest Neep, the pauper, was the illegitimate child of Emma Neep, and was born in the Holbeach Union Workhouse on the 25th of October, 1899.

Emma Neep, the mother of the pauper, was the illegitimate child of Mary Ann Neep, and was born in the parish of Tilney St. Lawrence, in the Wisbech Union, on the 11th of April, 1879.

Mary Ann Neep married Alfred Frederick Chapman at Tilney St. Lawrence on the 23rd of December, 1881.

From the 27th of June, 1890, to the 7th of September, 1893, Chapman resided in the parish of West Ham with his wife for a term of three years in such manner and under such circumstances in each of such years as would in accordance with the several statutes on that behalf render him irremovable therefrom and settled therein.

From the 7th of September, 1893, Chapman continued to reside in the parish of West Ham, and was in receipt of relief from that union until his death on the 8th of September, 1894. His wife, the said Mary Ann Chapman, resided with him until his death.

From the 8th of September, 1894, Mary Ann Chapman (the widow of Alfred Chapman and mother of Emma Neep) continued to reside in the parish of West Ham, receiving relief from the union from that date until the 28th of November, 1895, when she ceased to reside there. She died in the Poplar Union Infirmary on the 14th of October, 1896.

From the 27th of June, 1890, to the 28th of July, 1893, Emma Neep (the mother of the pauper) resided with Chapman and her mother, Mary Ann Chapman, at West Ham. On the latter date she went into service in the Poplar Union, and has since had no settled residence.

The appellants affirmed that the settlement of Emma Neep could not be ascertained without inquiry into the derivative settlement of her parent, Mary Ann Chapman, and that Emma must be deemed to be settled in the parish of Tilney St. Lawrence, where she was born.

The respondents affirmed that the said Emma Neep acquired a legal settlement in the parish of West Ham by reason of the residence therein of Chapman and his wife, or by reason of the residence of Emma Neep for upwards of three years prior to the 28th of July, 1893, in such manner and under such circumstances as rendered her irremovable therefrom.

The question for the opinion of the court was whether upon the facts above stated the said Emma Neep acquired a settlement available for the pauper under sections 34 and 35 of 39 & 40 Vict. c. 61 in the parish of West Ham, in the West Ham Union.

Montague Lush, K.C. (*M. J. Grubbe* with him), for the appellants, West Ham Union.—The justices were wrong in making an order that the appellant union should receive and maintain this pauper child, for their order is contrary to the provisions of sections 34 and 35 of the Divided Parishes Act, 1876. Section 35 contains three separate clauses, the first of which abolishes derivative settlement subject to certain exceptions that do not apply here. It therefore being impossible for an illegitimate pauper to obtain a derivative settlement from a derivative settlement, this pauper must be deemed to be settled in the parish of Holbeach, in which union he was born: *Reigate Union* v. *Croydon Union,* 38 W. R. 295, 14 App. Cas. 465, per Lord Watson, at p. 481; *Hollingbourn Union* v. *West Ham Union,* 29 W. R. 629, 6 Q. B. D. 580; *Reg.* v. *Leeds Union,* 27 W. R. 708, 4 Q. B. B. 323; *West Ham Union* v. *Bethnal Green Churchwardens,* 42 W. R. 573, [1894] A. C. 230.

C. B. Marriott, for the respondents, the Holbeach Union.—Under section 34 Emma Neep, the mother of the pauper, acquired a *status* of irremovability in the West Ham Union, and that was so found as a fact by the case. Her child, being under the age of sixteen, would take her settlement in accordance with the provisions of section 35, and therefore the order was right: *Reg.* v. *Elvet, Inhabitants of,* 8 W. R. 523, 2 E. & E. 266.

M. J Grubbe, in reply, cited *Manchester Overseers* v. *Ormskirk Union,* 38 W. R. 778, 24 Q. B. D. 678, where it was laid down that an illegitimate, like a legitimate child under sixteen years of age, cannot acquire a settlement for itself, but must follow its parentage settlement.

Lord ALVERSTONE, L.C.J.—The conclusion I have come to on the authorities that have been cited to us is that the order made by the justices here was right. If Mr. Lush could have shown us that this case fell under the last paragraph of section 35, which provides

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

that "if any child in this section mentioned shall not have acquired a settlement for itself . . . and it cannot be shown what settlement such child . . . derived from the parent without inquiring into the derivative settlement of such parent, such child shall be deemed to be settled in the parish in which he or she was born," then I think his argument would have been well founded. If the settlement of Emma Neep, the mother, is a derivative one, then the *Reigate Union case* is an authority for us to say that you may not inquire into what that derivative settlement is and that the settlement of the child must be determined by its birth settlement, notwithstanding that drastic results might follow, such as the separating of a child from its mother or a wife from her husband. If the facts brought the case within that section, I see no answer to the appellants' contention. But it was said that that argument overlooked the principle laid down in *Reg.* v. *Elvet Inhabitants*, that if the mother of a pauper had acquired a settlement of her own, then, as it would not be necessary to inquire into her derivative settlement, the order of the justices would be right. Section 34 enacts that "where any person shall have resided for the term of three years in any parish in such a manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he acquire a settlement in some other parish by a like residence or otherwise." Therefore, if the principle stated by Lord Coleridge in *Manchester Overseers* v. *Ormskirk Union* to the effect that a child under sixteen cannot acquire a settlement is right, then the case becomes easy. But in *Reg.* v. *Elvet Inhabitants* the language of the judges point to that principle having been too widely stated by Lord Coleridge, for in that case it was held that a child under sixteen had acquired a settlement. That is the view I take of the language of sections 34 and 35 of the Act, particularly from the last clause of section 35, which I have already read. The case of *Reg.* v. *Elvet Inhabitants* having decided that a child under sixteen could acquire a settlement, Mr. Lush's attempt to draw a distinction as to that part of the period of residence that was before the age of sixteen and a part after, does not appear to be well founded although it is supported by the *Manchester case* He had, then, to press us to say that the case fell within the statement of law made by Lord Watson in the *Reigate case*, who said that in all cases where the parent's settlement was itself derivative the effect of section 35 was to throw children as soon as they attained the age of sixteen upon their own birth settlement until they acquired another. Does that exclude the justices from inquiring into what the settlement of the parent was if there were grounds for contending it was not derivative. In my opinion that is not the effect of the section, and therefore, in the circumstances of the present case, it was open for the justices to come to the conclusion that Emma Neep by reason of her residence in the appellants' union had become irremovable. That being so, section 34 applies. Under that section it is clear that she must be deemed as being settled in the appellants' union, and her child would, taking her settlement, be rightly made by the order chargeable to the appellants' union. For these reasons I think the justices came to a right decision and their order must be upheld.

WILLS, J., agreed.

CHANNELL, J., in concurring, said: I think that *Reg.* v. *Elvet Inhabitants*, approved as that decision was by the House of Lords, must be taken as an authority governing the present case, and consequently the mother's settlement, not being a derivative one, but one which her own residence within the union gave her in her own right, the magistrates here came to a correct conclusion. I agree that this appeal fails.

Solicitor for the appellants, *Fred E. Hilleary.*

Solicitors for the respondents, *Callard & Vulliamy*, for *Richard P. Mossop*, Holbeach.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — May 15, 1903.

REX v. CORNWALL JUSTICES. (*a.*)

Practice—Costs—Rating appeals—Appeal to quarter sessions—Parochial Assessments Act, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 6.

In an appeal to quarter sessions under the Parochial Assessments Act, 1836, *the court has power to give to the successful party the costs incurred in the court below as well as the costs of the appeal.*

Rule *nisi* calling on the justices at quarter sessions to show cause why they should not hear and determine according to law the application of the assessment committee for an order adjudging that one Jane Sandercock should pay to the committee their costs at the proceedings at special sessions.

The following are the facts of the case:

Jane Sandercock appealed to special sessions against an assessment of poor rate made by the assessment committee of the poor law union.

The special sessions allowed the appeal with costs and reduced the assessment.

The assessment committee then appealed to quarter sessions, who restored the original assessment with costs, but refused to give to the committee their costs of the appeal to special sessions or to vary the order of the special sessions, on the ground that they had no power to do so.

The assessment committee then obtained this rule.

Section 6 of the Parochial Assessments Act, 1836, which provides for appeals against assessments being made to quarter sessions, gives the justices the following power with regard to costs: ". . . And such justices upon hearing and finally determining such appeal shall and may according to their discretion award such costs to the party or parties appealing or appealed against as they shall think proper. . . ."

Foote, K.C., and *Lawrance* showed cause against the rule.—The only power given to the justices to deal with costs is the power conferred by section 6 of the Parochial Assessments Act, 1836. The words in that section do not give power to the quarter sessions to make the order as to costs that the special sessions should have made.

Ryde, in support.—If this section does not give power to the magistrates to vary the order of special sessions the result follows that an appellant who is successful has to pay the costs of his opponent in the court below.

Lord ALVERSTONE, L.C.J.—In this case a rule was moved by Mr. Ryde asking that the court of quarter sessions should entertain and decide according to law an application for an order as to costs of certain proceedings at special sessions which had been appealed to them. The point raised is one which has not been decided before apparently.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

The question is whether or not the court of quarter sessions, which has an undoubted right to deal (and this is not disputed) with the costs of the appeal to them, have also a right to make an order respecting the costs of the hearing before the special sessions, or, to put it more correctly, in this particular case to make an order varying the order as to costs which the court of special sessions has made. That depends upon the language of section 6 of the Parochial Assessments Act, 1836, which established the quarter sessions to be held four times in the year, and allowed appeals to those sessions on the ground of inequality, unfairness, or incorrectness in the valuation; and the decision of the special sessions was to be binding on the parties unless the person or persons impugning such decision should within fourteen days after the same shall been given cause notice to be given in writing of his, her, or their intention of appealing against such decision, and of the matter or cause of such appeal to the person or persons in whose favour such decision shall have been made, and within five days after giving such notice enter into a recognizance before some justice of the peace with sufficient securities conditioned to try such appeal at the then next general sessions or quarter sessions of the peace, which shall first happen, and to abide the order of and pay such costs as should be awarded by the justices at such quarter sessions or an adjournment thereof, and such justices after hearing and finally determining such matter of appeal should and might according to their discretion award such costs to the party or parties appealing or appealed against as they should think proper, and their determination in or concerning the premises should be conclusive and binding on all parties to all intents and purposes whatsoever. Of course the section refers to costs and refers to appeals, and it is easy to suggest many forms of expression which would have made the case clear one way or other. For instance, had the Legislature been proposing to deal only with the costs of the appeal, they might have put in such words as these and said "the costs of the appeal," and had they been proposing to make it quite clear that the court of quarter sessions should have power to deal with the costs of the special sessions, they might have inserted words which suggested or gave the court power to make such order as to the appeal or costs as the court below might have made. Either of these expressions would have resolved the doubt on one side or the other.

It seems to me that we have here an expression which does not give a direct guide, but which I think has been adopted in order to give as large a discretion as possible in the matter which is before them, to the court of quarter sessions. If we look back at the questions which were coming before them, it is not like a decision on a different matter; it is an appeal from a previous decision of the special sessions on the ground of "inequality, unfairness, or incorrectness," and it would seem to be in accordance with justice, if the words of the section do not prohibit such a construction being put upon them, that the justices should have power to make an order in respect of costs which would in effect put the parties in the position they ought to be in, having regard to the litigation; and I certainly think that unless they have power to make some such order it would seem that they could not make an order varying the order of special sessions in the matter of costs; and therefore, taking this case merely as an example, the order directing the unsuccessful respondent to receive his costs, which the successful appellant apparently had been ordered to pay him, could not be varied and must stand. And I also think there is weight—only as giving a guide to the general construction—in the last part of section 7, which says that no order of the justices in special sessions shall be of any force pending any appeal touching the same subject-matter in the court of general or quarter sessions of the peace having jurisdiction to try such appeal or in opposition to the order of any such court upon such appeal. I therefore come to the conclusion that under this statute the court of quarter sessions, dealing with an appeal on the same subject-matter, were intended to be given, and have been given, power to deal with the costs in the court below, as well as the costs of the appeal. The language of section 6, of the Summary Jurisdiction Act, 1857, is very different from that in the section we have to construe, and seems to me not to be any guide to us in the particular matter.

The only other point that arises is this. It is suggested that the counsel for the appellant indicated that he would be satisfied with the lesser of the two remedies—that is to say, that he was not forced to pay the costs of Miss Sandercock in the court below, but got off with paying his own costs. I do not think that that is a matter as to which anything has happened to prevent counsel from asking the court for what he asked for here. He asked that the court should hear and determine according to their jurisdiction what it thought ought to be done in the matter of costs, and he has moved his rule asking for an order that they should hear and determine the application that Miss Sandercock should pay the costs. That, in my opinion, clearly involves the minor or consequential result that the order which made the assessment committee pay Miss Sandercock's costs at any rate should be reviewed by the court of quarter sessions. I think the greater includes the lesser, and had it been necessary we should have marked the rule. I think the right form of order is that the court of quarter sessions should be directed to hear and determine the application made by counsel for the appellant to vary the order of special sessions in the matter of the costs, and then they can give such relief as they think fit, and if the appellants think fit to waive any part of their claim, that is a matter we have nothing to do with. I am of opinion that the court of quarter sessions had jurisdiction, and they have said on the face of their judgment that they would have entertained the matter but for the fact that they thought they had not jurisdiction.

WILLS, J.—I am of the same opinion. Upon the matter of form I think this is perfectly right, because what took place in the court below amounted to this: The appellants asked for exactly the order they ask for now—that is to say, they asked the court of quarter sessions to give them the costs before the special sessions, but then their counsel added: "If you make the smaller order—namely, that I should be relieved from these costs which I have been compelled to pay, I make no request at all." The court did not accept that, and therefore I think the appellants are remitted to their original demand to the quarter sessions—namely, to hear and determine their application for their costs in the court below.

Then as to the important matter of substance my view, shortly put, is this: That the language of the section here is not sufficiently definite to enable me to say with absolute certainty, looking at the mere words which are used, whether it should be read so as to include power to deal with the costs below or not, and I think either construction might be adopted without doing violence to the language. When that is the case, it is legitimate, I think, to look at the consequences which would happen in either the one view or the other. If the view which has been pronounced by my lord, and in which I entirely agree, is accepted, it enables the court of quarter sessions to do com-

plete justice between the parties. If the contrary view prevail, and if the power to quarter sessions is limited to dealing with the question of amount, it seems to me that the greatest injustice might follow. With the reasons which my lord has given I beg to express my entire agreement.

CHANNELL, J.—I entirely agree that as these words are capable of bearing the meaning contended for by the assessment committee, and as there would be very great inconvenience, and possibly injustice, if we did not so hold, we are justified in holding the view expressed by my lord and my brother Wills. Upon the question of form I should like to say a word. The point is relied upon that there has been no distinct demand for the performance of what the *mandamus* is to go for. A demand is necessary in order to make a refusal a ground for *mandamus* in most cases, and a refusal to do the duty is that which gives the jurisdiction to the court to issue a *mandamus*, and the duty here is to hear and determine an application which, according to the view we take of the sections, the court had power to entertain, and which they refused to entertain, on the ground that in their view they had no such power. The *mandamus* goes to them not to make any particular order, but to hear and determine the matter, and make such order as they in their discretion think fit and right.

If the order as to costs made by the special sessions were to stand as a separate thing with which the quarter sessions had no power to deal, of course the greatest injustice would result, and this case is an exact illustration of it. The party who had been successful on the appeal, and who ought to have been successful before the special sessions, would remain liable still to pay the costs which were ordered to be paid by him when it was supposed that he was not successful. Of course that is a great injustice. On the other hand, if the order as to costs fail and there is no order as to costs before the special sessions, almost equal injustice in certain cases might be done.

Supposing, for instance, that originally the appeal had been against an assessment of £100, and supposing that that had been reduced, and that then the council for the committee asked for another if there had been any chance of getting it. That is the substance, I think, of what he says, but it is quite unimportant what he asked the quarter sessions to do, provided it is clear he did ask them to exercise jurisdiction and they erroneously held that they had not that jurisdiction. This is quite enough to enable us to grant the *mandamus* in the form in which it is here—namely, to hear and determine according to law the matter of an application and although he has put his application apparently in terms which are not exactly correct, that is the effect of what is asked.

Rule absolute.

Solicitors, *Carthew & Wheeler*, for *Graham & Graham*, Fowey; *Bell, Stuart, May, & Horne*, for *John Stephens (Carlyon & Stephens)*, St. Austell.

Court of Appeal.

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — June 22, 23; July 30, 1903.

SANDERSON v. BLYTH THEATRE CO. (LIMITED) AND HOPE. (a.)

Practice—Costs—Defendant joined in the alternative—Liability of unsuccessful co-defendant to pay costs of successful co-defendant—Judicature Act, 1890, *s.* 5—*Rules of Supreme Court, ord.* 16, *r.* 4; *ord.* 65, *r.* 1.

In an action brought against two defendants in the alternative, and tried with a jury, the judge held that there was not good cause to deprive one of the defendants of costs as against the plaintiff, but yet was of opinion that the costs so occasioned ought properly to be borne by the other defendant. He accordingly ordered the plaintiff to pay these costs in the first instance and then to add them to his own, and to have them paid to him by the other defendant.

Held, that the judge had jurisdiction to make such an order.

Appeal by the defendant company from Grantham, J.

The facts were thus stated in the written judgment of Stirling, L.J.:

This action was brought originally against the Blyth Theatre Co. alone, to recover a sum of £189 11s 6d. for work done and materials supplied in connection with the defendants' theatre at Blyth. The statement of claim alleged that the work was done and the materials supplied at the request of the company by their agents, Messrs. Hope & Maxwell, the architects employed by the defendants in building the theatre. By their defence the company denied (amongst other things) that they or their agents requested the plaintiff to supply materials or do work as alleged in the statement of claim, and also set up other defences immaterial to be stated in detail. Thereupon the plaintiff took out a summons for leave to add William Hope, the architect of the company, as a defendant to the action, and an order was made, dated the 29th of January, 1902, giving the plaintiff liberty to amend the writ by adding the name of Hope as a defendant to the action, and to amend the statement of claim by claiming in the alternative against Hope the same sum as that claimed against the company, and in further alternative claiming the same sum against Hope by way of damages for breach of warranty of authority to order the work and materials, and the question of costs of and incident to the application was reserved. The writ and statement of claim were amended accordingly. The company put in an amended defence, alleging that Hope had no authority to employ the plaintiff. The defendant Hope, by his defence, denied that he was the agent of the company, and set up other defences identical with those set up by the company. At the trial the jury found a verdict for the plaintiff against the defendant company; and thereupon the judge ordered that judgment be entered for the plaintiff against the company and for the defendant Hope, and also ordered that the defendant Hope should recover against the plaintiff costs, to be ascertained, and that the plaintiff should recover costs against the defendant company, to be taxed, and also the plaintiff's taxed costs occasioned by joining the defendant Hope, including the costs which the plaintiff was adjudged to pay to the defendant Hope.

(a.) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

The learned judge gave leave to the company to appeal from so much of the judgment as directed them to pay to the plaintiff costs incurred by joining the defendant Hope, including the costs which the plaintiff was ordered to pay to the defendant Hope. An appeal was accordingly brought, but to it the defendant Hope was not a party.

Ord. 65, r. 1, so far as material, is as follows: "Subject to the provisions of the Acts and these rules the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court or a judge . . . provided . . . that when any action . . . is tried with a jury the costs shall follow the event unless the judge by whom such action . . . is tried or the court shall for good cause otherwise order."

The Judicature Act of 1890, s. 5, provides as follows: "Subject to the Supreme Court of Judicature Acts and the Rules of Court made thereunder . . . the costs of and incident to all proceedings of the Supreme Court . . . shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

Ord. 16, r. 7, provides that "where a plaintiff is in doubt as to the person from whom he is entitled to redress he may . . . join two or more defendants to the intent that the question as to which (if any) of the two defendants is liable and to what extent may be determined as between all parties."

Manisty, K.C., and *Shortt*, for the appellants.—No doubt ord. 65, r. 1, gives the court a wide discretion as to costs, but this is not a case where a defendant was added to enable the court to do justice between the parties. Hope was merely added for the convenience of the plaintiff, in order that she might have two strings to her bow. If she had brought her action against Hope alone she could not have succeeded, and it is not just that she should be able to cast these costs upon the company. [VAUGHAN WILLIAMS, L.J.—As to Hope being a proper party, ord. 16, r. 4, enables one to join as defendants all persons against whom a right to relief is alleged to exist in the alternative. A claim against an agent and a claim against a principal are quite inconsistent one with the other, but are they not both proper parties? Before the Judicature Act there was no power to try alternative causes of action—at least at common law. The result of order 16 is that you get power in one writ to insert two or more inconsistent alternative causes of action against two or more different persons, the object being to save expense. The term "proper party" is used in ord. 11, r. 1 (*g*), under which a person in England may be liable and also another person out of the jurisdiction, both being "proper parties."] [ROMER, L.J.—How can you say Hope was not a proper party in view of ord. 16, r. 7?] Absolute justice could have been done as between the plaintiff and the defendant company without joining Hope. Costs of this kind have always been recovered as damages, and if the plaintiff reclaims payment of Hope's costs as damages it must be on the ground that they were reasonably incurred by reason of the representation of the agent. [VAUGHAN WILLIAMS, L.J., referred to *Hammond* v. *Bussey*, 20 Q. B. D. 79, 36 W. R. Dig. 65.] These are not costs incurred by the plaintiff, but they are costs which the plaintiff has been ordered to pay. [ROMER, L.J.—If the plaintiff was ordered to pay the costs, are not the costs so paid costs incurred by her, the plaintiff?] The order joining Hope as defendant expressly provides for the costs being reserved. *Green & Burbey* v. *Goodyear*, reported in a note to *The River Lagan*, 6 Asp. M. L. C. 281, 36 W. R. Dig. 54, was the first case in which an unsuccessful defendant was ordered to pay a successful co-defendant's costs. [STIRLING, L.J., referred to *Rudow* v. *Great Britain, &c., Assurance Co.*, 29 W. R. 585, 17 Ch. D. 600.] Unless there is a question to be decided as between two defendants there is no jurisdiction to make one pay the costs of the other.

They also cited the following cases: *Collen* v. *Wright*, 6 W. R. 123, 8 Ex. D. 647; *Child* v. *Stanning*, 27 W. R. 462, 11 Ch. D. 82; *The Mystery*, 5 W. R. 414, [1902] P. 115; *Shaw* v. *Smith*, 35 W. R. 188, 18 Q. B. D. 193; *In re Fisher*, 42 W. R. 241, [1894] 1 Ch. 450; *McCheane* v. *Gyles*, [1902] 1 Ch. 911.

Scott-Fox, K.C., and *Woodcock*, for the plaintiff, the respondent.—Any person liable to be sued can be ordered to pay any other party's costs. Although the plaintiff might have applied under ord. 21, r. 9, that Hope should pay the costs, yet the plaintiff's only relevant allegation against him failed. He had not ordered the goods for himself. There is here one essential cause of action, which can be tried between all three parties. Hope was therefore a proper party to the action. If the appellants had objected, they might have appealed at the time. The judge had jurisdiction to order costs as to all parties.

They cited: *Honduras Inter-Oceanic Railway Co.* v. *Lefevre*, 25 W. R. 310, 2 Ex. D. 301; *Massey* v. *Heynes & Co.*, 36 W. R. 834, (1888) 21 Q. B. D. 330; *Bostock* v. *Ramsay Urban District Council*, 48 W. R. 254, [1900] 2 Q. B. 616; *Bennetts & Co.* v. *McIlwraith & Co.*, 45 W. R. 17, [1896] 2 Q. B. 464.

Manisty, K.C., in reply.

Cur. adv. vult.

July 30.—ROMER, L.J.—This action, seeking relief in the alternative against the two defendants, was rightly brought under ord. 16, r. 4—see *Honduras Inter-Oceanic Railway Co.* v. *Lefevre*, and *Bennetts & Co.* v. *McIlwraith & Co.* The rule is a beneficial one, and a plaintiff who rightly brings such an action as the present ought not to be mulcted in costs by reason of his taking advantage of the rule in a proper case. Under the Judicature Act, 1890, s. 5, and ord. 65, r. 1, the court has full power over the costs of all parties of such an action. And, in my opinion, it has jurisdiction to order the plaintiff to pay the costs of the defendant against whom the action fails, and to add those costs to his own to be paid by the defendant against whom the action has succeeded, and whose conduct has necessitated the action. This jurisdiction has been frequently exercised in Chancery in proper cases, and can, of course, be exercised in the King's Bench Division. The costs so recovered over by the plaintiff are in no true sense damages, but are ordered to be paid by the unsuccessful defendant on the ground that in such an action as I am considering those costs have been reasonably and properly incurred by the plaintiff as between him and the last-named defendant. See, by way of illustration, *Child* v. *Stenning*, where it will be seen, on looking into the facts of that case, that Sir George Jessel, M.R., at p. 87 (11 Ch. D.), made exactly such an order as I have been indicating. The modern practice, in order to avoid circuity, has been, in such cases where there has been no jury, to order the unsuccessful defendant to pay directly to the successful defendant his costs—see *Rudow* v. *Great Britain Mutual Life Assurance Society*. But, of course, a judge has jurisdiction to follow the old practice if he thinks fit to do so, and ought to do so when necessary, as, for example, when, having regard to ord. 65, r. 1, difficulties would otherwise arise by reason of the trial being with a jury. I think, therefore, that in the present case Grantham, J., had jurisdiction to make the order he did. O:

course, in exercising the jurisdiction, a judge should have regard to the circumstances of the case, and be satisfied that it is just that the unsuccessful defendant should, either directly or indirectly, have to pay the costs of the successful defendant. In the present case I do not think that I myself should have given to the defendant Hope, having regard to his defences and conduct, any costs whatever, either as against the plaintiff or co-defendant. But I do not think it is open to the appellant on this appeal to go into the question whether the defendant Hope should have been paid his costs, for the following reasons: No doubt at the trial the plaintiff did not question Hope's right to costs. But the question as to costs was adjourned. At the adjournment Hope was not present, but the appellant company was present. If the company had taken the point that Hope ought not to have had his costs, Hope could have been brought before the court again and the matter been fully argued and decided. But the company did not raise the point, and I think the company and the plaintiff must be taken to have agreed that there was no "good cause" shown for depriving Hope of costs under ord. 65, r. 1. The only point argued by the company was that the court had no jurisdiction to add Hope's costs to the plaintiff's, and in that way order the company to pay them, and I think it is too late now for the company to argue that the defendant Hope never ought to have had his costs provided for as they have been. I think, moreover, that the leave to appeal was given on the question of jurisdiction only, and this view is borne out by the notice of appeal and by the fact that the defendant Hope is not before this court. And, lastly, with regard to the suggestion that the costs of Hope have been made to include costs of the issues on which he failed, I need only say that the taxation of those costs was in the presence of the company, and that it is too late now to question the amount taxed.

STIRLING, L.J., after stating the facts as above, continued: The first and most important question to be considered is whether the learned judge had jurisdiction to make the order appealed from. If the action had been tried by a judge without a jury the costs would have been entirely in the discretion of the judge, and he would have had power, in the exercise of his discretion, to order the defendant company first to pay to the plaintiff the costs occasioned to the plaintiff by joining Hope as a defendant, and secondly to pay to the defendant Hope his costs of the action. Inasmuch as the action was tried by a jury the costs of the defendant Hope had to follow the event, and the plaintiff having failed as against Hope, was bound to pay his costs unless the judge for good cause otherwise ordered. As the learned judge did not otherwise order it must be taken for the purpose of dealing with the question of jurisdiction that good cause did not exist. It must also be taken that the learned judge was of opinion that as between Hope and the defendant company the costs of the former ought to be borne by the latter, and the question is whether he had jurisdiction to give effect to this opinion by making the order which he did.

The defendant, Hope, was made a defendant under the powers conferred by ord. 16, rr. 7 and 11. Previously to the Judicature Act, 1873, there was no power to join two persons as defendants in this way either at law or in equity; but under the present rules it has been held that an action in such a form as the present is one capable of being maintained, and that any defendant to such an action is a proper party to it: see *Honduras Co.* v. *Lefevre*; *Massey* v. *Haynes*. Questions, however, of a similar kind to that now under consideration arose and had to be dealt with by the Court of Chancery prior to the Judicature Act, 1873; for it was the rule of that court that all persons materially interested in the subject-matter of the suit ought generally to be made parties as plaintiffs or defendants so that the court might be enabled to do complete justice by deciding upon and settling the rights of all persons interested: see Mitford on Pleading, p. 164. Ord. 65, r. 27, regulation 37, directs that the rules, orders, and practice of any court whose jurisdiction has been transferred to the High Court of Justice relating to costs existing prior to the commencement of the Judicature Act, 1873, shall, so far as not inconsistent with the principal Act and the rules, remain in force and be applicable to costs of the same or analogous proceedings. The mode, therefore, in which the Court of Chancery dealt with the costs of defendants to chancery suits affords an analogy which, in my opinion, ought to guide the court on the present occasion.

Now, in suits where persons were made defendants for the purpose of complying with the rule just stated, the Court of Chancery had full jurisdiction when disposing of a suit on its merits to deal with the costs of such parties and to decide by whom they should be borne. If the court was of opinion that their costs ought to be borne by a co-defendant, the regular practice was to direct the plaintiff to pay them in the first instance and then to add them to his own and to have them over against the defendant who was to bear them: see for example *Blenkinsop* v. *B.*, 12 Beav. 588. When, however, a suit was instituted by the Attorney-General *ex officio* the practice was different; for, as the Attorney-General could not be ordered to pay costs, costs were ordered to be paid directly by one defendant to another: see *Attorney-General* v. *Corporation of Chester*, 14 Beav. 338. After the Judicature Acts came into operation this practice was altered by the Court of Appeal in *Rudow* v. *Great Britain Mutual Life Assurance Society*, and it was laid down that the proper form of order was to order the defendant liable to costs as between himself and his co-defendant to pay them to the co-defendant. Sir G. Jessel, M.R., said that the machinery which had been adopted by the Court of Chancery was no longer either necessary or useful, but was mischievous. I understand this to mean that it was no longer necessary, because under the Judicature Acts and Rules the court had full power to order one defendant to pay costs to another, and that it was mischievous because the plaintiff, who was ordered to pay costs in the first instance and then to have them over against a defendant, ran the risk of losing them if the defendant proved to be insolvent. The change of practice appears to me, if I may be allowed to say so, to be perfectly proper, and I think that the new practice ought to be adhered to wherever it is practicable to do so.

It appears to me that this practice is not applicable to a case in which a judge holds that there is not good cause to deprive one defendant of costs against the plaintiff under the last clause of ord. 65, r. 1, and yet is of opinion that the costs so occasioned ought properly to be borne by another defendant. In that state of things it seems to me that for the attainment of justice recourse may and ought to be had to the old practice.

It is to be observed that when the Court of Chancery ordered the costs of one defendant to be paid by the plaintiff and added to his own, and the whole to be borne by another defendant, the court was not giving substantive relief by way of indemnity or damages or otherwise, but was simply exercising its jurisdiction over the costs of a pending suit. This particular form of order was, as Sir G. Jessel calls it, "machinery" for properly disposing of the costs, and this is shown

by the change in the form of order when, as in the case of the Attorney-General being plaintiff, the plaintiff could not be ordered to pay costs. Having regard to this, and to the express directions of ord. 65, r. 27, regulation 37, I think that the term costs in section 5 of the Judicature Act, 1890, ought to be read as including costs which a particular party may be ordered to pay in the first instance and then to have over against another.

For these reasons I think that the learned judge had jurisdiction to make such an order as he has made.

It is said, however, that the learned judge did not properly exercise the jurisdiction. To this there appear to me to be two answers. In the first place it is well settled that the Court of Appeal will not review the discretion of the judge of first instance, even although he has given leave to appeal, unless there has been a disregard of principle or a misapprehension of facts: see *In re Gilbert*, 33 W. R. 832, 28 Ch. D. 549; *Young* v. *Thomas*, 40 W. R. 468, [1892] 2 Ch. 134. In the present case I am not satisfied of the existence of either. Secondly, the defendant Hope has not been made a party to the present appeal, and in his absence it appears to me to be impossible to do complete justice.

For these reasons I think that the appeal ought to be dismissed.

VAUGHAN WILLIAMS, L.J.—I concur in the judgment of my learned brethren because I think there is jurisdiction under the old Chancery practice for ordering recoupment of costs directed to be paid by another litigant. It may be necessary to exercise this jurisdiction in a case like the present, where there are claims against alternative defendants, and the issues are tried by a jury. But generally I think that under the Judicature Act this jurisdiction should only be exercised in exceptional cases; and in the present case I cannot help doubting whether the learned judge had present to his mind either the question whether he ought to deprive Hope of costs, or whether, as between Hope and the theatre company, the company ought to pay Hope's costs, or whether the defence and conduct of the company was not reasonable and proper having regard to the statements made to the company by Hope, their architect. The result does not seem to me very satisfactory, but I suppose it cannot be helped.

Appeal dismissed.

Solicitors, *J. E. & H. Scott*, for *W. Charton*, Blyth; *Gibson & Weldon*, for *Hannay & Hannay*, South Shields.

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — July 21, 23, 1903.

DE HART v. COMPANIA ANONIMA DE SEGUROS AURORA. (*a.*)

Insurance—Marine—Time policy—General average—Contract of affreightment—Foreign statement—Belgian law.

A shipowner effected with underwriters a time policy of insurance on his ship containing the following clause: "General average payable according to foreign statement if so made up or York-Antwerp rules if in accordance with contract of affreightment." The shipowner sub-chartered the ship to third parties, and by the terms of that charter-party it was provided that the ship might carry a deck-load of timber, and that "in case of average the same to be settled according to York-Antwerp Rules, 1890, except that jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as general average." The ship sailed for Antwerp, and in the course of the voyage it became necessary for the steamer's safety to jettison part of the deck cargo. The average statement was made up at Antwerp, and included jettisoned deck cargo and freight thereon. The shipowner paid the ship's contribution to general average. In an action by the shipowner to recover from the underwriters the amount of his contribution,

Held, applying the principle laid down in Harris v. Scaramanga, 20 *W. R.* 777, *that the parties having agreed that general average should be payable according to the foreign statement if so made up, and the terms of the contract of affreightment not being of a special and unusual character, which could not have been contemplated by the parties to the policy of insurance, the underwriters were liable to pay the shipowner the amount of his contribution, notwithstanding that, apart from the express agreement in the contract of affreightment, the Belgian law would not recognize jettisoned deck cargo and freight thereon as being the subject of a claim for general average.*

Decision of Kennedy, J. (51 *W. R.* 318, [1901] 1 *K. B.* 109), *affirmed.*

This was an appeal from a decision of Kennedy, J. (reported 51 W. R. 318, [1903] 1 K. B. 109).

The action was brought by shipowners against underwriters on two policies of insurance on the steamship *Henriette H.*

The two policies were dated the 31st of August, 1900, and the 28th of September, 1900, respectively. They were for twelve months, and both contained the following clause: "General average payable according to foreign statement if so made up or York-Antwerp Rules if in accordance with contract of affreightment."

Attached to the policies were the Institute Time Clauses, 1900, including the following clause: "General average and salvage charges payable according to foreign statement or per York-Antwerp Rules if in accordance with the contract of affreightment."

By a charter-party dated the 11th of October, 1900, made between the plaintiff as shipowner and Bears, Dunwody, & Co. as charterers, it was agreed that the *Henriette H.* should carry a cargo of wood, and if the master required it a deck-load from Pensacola to Antwerp.

The charter-party contained the following clause: "In case of average the same to be settled according to York-Antwerp Rules, 1900, excepting that jettison of deck cargo (and freight thereon) for the common safety shall be allowable as general average."

The vessel sailed from Pensacola with a deck-load of timber, which was customary. During the voyage part of the deck-load was jettisoned for the safety of ship and cargo.

The vessel reached Antwerp and there delivered the remaining cargo. An average adjustment made at that port included the deck cargo jettisoned and the freight thereon as the subject of general average. The plaintiff, having paid the ship's contribution to general average, claimed to be indemnified by the underwriters. It was admitted that by the Belgian law the jettison of the deck cargo and the freight thereon would not give rise to a claim for general average apart from express provision in the charter-party.

Kennedy, J., held that the underwriters were liable.

The defendants appealed.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The following is a translation of the material articles of the Belgian Code of Maritime Commerce:

Art. 100.—Failing special agreements between all parties concerned, average losses are settled according to the following regulations.

Art. 109.—Goods carried on the ship's upper deck contribute if saved. If they are jettisoned or damaged by jettisoning, the owner has no claim to contribution. He can only make use of his rights against the master.

Art. 118.—The statement of losses and damages is made up by experts (average staters) in the place where the ship is discharged at the instigation of the commander. The experts are nominated by the Tribunal of Commerce if the discharge takes place in a Belgian port.

Art. 119.—The specialists nominated in accordance with the preceding article apportion the losses and damages. The apportionment becomes legally binding on approval by the tribunal.

J. A. Hamilton, K.C., and *J. R. Atkin*, for the appellants.—The foreign law is that which governs the general law of average, and the adjustment is not intended to be conclusive unless made in conformity with the foreign law. In the present case the foreign statement was to be binding on the defendants in accordance with the Belgian code, the provisions of which the defendants could ascertain. But they ought not to be made liable under special provisions contained in a contract to which they were not parties.

They referred to *Mavro* v. *Ocean Marine Insurance Co.*, 23 W. R. 758, L. R. 10 C. P. 414; *Hendricks* v. *Australasian Insurance Co.*, 22 W. R. 947, L. R. 9 C. P. 460; *Harris* v. *Scaramanga*, 20 W. R. 777, L. R. 7 C. P. 481; *The Brigella*, [1893] P. 189, 41 W. R. Dig. 192; *Dickenson* v. *Jardine*, 16 W. R. 1169, L. R. 3 C. P. 639; and *Montgomery & Co.* v. *Indemnity Mutual Marine Assurance Co. (Limited)*, 50 W. R. 440, [1902] 1 K. B. 734.

Carver, K.C., and *De Hart*, for the respondent, referred to *Strang, Steel, & Co.* v. *A. Scott & Co.*, 38 W. R. 452, 14 A. C. 801, and *Harris* v. *Scaramanga*. [They were stopped by the Court.]

Atkin replied.

VAUGHAN WILLIAMS, L.J.—In this case the plaintiff, who is a shipowner, effected with the defendant company, who are underwriters, a time policy of insurance upon his ship containing the following clause: "General average payable according to foreign statement if so made up or York-Antwerp rules if in accordance with the contract of affreightment." The plaintiff sub-chartered the ship to third persons, and by the terms of that charter-party it was provided that the ship might carry a deck-load of timber; and that "in case of average the same to be settled according to York-Antwerp Rules, 1890, except that jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as general average." The ship sailed for Antwerp with a deck-load, and in the course of the voyage and during the currency of the policy she suffered damage, so that it became necessary for the steamer's safety, in consequence of perils insured against, to jettison part of the deck cargo. On her arrival at Antwerp an average statement was then made up, and the average stater, in accordance with the terms of the charter-party, included the jettison of deck cargo in general average. Then there were some admissions between the parties, and there were also letters which passed between the solicitors as to the Belgian law. I may as well read one letter in full, as it is very short: "We are in receipt your letter, dated the 24th inst., and are prepared to admit that a foreign general average statement was prepared, and that by it the deck cargo jettisoned and the freight thereon were, as required by the contract of affreightment, treated as general average subject to your admitting that, apart from the condition in the charter-party, such loss would not have been so treated, as it is not, in accordance either with York-Antwerp Rules or Belgian law, the subject of general average." Now, that being the nature of the action, what Kennedy, J., decided was this: He decided in favour of the plaintiff on the ground that the average statement as made up was in accordance with the Belgian law, because the Belgian law recognizes in regard to general average the terms of any special contract of affreightment that the parties—meaning there the parties to the sub-charter, the contract of affreightment referred to really in the policy—may have chosen to make. Kennedy, J., takes notice also of another contention that had been made on behalf of the plaintiff, which contention was to the effect that, having regard to the judgment of Bovill, C.J., and Keating, J., in *Harris* v. *Scaramanga*, these words in the policy of insurance, "general average payable according to foreign statement if so made up," were words which bound the underwriters, whether the foreign statement was made in accordance with the Belgian law as proved, or whether it was not. But, having noticed it, Kennedy, J., says that it is unnecessary for him to decide whether or not that assumption or that statement of law by Bovill, C.J., and Keating, J., was correctly made or not. Now, that being the state of things, we have to consider whether the judgment of Kennedy, J., is right. I am not at all prepared to say that Kennedy, J.'s, judgment may not be supported upon the ground upon which he has put it himself. A passage from the foreign code was read to us, and it would appear from that passage that, according to Belgian law, if there is a special contract as between the parties who are primarily interested in the law of contribution—that is, the shipowner and the cargo owner—effect is given to that special bargain in making up the foreign statement. It is also said, with regard to the particular provision of Belgian law that a deck cargo does not come within the rules as to contribution, that that rule is subject to the special agreement of the parties to the contract of affreightment. Speaking for myself, I always have some doubt as to whether foreign codes are by themselves admissible as evidence of foreign law. I have always thought that the practice was not to give effect to a foreign code unless the court had a foreign expert present to construe the foreign code and to inform the court, or to assist the court, not so much in construing the foreign code, but in the conclusion of fact that would have to be arrived at in the English courts as to what was the foreign law. That would be done by informing the court what has been recognized by the law in the foreign country. I do not think that it is part of the duty of English judges to take a foreign code and, unassisted by a foreign expert, to construe that foreign code, because that is to make the question of the foreign law a question of law and not a question of fact. I always understood that it was a question of fact and not a question of law, and for that, amongst other reasons, I prefer myself to look and to inquire and see whether the judgment of Kennedy, J., can be supported upon other grounds. Now, in the first place, I am myself disposed to support it upon the passage in the judgments of Bovill, C.J., and Keating, J., in *Harris* v. *Scaramanga*. In *Harris* v. *Scaramanga* the statement, so far as it is material to the particular part of this paragraph in the policy that I am referring to, was almost identical

with the paragraph here, because the paragraph in *Harris* v. *Scaramanga* was "to pay general average as per foreign statement, if so made up," and upon p. 489 of L. R. 7 C. P., Bovill, C.J., first says this: "It seems to me that the general effect of the memorandum is to make the underwriters liable as for general average for whatever the owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. This memorandum"—that is, the memorandum of the foreign statement, if so made up—"was probably introduced in order to avoid all questions, not only as to the propriety of particular items being treated as the subjects of general average, but also as to the correctness of the apportionment; and I find it difficult to place any other reasonable construction upon the terms of the policy and memorandum." Then he deals with the question of the law of England and the law of Bremen, and goes on: "It seems to me, however, that under the terms of this policy the underwriters and the assured have both agreed to accept the adjustment and statement of the average stater in the foreign port, if and when made, as conclusive between them, both in principle and in details, as to the loss which the underwriters are to take in respect of general average, subject to the exception of any matters, such as capture or seizure, which are excluded by the express terms of the policy." And then, on the top of p. 490, he says: "It seems to me that, by the express agreement of the parties contained in the memorandum, it is not open to us to determine it"—that is, the question whether the claim was to be determined by the English court or by the statement of the foreign average stater at Bremen—"and that we have only to see whether the foreign adjustment which gives rise to this claim has been in fact made or not. Has there, then, been such a statement of general average made in Bremen with respect to the amount now claimed? And how does the matter stand upon the facts as stated in the special case?" I think myself that, so far from there being anything inconsistent with mercantile usage and mercantile convenience in so reading this statement appearing in this policy, and which has appeared in hundreds of policies before, being a very usual clause, I think it is in accordance with mercantile convenience. The parties primarily interested in the adjustment for the purpose of carrying into effect the rights to contribution based upon the law of general average may conveniently be left to deal with questions of contribution both in their contracts of affreightment and in other respects. If adjustment has to be effected in a foreign port, it seems to me obviously convenient that there should be an express provision that the underwriters in such a case shall stand in the shoes of the parties primarily liable. In my view of the law it is perfectly plain that in the absence of any special provision such would be the law. You would not require any special clause to say this; it would be the law without a special clause. Then in this particular clause are the words following: "If so made up or York-Antwerp Rules if in accordance with contract of affreightment." It is said that the effect of those latter words is that the only case in which the shipowner is to be entitled to affect the matter of contribution by the contract of affreightment is in case he adopts the York-Antwerp Rules without any qualifications. And it is said that the result of that is that in this case the court ought to apply the Belgian law here, and to give no effect whatsoever to the York-Antwerp Rules as qualified by the words of exception; and that that means that the court ought to go back to the simple Belgian law unqualified by this special bargain. I cannot so read these words. I think that there is nothing—at all events in these words—which in the slightest degree prevents us from applying the rule laid down by Bovill, C.J., and Keating, J., in *Harris* v. *Scaramanga*. Taking this view of the case, it seems to me unnecessary to consider the other questions that have been raised in this case. The ground of my decision is simply that I apply here the rule laid down by Bovill, C.J., and Keating, J., in *Harris* v. *Scaramanga*; and, applying that rule, I think that the underwriters here are bound by the foreign statement so made up. It was said in this case, in addition, that we ought not to come to this conclusion for the reason of several passages which were read to us, one from the case of *Mavro* v. *Ocean Marine Insurance Co.* in the judgment of Cockburn, C.J., where he says: "The only sensible construction appears to be this: the underwriter is only to be liable for a general average, but what is general average is to be determined by the law of the foreign place to which the ship is bound." I quite agree, but that only means in the absence of a special bargain; and in my judgment in this particular case there was a special bargain, if this contract is properly construed, whereby the underwriters agreed to accept the average statement abroad, if so made up, as binding upon all parties. I think, therefore, the judgment of Kennedy, J., must be affirmed and this appeal dismissed with costs.

ROMER, L.J.—I have come to the same conclusion. It is admitted by the appellants' counsel in the case before us that with regard to the clauses of the policy of insurance which are material, the general average was not to be made up according to the York-Antwerp Rules inasmuch, as having regard to the special terms of the contract of affreightment here, which purported to incorporate these clauses with some exceptions, it could not be said that in the meaning of this policy of insurance the general average could be provided by the contract of affreightment to be per York-Antwerp Rules; the appellants' counsel rested their contention accordingly on this: They said that the general average ought to have been made payable according to foreign statement, whatever that term "foreign statement" may have meant in this policy of insurance. Now, there are two clauses in the policy of insurance dealing with the same subject-matter. They only differ in this, that in the clause in the body of the policy the words are "general average payable according to foreign statement if so made up," and the words "if so made up" are omitted from the corresponding clause in what are called the Institute Time Clauses, 1900. But it is clear to my mind that the two clauses must be read together; and I have no hesitation, therefore, in coming to the conclusion that in this policy the foreign statement which is meant is the foreign statement if so made up. Now, I think that, by agreeing that general average shall be payable according to foreign statement if so made up, the parties have in effect agreed to be bound by the foreign statement if so made up as it exists in fact, only subject to two observations which I am about to make. In the first place, I think in order to bind the parties that the statement so made up must have been made up in good faith. It is not challenged here by the appellants that the statement has not been made up in good faith. Moreover, I should like to make a reservation for further consideration if the case I am about to mention should hereafter arise—that is to say, if the statement be made up according, say, to the law of the port which recognised the special terms of the contract of affreightment. I doubt if the parties to the policy of

insurance in a case like the present would be bound by the statement if the contract of affreightment imported terms as to general average of a special and unusual character, which could not reasonably have been contemplated by the parties to the policy of insurance. If such a case arises I should like to further consider it; but such a case does not arise here. I may point out that jettison of deck cargoes is in many cases allowable as general average—for example, by English law in the case of voyages where deck cargo is permitted by the established custom of navigation. And I may point out that in the present case the voyage was one where deck cargo was so permitted, and in the present case, therefore, it could not be said that the contract of affreightment so far as it referred to deck cargoes was of so special or unusual a character as to be outside the reasonable contemplation of the parties to the policy of insurance. In the present case, therefore, I have no hesitation in saying for myself that I think the parties are bound by the statement, which was, in fact, made up at Antwerp, and which decides to my mind the rights of the parties. I agree, therefore, in thinking that the appeal fails.

STIRLING, L.J.—I am of the same opinion. For myself I agree with the reasoning of Kennedy, J. The appellants invite us to deal with the present case reading as applicable thereto the words "general average payable according to foreign statement if so made up" as meaning a statement made up in conformity with foreign law. Now, the statement was made up at Antwerp, which was the proper place for making it up, and what is sued for in the present case is the contribution as defined by that foreign statement. But it is said that that statement was not in accordance with the general law of Belgium, and that these words which I have already read ought to be treated as meaning that the general average is to be payable according to the general law of the country where it is made up, and not in accordance with any specific agreement which may be made between the parties, even if such could be recognized by the law. Now, I am unable for myself to construe these words as referring to the general law of the country. It seems to me that to do so is to give no effect to the words "if so made up." By those words I think the parties meant in some sense or other to bind themselves to a statement actually made up in the foreign country. And the utmost, it seems to me, that could be introduced as qualification would be that, if it is not the actual statement made up by the average adjuster holding the official position there, it should be in accordance with the law of that country, so as to be valid and binding in that country when made. Now, I understand it to be conceded by both the learned counsel for the appellants that, in point of fact, the law of Belgium did recognize the existence of special agreements, and did give effect to them in respect of any contract which they might contain with respect to general average. For these reasons, which are those of Kennedy, J., I should be prepared to follow his decision. I also agree with the view which has been expressed by my brethren, if that be not the case, as to the effect which ought to be given to the clause.

Appeal dismissed.

Solicitors for the appellants, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the respondent, *Stibbard, Gibson, & Co.*, for *Gibson, Pybus, & Pybus*, Newcastle-upon-Tyne.

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) July 21, 1901.

CUNARD STEAMSHIP CO. (LIMITED) *v.* MARTEN. (*a.*)

Marine insurance—Subject-matter of insurance—Shipowner's liability to cargo-owner—Suing and labouring clause—Applicability.

A shipowner agreed to convey to South Africa a number of mules, valued at £40,000. There was no clause in the contract exempting him from liability for loss occasioned by the negligence of his servants. He accordingly effected an insurance with an underwriter at Lloyd's to protect himself against "liability of any kind" to the owners of the mules up to £20,000. The policy was in the printed form of an ordinary Lloyd's policy, and contained the usual suing and labouring clause. During the voyage the vessel stranded through the negligence of the shipowner's servants, and expenses were incurred by the shipowner in salving the mules. The shipowner therefore sought to recover the expenses thus incurred under the suing and labouring clause.

Held, that the suing and labouring clause was inapplicable, and was never intended to apply.

Judgment of Walton, J. (*reported* [1902] 2 *K. B.* 624), *affirmed.*

Appeal from a decision of Walton, J. (reported [1902] 2 K. B. 624).

The facts were as follows; In 1900 the Cunard Steamship Co., the plaintiffs in this action, entered into a contract with the Admiralty Director of Transports for the conveyance of mules from New Orleans to Cape Town. The contract contained no negligence clause—that is to say, no clause exempting the company from liability for loss of the mules by the negligence of their servants. Accordingly the plaintiffs effected an insurance with the defendant, an underwriter at Lloyd's, to protect them against "liability of any kind" to the owners of the mules up to £20,000. The policy was in the printed form of an ordinary Lloyd's policy, and contained the usual suing and labouring clause—viz., "and in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandizes and ship, &c., or any part thereof, without prejudice to this assurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured."

The ship *Carinthia* sailed from New Orleans on the 11th of May, 1900, with the mules (about 1,500) on board. The value of the mules was about £40,000.

On the 15th of May, through the negligence of the plaintiffs' servants navigating the vessel, *The Carinthia* stranded near Gravois Point, in Hayti. Efforts were made to tow the vessel off the rocks, but were unsuccessful, and she eventually broke up. Between 900 and 1,000 of the mules were saved and sent on to Cape Town.

The plaintiffs thereupon sought to recover the expenses incurred in saving some of the mules and in attempting to save the others which were lost, not as a direct loss under the policy, but under the suing and labouring clause as expenses incurred to avert or reduce the amount of the loss. The amount claimed was £7,744.

Walton, J., held that the suing and labouring clause was inapplicable, and that the plaintiffs were not entitled to recover. In concluding his judgment the learned judge said: "I fully recognize that a

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

suing and labouring clause might be framed which would be appropriate to such an insurance as was effected in the present case. But, in my judgment, any attempt to apply to the insurance in question a clause which was framed and intended to apply to an insurance of a different kind would work injustice. . . . I think that the suing and labouring clause in this policy, like many other parts of the policy, is inapplicable to the insurance actually effected, and was no part of the contract."

The plaintiffs appealed.

Pickford, K.C., and *Loehnis*, for the appellants.—If no steps had been taken to save the mules, and they had all been lost, the defendants would have had to pay £20,000. The suing and labouring clause, the intention of which is to provide for the taking of extraordinary steps by the shipowner, has always been deemed most applicable to cases of negligence. Here the appellants have sued and laboured for the purpose of warding off a loss which must otherwise have fallen on the respondents.

They referred to *Xenas* v. *Fox*, (1869) L. R. 4 C. P. 665; *Cary* v. *Burr*, 8 App. Cas. 393; *Kidston* v. *Empire Marine Insurance Co.*, L. R. 1 C. P. 535; *Paterson* v. *Harris*, 1 B. & S. 354, 2 B. & S. 814.

Carver, K.C., and *F. D. Mackinnon*, for the respondents, were not called upon.

VAUGHAN WILLIAMS, L.J.—I am of opinion that this appeal must fail, and that the judgment of Walton, J., was right. Now I start with one common proposition in this case, and that is this—that everyone is agreed that whatever is the subject of this policy it is quite plain that the mules are not. When we look to see what the subject of the policy is, we find it is "To cover shipowner's liability of any kind to owners of mules and for cargo up to £20,000 owing to the omission of the negligence clause in contract and for charter-party and for bill of lading." I understand that it is because the appellants feel the impossibility of recovering the expenses which were incurred in salving these mules as a direct loss under this policy that they are obliged to have recourse to the suing and labouring clause. That clause runs as follows: [His lordship read the clause.] Now, as is pointed out by Walton, J., in his judgment, *primâ facie* those words "said goods and merchandizes" have no application to the subject-matter of this policy. It cannot be contended that they have. But, it is said, although the mules are not the subject-matter of this policy, yet if you salve the mules you really avert a liability to the owner of the mules, and, as that is so, the suing and labouring clause does apply. I do not think myself that one ought to strain the words of this policy in this case to make them apply to this subject-matter. My own view is that the parties really never could have intended it. In this particular case the value of the mules was £40,000 and the amount insured to cover this liability was £20,000, and in case the expenses thus incurred had amounted to the whole £20 000 the assured would have been entitled, if this argument is right, to recover in respect of the whole of this loss although his insurance was an insurance for only half the value of the mules. Really, although in this case both sides are agreed this is not an insurance on the mules, we are being invited to apply the suing and labouring clause just as if it was. I think that it is unnecessary to go any further into the matter. I can only say that I adopt in full the reasoning of Walton, J., and I feel that he has put it in a way that it is quite impossible for me to improve upon.

ROMER, L.J.—I also do not see my way to differ in his case from Walton, J. The point involved is a very short one, and I can state my reasons for my opinion very shortly too. It is insisted on behalf of the appellants, and it is part of their case, that this policy of insurance is not one upon mules or goods or ship at all. It is what it purports to be, solely an insurance to cover shipowners' liability of any kind, mules or cargo, up to £20,000 owing to the omission of the negligence clause. Now, that is the only subject of insurance, and it is put on a policy which in the printed part applies to a policy of insurance on ship and goods and cargo. Naturally enough you find that most, if not all, of the printed matter has little or no application to the precise risk insured against, but it is said that one of the printed clauses can be pulled out as it were from the others and made applicable, and that clause is what is commonly called the suing and labouring clause. How does it run? [His lordship read the clause.] It refers to "said goods and merchandizes and ship," and admittedly to my mind this is a policy of insurance not on any goods or merchandizes or ship at all. Of course I should apply that clause if I could do so reasonably to the present case, but it simply appears to me, putting it shortly, that you cannot reasonably apply it. The clause never was intended to apply to any such subject of insurance; it was intended to apply, on the very face of it, to my mind, to an insurance on goods, merchandizes, and ship.

STIRLING, L.J.—I concur, and have nothing to add.

Appeal dismissed.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool; *Parker, Garrett, & Co*

From P. D. & Ad. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — July 15, 1903.

"THE TORBRYAN." (*a.*)

Ship—Bill of lading — Charter-party — Exceptions — Accident caused by negligence of servants of shipowner —Use of reckless means of unloading by stevedore's men.

A cargo of sugar in bags was shipped under a bill of lading which incorporated a charter-party containing, inter alia, *the following exceptions—viz., perils of the seas, barratry, collisions, stranding, and all other accidents, even though caused by the negligence of the shipowners' servants. The cargo was discharged into lighters by stevedores employed by the ship. The stevedores' men, in order to facilitate the unloading, recklessly made use of large hooks, whereby some of the bags were torn and sugar was spilt and lost.*

Held, that the loss of the sugar was due to an accident within the meaning of the exemption clause.

Judgment of Phillimore, J., [1903] *P.* 35, *affirmed.*

Appeal by the plaintiffs from the judgment of Phillimore, J., on the trial of an action in the Admiralty Division, reported [1903] P. 35, 51 W. R. Dig. 147.

The action was brought by shippers of goods under a bill of lading against shipowners for breach of contract.

The plaintiffs shipped on board the defendants' steamship *The Torbryan*, at Dunkirk, 796 tons of sugar in bags for delivery in London. The bill of lading under which the sugar was shipped incorporated a charter-party in the French language which

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

contained a negligence clause of which the following was an agreed translation: "Act of God, fire, perils of the seas, barratry on the part of the captain or crew, enemies, pirates or robbers, strikes, arrests or restraints of princes, rulers, and peoples, collisions, stranding, and all other accidents excepted, even though caused by negligence, fault or error of judgment on the part of the pilot, captain, sailors or other servants of the owner, in the management or navigation of the vessel or otherwise."

The vessel proceeded to the port of London, where her cargo was discharged into lighters by stevedores employed by the ship.

The plaintiffs complained that in the course of being discharged the cargo was roughly handled, and in particular that by the reckless use of large "can" hooks the bags were so torn that quantities of sugar were spilt and lost, and that a further spilling of sugar was caused by the bags being cut by the slings, and by the bursting of the seams of the bags in consequence of their being struck against the hatch-coamings in the process of being lifted out of the hold. They further complained that the stevedores persisted in the improper use of hooks after being warned by the agents of the consignees.

The plaintiffs claimed £158 2s. 8d. in respect of sugar lost, and £7 19s. 5d. the cost of repairing the bags.

The defendants contended that the loss in respect of which the plaintiffs sued was due to accident caused by the negligence of the owners' servants otherwise than in the management or navigation of the vessel, and that they were therefore relieved from liability by the negligence clause.

At the trial Phillimore, J., held that the damage was due to accident caused by the negligence of the owners' servants, and that the word "otherwise" in the negligence clause referred to the receiving and delivery of the cargo. He accordingly gave judgment for the defendants.

The plaintiffs appealed.

Scrutton, K.C., and *Balloch*, for the appellants.—The use of the large "can" hooks was wrongful, and it was persisted in after warning. The damage was the inevitable consequence of the wrongful act, and was not accidental. "Accident" involves the idea of something fortuitous and unexpected: *Hamilton* v. *Pandorf*, 36 W. R. 369, 12 App. Cas. 518; *Fenwick* v. *Schmalz*, L. R. 3 C. P. 313.

Carver, K.C., and *A. E. Nelson*, for the respondents.—This was an accidental loss. The hooks were used, not with the intention of tearing the bags, but for the purpose of effecting quick despatch. In each case in which a bag was torn it was an accident.

They referred to *Baerselman* v. *Bailey*, 43 W. R. 593, [1895] 2 Q. B. 301; *The Cressington*, [1891] P. 152; and *The Xantho*, 36 W. R. 353, 12 App. Cas. 503.

COLLINS, M.R.—The point in this case is whether in the circumstances shipowners are protected from liability by a clause in a charter-party which runs as follows: "Act of God, fire, perils of the seas, barratry on the part of the captain or crew, enemies, pirates or robbers, strikes, arrests or restraints of princes, rulers, and peoples, collisions, stranding, and all other accidents excepted, even though caused by negligence, fault or error of judgment on the part of the pilot, captain, sailors, or other servants of the owner in the management or navigation of the vessel or otherwise." What happened was that, in the process of unloading a cargo of sugar in bags, the stevedores' men recklessly used large hooks, called can hooks, for the purpose of facilitating the discharge. It was probable that this would result in some of the bags giving way and in damage being done to the sugar. The cargo owners made remonstrances, but the stevedores' men persisted in using the hooks, and damage in fact resulted. The point is whether damage so arising is damage covered by the clause which I have read. I agree with Phillimore, J., in thinking that it does come within that part of the clause which begins "all other accidents excepted." I can only arrive at the meaning of the word "accidents" by looking at the context. This is a contract between a shipowner and a cargo owner, and it provides that the shipowner is to be excused from liability in the event of any of a number of possible occurrences, including barratry, all of which are swept into the category of "accidents." Looking at the matter from this point of view, it was an accident to the shipowner, a fortuitous and unexpected occurrence, that the persons engaged in unloading the cargo should use reckless means for carrying out their work, though from another point of view it may not have been an accident. Even if there had been something more than recklessness, I think that from this point of view it might have been an accident. I am therefore of opinion that the case comes within the clause and that the judgment of the learned judge was right.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for the respondents, *Lowless & Co.*

High Court of Justice.

Chan. Div. Byrne, J. — June 12, 17, 1903.

PUNT v. SYMONS & CO. (LIMITED). (a.)

Company—Articles of association—Contract by company not to alter articles of association—Shares issued not bonâ fide*—Control of voting—Companies Act,* 1862 (25 & 26 *Vict.* c. 89), *s.* 50.

A company cannot validly by contract deprive itself of its statutory right under section 50 *of the Companies Act,* 1862 (25 & 26 *Vict.* c. 89), *to alter its articles of association.*

Where directors issue shares not bonâ fide *for the advantage of the company, but for the purpose of altering the voting power of the company and of controlling the holders of the greater number of shares, an injunction will be granted for the purpose of restraining them from employing the votes of the shareholders so created for such purpose.*

The principle in Fraser v. Whalley, 2 *H. & M.* 10, 13 *W. R. Ch. Dig.* 42, *applied.*

Motion.

This was a motion for an injunction by the executors and trustees of the will of G. G. Symons, deceased, for an injunction to restrain the defendant company, its directors, secretary, and agents from convening and holding an extraordinary meeting intended to be held with a view of altering certain of the company's articles of association.

The facts of the case were as follow: The company was incorporated on the 17th of October, 1898, for the purpose of taking over a business previously carried on by the said G. G. Symons.

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

By clauses A and B of the memorandum of association it was stated that the company was incorporated for the purpose of acquiring and taking over as a going concern the said business; and, secondly, "To adopt and carry into effect, with or without modifications, the agreements referred to in clause 3 of the company's articles of association."

On the 27th of October, 1898, an agreement was entered into under which the company acquired the business, and by clause 6 of that agreement it was provided: "The company shall not at any time alter or attempt to alter the clause relating to the appointment of the vendor as governing director as originally framed, or do or suffer anything to be done in contravention of the powers contained in these clauses."

Article 94 provided that "Symons should be the governing director until he resigned office or died, and that while he retained the said office he should have authority to exercise all the powers and authorities vested in the directors, and that the other directors should conform to his directions."

Article 95 provided that he might at any time appoint, limit the powers of, and remove any directors.

Article 96 provided that if Symons should resign his governing directorship he should become an ordinary director.

Article 97 provided: "If the said G. G. Symons dies whilst he holds the office of governing director the trustees for the time being of his will, so long as £2,000 of the share capital stands in his name, or in the name of such trustees, may execute the powers vested in the said G. G. Symons by clause 95 hereof."

The capital of the company was £11,000, of which £8,300 in shares was held by Symons.

Symons died on the 10th of November, 1900, having by his will, dated the 21st of March, 1894, appointed the applicants, Punt and Robertson, executors and trustees thereof, and having given £6,300 of his share capital to his said trustees upon certain trusts for his wife and children as therein mentioned.

During all this time there were only seven shareholders, and four of these held only one share each.

During the testator's life the business was prosperous, but after his death it declined, and friction arose between the trustees of the will and some other members of the company.

On the 7th of May, 1903, the directors of the company issued eleven shares to five new shareholders, and passed a special resolution so as to alter the articles for the purpose of depriving the applicants of the powers vested in them as Symons' trustees.

The directors then caused an extraordinary general meeting to be summoned for the purpose of confirming the resolution, whereupon the trustees of Symons' will commenced the present proceedings.

The applicants, in their affidavit, declared that in their opinion the new shareholders had been created to pass the resolution. The circumstances of the company are more fully explained in the judgment.

Levett, K.C., and *J. B. Matthews*, for the applicants.—If the special resolution is carried it will be in contravention of the contract with Symons. A company cannot alter its articles when the effect of so doing will be to break its contract. The adoption of the agreement was an essential part of the object of the company as contemplated by Symons, and as defined in the memorandum of association. Its alteration is therefore *ultra vires*. The directors had no right to issue fresh shares to increase their voting power or for other private reasons.

They referred to *Walker* v. *London Tramways Co.*, 28 W. R. 163, 12 Ch. D. 705; *Andrews* v. *Gas Meter Co.*, 45 W. R. 321, [1897] 1 Ch. 361; *Greenwood* v. *Leather Shod Wheel Co.*, [1900] 1 Ch. 421, 48 W. R. Ch. Dig. 35.

Norton, K.C., and *Ward Coldridge*, for the company.—The company has no power to contract itself out of section 50 of the Companies Act, 1862. To hold to the contrary would be to increase the evils of one-man companies. Clause 6 came to an end with Symons' death. In *Walker* v. *London Tramways Co.* it was never suggested that a company can contract not to alter its articles. The directors have a control over the issue and transfer of shares, and no injunction can be granted against them in respect thereto.

They referred to *Allen* v. *Gold Reefs of West Africa (Limited)*, 48 W. R. 452, [1900] 1 Ch. 656; and *In re The Ladies Dress' Association (Limited)* (an unreported case summarized in the judgment).

Levett, K.C., in reply.—Symons' estate is as much entitled to the benefit of clause 6 as himself.

BYRNE, J.—This is a motion in effect to restrain the holding of a confirmatory meeting for the purpose of passing a special resolution for altering the articles of association.

The short facts are as follows: In October, 1898, the company was incorporated for the purpose of carrying on a business formerly carried on by Mr. Symons, who is dead, and by clauses A and B of the memorandum of association it is stated that the objects for which the company was established are to acquire and take over as a going concern and to carry on a certain business; and, secondly, "to adopt and carry into effect, with or without modifications, the agreement referred to in clause 3 of the company's articles of association." On the 29th of October, 1898, an agreement was entered into under which the company acquired the business, and by that agreement by clause 6 it was provided that "the company shall not at any time alter or attempt to alter the clauses of the articles of association relating to the appointment of the vendor as governing director as originally framed, or do or suffer anything to be done in contravention of the powers contained in those clauses." Those clauses I shall have to refer to later on. Now during the lifetime of the testator the share-holding was in this way: The testator himself held 8,300 shares out of 9,377. Mr. G. R. Symons held 536, and Mr. John Jay 537. There were four other shareholders holding one share each, so that the total share-holding was in the hands of seven members. The business was carried on, and carried on successfully, till the testator died in November, 1900, shortly after making his will. As a result of the effect of his will the share-holding in the company came to be as follows: Robert Robertson and John Punt, the plaintiff, as executors and trustees of the testator, became the holders of 6,300 shares, G. R. Symons continued the holder of 536 shares, J. Jay became the holder, partly in consequence of the testator's will, of 2,537 shares, and the remaining four shares remained as they were, J. Punt holding one share in his own right, Mr. Marshall one and Mr. Chapman one, P. Phass one share—total holding 9,377 shares. In that state of circumstances the business during the last year, the year ending, I think, last December, ceased to be profitable—that is to say, during this year only £2 was left to be carried over by way of profit after satisfying the remuneration of Symons and Jay, who are directors of the company, and who are appointed by the trustees of the testator's will under their powers managing directors of the company under an agreement for five years, subject to determination at six

months' notice. Now, the way they were remunerated was by a commission on sales, moneys raised for customers, and by a certain salary; the sales in the last year were for as large an amount as in the previous year, but the profits made by the company were not as large in consequence of circumstances as to which I will only say at present that the charge of fraudulent dealing on the part of the managing director is not made out. It would be wrong to say anything more than that on the present occasion except that it is rather an unfortunate way of remunerating managing directors that they get their commission on given sales irrespective of the profits.

That being the state of circumstances, and very considerable friction having arisen between the trustees of the will, particularly Mr. Punt, who is a son-in-law of the testator, and Mr. G. R. Symons, one of the managing directors, disputes arose and a correspondence took place which I will not go into. The correspondence was very properly not referred to, although there was a correspondence between the solicitors, and while that correspondence was going on on the 7th of May the directors issued eleven shares in the company. I may say that under the articles they had power to issue the remaining shares of the company and there was no express limitation of their power with reference to such issue. They issued five shares to Mrs. Emily J. Symons, who is the wife of Mr. G. R. Symons, the managing director; to Mr. R. H. Symons, one share; to Mr. Guntway two shares; Mr. Gladstone Hammond two shares; and Mr. T. W. Rose one share; making altogether eleven shares and five new shareholders. Now, under the powers of the articles a poll cannot be demanded except by five members, and it is obvious when the share-holding is in the hands of the seven shareholders, there being one adherent to the plaintiffs, Mr. Punt holding one share in his own right, there were three persons in the one camp, while there were four persons in the other camp. Now the result of the issue of these additional shares was to make the number of shareholders such as that a majority for the purpose of passing a special resolution could be obtained by the adherence of the majority holding shares in the company, and accordingly, after the issue of these shares—that was on the 7th of May—on the 12th of May notice of a meeting was sent out for the purpose of altering the articles of association; and without going through all the alterations that were proposed to be effected, I will refer to the substantial articles, as to which the complaint really arises. Under article 94 it was provided that "George Green Symons," he was the founder of the company, the testator, "shall be the governing director of the company until he resigns the office or dies, and whilst he retains the said office he shall have authority to exercise all the powers, authorities, and discretions by these presents expressed to be vested in the directors generally, and all the other directors, if any, for the time being of the company shall be under his control and shall be bound to conform to his decisions in regard to the company's business, and the said G. G. Symons shall be paid out of the funds of the company as remuneration for his services as managing director the sum of £300 per annum." Then 95 is "The said G. G. Symons whilst he holds the office of governing director may from time to time and at any time appoint any other persons to be directors of the company, and may define, limit, and restrict their powers and may fix and determine their remuneration and duties and may at any time remove any director however appointed, and may at any time convene a general meeting of the company. Every such appointment or removal must be in writing under the hand of the person making the same." Then 96 is "If the said G. G. Symons shall resign the office of governing director he shall become an ordinary director." Then 97 runs "If the said G. G. Symons dies whilst he holds the office of governing director, the trustees for the time being of his will so long as £2,000 of the share capital stands in his name or in the names of such trustees may exercise the powers vested in the said G. G. Symons by clause 95 hereof." Now, G. G. Symons being dead, of course the powers, so far as he is concerned, are gone, and the real materiality of the proposed alteration is that the powers given by article 97 to the trustees for the time being holding £2,000 of the share capital would be done away with. What the result of doing away with them would be is another question. At all events, what was proposed to be done was to take away from the trustees of the testator's will a power which, on the face of the article, they possessed.

Now, the meeting was accordingly held, and, as might be expected, nine voted in favour of the resolution—namely, the managing director and the new shareholders to whom a few days before shares had been issued. These were thus against the old party, whose forces had not been augmented by the directors in the exercise of their powers. The old party being only three shareholders, notwithstanding they had very much the largest holding of shares in the company, could not demand a poll. The result was that at that meeting there was the exact statutory majority required, neither more nor less, and the directors appear to have been careful not recklessly to have increased the number of single holdings of shareholders beyond what was absolutely necessary for their purpose, and notice is given of a confirmation meeting to be held; whereupon the trustees holding the 6,300 shares, and Mr. J. Punt also holding one share, commence this action, and they sue in a double position. First in respect of their position as trustees of the testator, with whom the company had entered into an agreement containing the stipulation to which I have referred; and, secondly, in the position of shareholders complaining of a misuse of the power of the directors with the purpose and object of enabling a minority of the shareholders to control the majority, speaking of shareholder as meaning the holder of the greater number of shares. There is one other circumstance I ought to mention because it has a bearing on the case. Under the testator's will shares are settled, and some of the persons to whom shares are given are persons having life interests or limited interests under it; for instance, Mr. G. R. Symons has himself a limited life interest, I think his wife has an interest, and there are other interests. But I need not say more than this, that the trustees of the will had duties to perform to all their *cestuis que trust*, and there is no reason for saying that they ought not to have the powers which are by the articles conferred upon them, and to be exercised for the benefit of their *cestuis que trust*.

Now, the first point taken is this. It is said that the resolution would be a breach of the contract which was entered into with the testator; and that the plaintiffs would be entitled to enforce the terms of this agreement by restraining any alteration of the articles. I think that the answer to this argument is that the company cannot contract itself out of the right to alter its articles; though it cannot by altering its articles commit a breach of contract. It is well established as between a company and a shareholder not depending upon a special contract outside the articles that this is the case. It has not been, so far as I know, the precise subject of a reported decision as between a contractor

and company when the contract is independent of and outside the articles; but in the case of *Allen* v. *Gold Reefs of West Africa* (*Limited*), [1900] 1 Ch., at p. 671, Lord Lindley, M.R., says: "The articles of a company prescribe the regulations binding on its members (Companies Act, 1862, s. 14). They have the effect of a contract (section 16), but the exact nature of the contract is even now very difficult to define. Be its nature what it may, the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolution (articles 50, 51), and any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to statute: *Walker* v. *London Tramways Co.* The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provision contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of section 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised not only in the manner required by law, but also *bonâ fide* for the benefit of the company as a whole, and it must not be exceeded. Those conditions are always implied and are seldom, if ever, expressed." Then his lordship, at p. 673, says: "Although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will arise whether an alteration of the articles so embodied is consistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his share, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered." And at p. 679 Romer, L.J., after dealing with the particular case, says: "Of course by the above observation I have not been dealing with exceptional cases. I can imagine a case, for example, where by the memorandum of association certain provisions as to the lien are made part of the constitution of the company which could not be affected by any alteration of the articles. And special contracts might be made by particular classes of shareholders or individuals, or special obligations to them might be incurred by the company, and that even by virtue of the original articles alone, which would prevent the articles being altered as against them, or prevent the alterations being enforceable against them."

Now, Mr. Coldridge was good enough to refer to a case in which he had been counsel before the Court of Appeal, and Mr. Registrar Carrington was good enough to get for me the registrar's book containing the registrar's note of what took place in the Court of Appeal with reference to it. The case was *In the Matter of the Ladies' Dress Association* (*Limited*). It was a case as to the effect really of certain founder's certificates that had been given. Founder's certificates had been issued to a Mr. Pulbrook, who was the founder, who had certain rights conferred on him by the articles of association. These founder's certificates were in these terms: "This certificate is one of the ten founder's certificates issued in pursuance of the articles of association of the company." Then it states certain rights that the holder of the certificate is to have—a certain commission on gross sales, as provided by section 113 of the articles, and states that he "is entitled to all the further rights and subject to the provisions expressed and contained in sections 112, 113, 114, 115, and 116 of the articles of association, copies of which several sections are endorsed hereon, and the said association (limited) for itself and its successors hereby covenants with the holder of this certificate that it will not alter or vary any or either of the above-mentioned sections of the articles of association without the written consent of the holder of the certificate. The holder is entitled to transfer the certificate; and it is given under the common seal of the company." Now, from the registrar's note it appears the argument was, "the counsel for the appellant"—and Mr. Coldridge had very good reason for recollecting this case, as he was counsel for the appellant—"submitted that a company can by contract bind itself not to alter"—that means to alter articles—"as regards an outsider." Wright, J., dismissed the application, whatever form it took, and it came before the Court of Appeal. The Master of the Rolls makes an interlocutory observation which I will pass by, and then the note is, "Coldridge submits he can ratify the contract." Then the Master of the Rolls: "There is no legal covenant. Let me see a contract between you and the company." Then Mr. Coldridge submits he has a contract in the founder's certificates and in the covenant mentioned in article 117. Then the argument goes on "The company can bind itself not to avail itself of its statutory powers." Then the note of the judgment is: "The Master of the Rolls.—I think this case ought to be disposed of in a summary way. The covenant cannot be sued upon. The covenant is by the company that it should not alter any article. Order below affirmed; appeal dismissed with costs." That appears, so far as I can judge, to be a direct decision upon the present point. Whether that be so or not, I am prepared to hold that in the circumstances of the present case the contract could not operate to prevent the articles being altered under the provisions of section 50, whatever the result of that alteration may be. It may be the effect of an alteration after a contract is retrospective. It may be the remedy is in damages only, or it may be that the stipulations of the contract can be enforced notwithstanding the alteration of the articles. It appears to me that the effect of the alteration depends upon the special circumstances in each case, but, speaking generally, and without saying that there may not be some exceptions, an illustration of which does not at present occur to me, I think that the principle in *Allen* v. *The Gold Reefs of West Africa* (*Limited*) applies in a case between the company and an outside person on a separate contract, as well as in a case between a company and a shareholder on the contract contained in the articles, and that it applies in the present case.

The second point taken is this: It is said that the memorandum binds the company to adopt and carry out the agreement which, once adopted, cannot be modified against the wish of the contractor with the company. I think it is a sufficient answer in the present case that the proposed alteration is not in contravention of the contract except in respect of a matter which has ceased to be effective. It appears to me that clause 6 of the agreement refers to those articles giving personal power to the deceased testator, and if you were to read it as though clause 6 were actually inserted in the memorandum, still the stipulation being in favour of a dead person, if that were the only point in the case I should not interfere to restrain the doing away with articles which have ceased to be effective. But of course that is not the substance of the present case.

I now come to the last, and to my mind the most important point of the case. It is argued on the evi-

dence that but for the issue by the directors of the shares in the way in which they did issue them—viz., in their fiduciary capacity, exercising their general powers to issue shares, it would be impossible to pass the resolution proposed; and it is said that the shares were not issued *bonâ fide*, but with the sole object and intention of creating voting power to carry out the proposed alteration in the articles. On the evidence I am quite clear that these shares were not issued *bonâ fide* for the general advantage of the company, but that they were issued for the immediate object of controlling the holders of the greater number of shares in the company, and of getting the necessary statutory majority for passing the resolution, while not at the same time conferring upon the minority the power to demand a poll. I need not go through the affidavits. It is really immaterial to me whether a new shareholder is described as a puppet or not. I am quite satisfied that the meaning, object, and intention of the issue of the shares was to enable the shareholders holding the smaller amount of such shares to control the holders of a very considerable majority of such shares. A power such as that which was exercised by the directors in this case is a power which must be exercised, as I have said, for the benefit of the company. *Primâ facie* it is given them, or rather I should say primarily it is given them, for the purpose of enabling them to raise capital when required for the purposes of the company. In saying that I do not at all mean to say there were not any other occasions when they might not fairly and properly exercise these powers, when a company is constituted like the present. I do not say it would be at all an unreasonable thing to create a sufficient number of shareholders in order to enable statutory powers to be exercised; but when I find persons named, all of whom, if not puppets, are persons whom it is obvious are meant and intended to secure the necessary statutory majority in a particular interest, I do not think that that is a fair and *bonâ fide* exercise of the power. I think that they were issued to the nominees for the express purpose, amongst other purposes probably, of passing the present resolution. The real difficulty in the case on this head to my mind consists in this, that unless and until the issue of these shares shall be set aside these persons are shareholders in the company, and I must take care that any injunction I grant shall be an injunction that will not interfere with the exercise of these powers generally. I may refer on this ground to a case of *Fraser* v. *Whalley*, which is reported in 2 H. & M. 10. Of course the circumstances of that case were not like the present case, but the principle I find in it I think justifies me in the injunction I propose to grant. In that case, which did not arise under the Companies Act, the directors of a railway company acted on an old resolution which authorized the issue of shares for a particular purpose. The particular purpose had ceased and the directors being afraid that at a general meeting they would be removed were attempting, under an entirely different state of circumstances, to issue shares so as to enable them to be supported and kept in office. At p. 28 Page-Wood, V.C., says: "Then the directors of the Oswestry Co. think it advisable if possible to advance money to Mid Wales Co. to assist them in this undertaking. Under the circumstances it would have been wise had the directors called a meeting of the shareholders and put the case to them, and if they had obtained the requisite consent of a general meeting it might have been a very arguable question whether they were or not now legally disabled from acting upon that assent either singly or coupled with the former unused resolution. Yet nothing of the kind is done, and accordingly, putting Savin out of the question, the point is reduced to this: The directors are informed that at the next general meeting they are likely to be removed, and therefore on the very verge of a general meeting they, without giving notice to any one, with this indecent haste and scramble which is shewn by the times at which the meetings were held, resolve that shares are, on the faith of this obsolete power entrusted to them for a different purpose, to be issued for the very purpose of controlling the ensuing general meeting. I have no doubt that the court will interfere to prevent so gross a breach of trust. I say nothing on the question whether the policy advocated by the directors, or that which I am told is to be pursued by Savin, is the more for the interest of the company. That is a matter wholly for the shareholders. I fully concur in the principle laid down in *Foss* v. *Harbottle*, 2 Hare 461, as to that; but if the directors can clandestinely and at the last moment use a stale resolution for the express purpose of preventing the free action of the shareholders, this court will take care that when the company cannot interfere the court will do so." It is true that is a case relating to railway companies and not to companies under the Joint Stock Companies Act, and it is also true that there the plaintiffs were in time to prevent the issue of the shares in question, but the principle appears to me to be the same. If I find, as I do, that shares have been issued under the general and fiduciary powers of the directors for the express purposes of acquiring an unfair and undue majority for the purpose of altering the rights of parties under the articles, I think I ought to interfere. I propose to grant an injunction to restrain the holding of this confirmatory meeting for the passing of this resolution, and to leave it there. The costs will be costs in the action.

Let me, however, say, now I have said so much, that I know in these cases where there are family disputes it is extremely difficult to bring parties to any sort of reason, but in this case, so far as I can see, here is a business which might be in the future, as it has been in the past, eminently successful, and if the parties can come to some sort of agreement or truce between themselves they may go on well. If they do not and unless the intervention of the court is sought in some other way, in an administration action or otherwise, I am very much afraid the result will be that between them they will destroy the goose that lays the golden eggs. I must grant the injunction to prevent the defendants holding the confirmatory meeting for the purpose of passing this resolution.

Motion granted.

Solicitors, *H. C. Barker & Son; H. Savidge.*

Chan. Div. }
Joyce, J. } May 4, 1903.

LONDON COUNTY COUNCIL v. SOUTH METROPOLITAN GAS CO. (*a.*)

Statute—Interpretation—"Daily"—Inclusion of Sunday—Gas Light and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 *Vict. c.* 181), *s.* 7.

By the South Metropolitan Gas Co.'s Special Acts of 1869 *and* 1876 *provision was made for the public testing of the quality of the gas supplied by them to consumers. The mode of testing and the locus and number of testing-*

(*a.*) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

places which were to be provided by the company, and to be under the control of the Metropolitan Board of Works, were to be prescribed by gas referees appointed by the Board of Trade, and daily testings were to be made by gas examiners appointed by the Metropolitan Board. Similar provisions were contained in the Special Acts of the other metropolitan gas companies. By an Act of 1880, *which was applicable to all the metropolitan gas companies, the provisions as to daily testing were (in effect) re enacted by a section providing that a gas examiner should at each testing-place make daily such number of testings as the gas referees should prescribe.*

There was also a provision in the Special Act of 1869 *which was to be read with the Act of* 1880 *defining "day" as twenty-four hours beginning at 9 o'clock in the forenoon of one day and ending at 9 o'clock in the forenoon of the next. Under these Acts the practice had been to test on week-days only.*

Held, that the literal meaning of "daily" in the Act of 1880, *read with the Act of* 1869, *with reference to the South Metropolitan Gas Co. was "every day," including Sundays, taking the day as commencing at 9 o'clock in the forenoon, and that the practice prevailing under similar provisions in previous Acts of Parliament from* 1869 *to* 1880 *was not sufficient to justify the court in construing the Act of* 1880 *with reference to that practice under the principle suggested by Lord Macnaghten in* Commissioners for Special Purposes of Income Tax *v.* Pemsel, [1891] A. C. 531, 591.

Held, therefore, that gas examiners appointed by the London County Council, as successors of the Metropolitan Board, were entitled to test the gas on Sundays.

The plaintiffs sought a declaration that their duly-appointed gas examiners were entitled on Sundays as well as week-days to make tests of the gas supplied to customers by the defendants and an injunction restraining interference with the making of such tests on Sundays.

By the South Metropolitan Gas Light and Coke Co.'s Act of 1869 (32 & 33 Vict. c. 130), s. 3, the term "day" (subject to an exception not in this case material) was defined to mean "twenty-four hours reckoned from 9 o'clock in the forenoon of one day to 9 o'clock in the forenoon of the next following day, so much of each day as is before 9 o'clock in the forenoon being reckoned as part of the immediately preceding day of the month or week."

The Act provided for the appointment by the Board of Trade of officials called "gas referees," who were to prescribe the mode and times for testing the illuminating power and purity of the gas supplied by the company, and also what testing places and apparatus should be furnished by the company, which testing places and apparatus were to be under the control and management of the Metropolitan Board of Works (hereinafter called the plaintiffs' predecessors). The Act further provided for the appointment by the plaintiffs' predecessors of gas examiners whose duty it was at each testing-place daily to test the illuminating power and purity of the gas supplied.

By the South Metropolitan Gas Light and Coke Co's Act, 1876 (39 & 40 Vict. c. 229), the provisions of the Act of 1869 as to testing and the appointment of gas examiners were repealed and re-enacted with modifications. By this Act it was provided that the gas referees should from time to time prescribe the situation and number of the testing-places and the apparatus therein for testing the quality of the gas to be supplied by the company, and that the company should provide and maintain such testing-places and apparatus, and that they should be under the control of the plaintiffs' predecessors; and the Act also provided for the appointment by the plaintiffs' predecessors of gas examiners for the several testing-places within their jurisdiction; the Act also provided for daily testings by the examiners. Between 1869 and 1876 similar provisions were enacted with respect to the other metropolitan gas companies.

In 1879 the defendants changed their name from the South Metropolitan Gas Light and Coke Co. to the South Metropolitan Gas Co. By the Gas Light and Coke and other Gas Companies Acts Amendment Act, 1880 (43 & 44 Vict. c. 181), it was provided (section 4) that the Act should apply to the metropolitan gas companies therein enumerated (including the defendants) and throughout the districts of the said companies, and that for the purposes of its application throughout any one of such districts the expression "the company" should be construed to mean such one of the said companies as was for the time being authorized to supply gas in such district, and that the expressions "gas referees" and "gas examiner" should respectively have the meanings assigned to them in the special Act of such company, and that the special Act of such company as amended by the Act now stating and the latter Act should be construed together as one Act. Section 4 provided as follows: "A gas examiner shall at each testing-place make daily such number of tests as the gas referees may prescribe for ascertaining whether during the whole of each day the illuminating power and purity of the gas supplied at such testing-place by the company are such as are respectively prescribed under the special Act, provided that the tests for illuminating power shall be taken at intervals of not less than one hour."

The plaintiffs duly appointed gas examiners for the several testing-places of the defendants as prescribed by the gas referees. One of such examiners, by the direction of the plaintiffs, attended at each of the defendants' testing-places on several Sundays in November and December, 1902, but on each occasion was refused admission by the defendants' caretakers. The plaintiffs thereupon brought this action.

By their defence the defendants alleged that ever since 1869 gas referees appointed by the Board of Trade had periodically issued notifications prescribing daily testing of the gas supplied by the defendants and the other companies for the time being under their jurisdiction, and duly appointed gas examiners had tested the gas supplied by such companies in accordance with the Acts and notifications for the time being in force; that all that period such tests (to the knowledge of the gas referees and other public authorities) had been made on week-days only, and never on Sundays, and that the obligation of daily testing had been treated by the gas examiners and public authorities as applying to week-days alone. This was not disputed. It further appeared that since 1872 the metropolitan gas companies had suspended work on Sundays from 6 a.m. to 6 and in some cases 10 p.m., and that the gas used on Sundays was for the most part made during the week and accumulated in the gas-holders.

Hughes, K.C., and *T. T. Methold*, for the plaintiffs.—In an Act of Parliament, unless there is express provision to the contrary, Sunday is included as a day: *Peacock* v. *R.*, (1858) 4 C. B. N. S. 264; *Ex parte Simpkin*, (1859) 2 E. & E. 392; *Rawlins* v. *West Derby Overseers*, (1846) 2 C. B. 72; *Calder and Hebble Navigation Co.* v. *Pilling*, (1845) 14 M. & W. 76.

Warmington, K.C., *Lord Robert Cecil, K.C.*, and *L. Rostron*, for the defendants.—The practice from the beginning until 1880, and since 1880 until now, has been to test only on week-days. No one suggests that the Act of 1880 intended to start a new practice,

and it is to be construed by reference to the practice subsisting in 1880, and continued ever since, and dealing as it does with a special trade, with reference to the practice in that trade. The question whether "day" includes Sunday depends on circumstances; generally, if work is directed to be done, day means work-a-day or week-day. We rely on the Sunday Observance Act, 1676, and the following cases: *River Wear Commissioners* v. *Adamson*, 2 A. C. 743, 26 W. R. Dig 222; *Hawkins* v. *Gathercole*, 3 W. R. 194, 6 D. M. & G. 1, 20; *Eastman, &c., Co.* v. *Comptroller-General of Patents, &c.*, 47 W. R 152, [1898] A. C. 571; *Fewens* v. *Noakes*, 28 W. R. 562, 50 L. J. Q. B. 132; *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, 40 W. R. Dig. 217, and Lord Macnaghten's opinion in that case; and also *Commercial Steamship Co.* v. *Boulton*, 23 W. R. 854, L. R. 10 Q. B. 346.

JOYCE, J.—The question in this case, as has been truly said by Lord Robert Cecil, is, What is the meaning of the word "daily" in the 7th section of the Act of 1880. I think, without looking at the dictionary, one may venture to say that the *primâ facie* meaning of "daily" is "every day," although we have in this case the peculiar provision with reference to days which is contained in the 3rd section of the Act of 1869, which says that "the term 'day'" (subject to the exception therein mentioned) "means twenty-four hours, reckoned from 9 o'clock in the forenoon of one day to 9 o'clock in the forenoon of the next following day, so much of each day as is before 9 o'clock in the forenoon being reckoned as part of the immediately preceding day of the month or week." Therefore it appears to me that *primâ facie* the effect of this 7th section of the Act of 1880 with reference to the company in question is that the gas is to be tested as thereby prescribed on every day, beginning at 9 o'clock in the forenoon of one day and ending at 9 o'clock in the forenoon of the next day. Now, if that be so, two of these days would include parts of Sunday, which, as I understand, begins at 12 o'clock on Saturday night, and ends at 12 o'clock on Sunday night. It is said that, from the provisions of this section, the twenty-four hours from midnight on Saturday to midnight on Sunday must be altogether excluded. Upon that I observe that as I understand there is not a word or an expression of any sort or kind in any of these Acts of Parliament to suggest that that is to be the case, or that that is the intention of the Legislature. *Primâ facie* I should suppose that where, as here, the gas is to be supplied at all times on every day and at every hour of the day the testing ought to take place on every day of the week.

Now, what is the argument which the defendants urge against this construction? How and where do they get any particular intent, so to speak—as it is called in one of the cases—at variance with or contrary to the literal words of the Act? Well, many not altogether relevant topics, as I consider, have been urged upon me, but the principal point is this. The defendants say that the practice from the passing of the Act of 1869 down to the passing of the Act of 1880 has been not to test on Sundays; that is to say, in other words, that the practice has been not to comply with the literal terms of the Act of Parliament applying to the case. Can that alter the meaning of the word "daily" in the Act of 1880? It is said that this can be done by the principle enunciated by Lord Macnaghten in the case of *Commissioners for Special Purposes of the Income Tax* v. *Pemsel*, where undoubtedly it is suggested "that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning." However, he expresses no opinion upon it. My opinion is that, if that is a sound principle upon which the court can act in construing an Act of Parliament, the practice in this case, assuming it to be established, has not been nearly sufficient for the purpose of founding upon it any really serious argument to the effect desired by the defendants. In my opinion the words are plain. I am asked to say upon the construction of the statute that there is something intended or to be inferred contrary to the words of the Act—a construction, by the way, which, as it appears to me, would lead to the greatest possible difficulty in working the Act with reference to the days of the rest of the week. I do not know why that is to be inferred. I have no reason to suspect that it was brought to the attention of the Legislature when the Act of 1880 was passed that there was any such practice as is alleged before me. The result of the whole argument upon my mind is that I do not even suspect that the Legislature did not intend that which is provided in the 7th section of the Act of 1880—namely, that the testing should be daily and should be every day, without excepting Sunday in any way whatever. There will be a declaration as claimed, with liberty to apply for an injunction.

Solicitors, *W. A. Blaxland; Hicklin, Washington, & Pasmore.*

Chan. Div.
Swinfen Eady, J. } June 17, 18, 1903.

In re MILES. (*a.*)

Solicitor—Costs—Taxation—Winding up of estate—Costs special to particular beneficiaries—Costs in anticipation—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 39.

In the taxation, under section 39 *of the Solicitors Act*, 1843, *of the bill of costs of the solicitor of trustees engaged in dividing an estate between beneficiaries, the special costs incurred with respect to the share of one of the beneficiaries are chargeable against the estate as a whole.*

In the final settlement of an estate between the beneficiaries, the trustees are entitled to include by anticipation such reasonable charges as will be incurred in carrying out the final division.

Summons to review taxation.

On the death of a tenant for life an estate became divisible among three beneficiaries equally, two of whom wished to receive transfers of their shares in specie, whilst the third wished his share to be realized and the mortgage on it paid off.

On the presentation of his bill by the solicitor of the trustees who wound up the estate, two of the beneficiaries issued an originating summons for its taxation under the provisions of section 39 of the Solicitors Act, 1843.

An order for taxation was thereupon made on the 29th of January, 1903.

On taxation the taxing-master disallowed certain items connected with the transference to two of the beneficiaries of their shares in specie, and with the payment off of the mortgage on the third share, on the ground that each beneficiary should bear his own share of the costs and that these items should not be

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

charged on the estate as a whole. He also disallowed certain items charged for expenses in anticipation.

The present summons was thereupon issued by the solicitor to review the master's decision on these two points.

A. J. Chitty, for the summons.—It is impossible to dissect every item of expense for taxation under section 39 and to allocate it to separate beneficiaries. The case of *In re Gray*, 49 W. R. 298, [1901] 1 Ch. 239, does not apply to this section: *In re Negus*, 43 W. R. 68, [1895] 1 Ch. 73.

Ashton Cross against the summons.

SWINFEN EADY, J.—In my opinion it is not the practice, when trustees are dividing an estate among beneficiaries, to have the bill of costs of their solicitor dissected in the manner that has been suggested, in order that every item referring to separate shares may be extracted from it and treated as chargeable only against the share of each beneficiary.

The trustees are proposing to divide an estate not yet divided, and their reasonable and proper costs in so doing are properly chargeable against the estate as a whole. I am further of opinion that the question whether any particular items properly chargeable by the trustees ought ultimately to be charged against any particular beneficiary does not arise on the present summons, because under section 39 of the Solicitors Act, 1843, this taxation must be treated as being a taxation between the trustees and their solicitors of the items properly chargeable by the trustees and properly payable by them to their solicitors; and every proper and reasonable item must be allowed, irrespective of whether it is ultimately to be charged on the final distribution against the share of a particular beneficiary.

As to costs allowed by anticipation, if the division be the division of the whole balance remaining in the hands of the trustees, and a final settlement of the whole estate, then I am of opinion that the trustees are entitled to include by anticipation such reasonable and proper charges as will be incurred in carrying out the final division, although the final division be not actually made at the moment. If, however, it be merely an interim division, still leaving a further balance to be divided, then the costs should include only the costs actually incurred up to date, leaving any further costs to be settled and adjusted in the final division. The better plan will be, accordingly, to allow the objection generally and to refer the bill back to the taxing-master to review his taxation upon the footing indicated.

Solicitors, *J. W. T. Miles; W. A. S. Hellyar & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) July 10, 1903.

LOCKWOOD v. COOPER. (a.)

Licensing law—Offences—"Gaming"—Game of skill played with cards for prizes given by persons not competitors—"Whist drive"—Suffering gaming on licensed premises—Licensing Act, 1872 (35 & 36 *Vict.* c. 94), *s.* 17, *sub-section* 1.

The appellant, a licensed victualler, suffered a game of skill, called a "whist drive," to be played by members of a club in a room on his licensed premises, for prizes only given by their friends.

Held, that he could not properly be convicted of suffering gaming under the Licensing Act, 1872, *s.* 17, *sub-section* 1.

This was an appeal by Dennis Arnold Lockwood, the proprietor of the Crescent Hotel, Filey, who had been summoned before certain justices of the peace for the East Riding of Yorkshire and convicted of suffering gaming on his licensed premises contrary to section 17 of the Licensing Act, 1872. The justices at the instance of the appellant stated the following case:

Upon the hearing of the said information the following facts were proved or admitted before us:

(*a*) A large room in the Crescent Hotel was engaged by a party of ladies and gentlemen of good social position in the neighbourhood of Filey, calling themselves the Filey Indoor Games Club. The members of this club and their friends met in this room for the purpose of playing a whist drive, and had the exclusive use of the room, for which they paid so much a week. A fee of five shillings was paid for membership of the club, and each person paid 1s. 6d. a night when playing towards the cost of the room, refreshments (which were supplied by the appellant in another room, but no intoxicants were supplied), and other incidental expenses. Any member could introduce a friend by submitting the person's name for approval and paying 1s. 6d. for the person introduced.

(*b*) On the night of the 24th of February, 1903, forty or fifty ladies and gentlemen, the majority of whom were members, met to play a game of cards commonly known as a whist drive for prizes which when won were taken by the winners of the game. There were eight prizes of varying value, one of which, a clock, was worth about £1 11s. 6d. This prize was won by a player who stated on oath that he would not have gone if the prizes had not been worth playing for.

(*c*) The prizes were not subscribed for by the players, but were given by some members of the club or by their friends who were not members, and it was a rule that no person should win the prize which he or she had given.

(*d*) The appellant knew that a whist drive was being played—he let the room for the purpose. He stated to a witness for the respondent that he did not know that there was anything wrong. When the parties went to him to take the room they said they would not play either for money or money's worth, and he let the room on the distinct understanding that the players should not stake money on the game. He knew, however, that there were prizes. Neither the appellant nor his staff had entered the room during the time of the play, nor was the room used as a public room after it was engaged by the club.

On behalf of the appellant it was contended that he could not be said to have suffered the gaming, if gaming there was, to be carried on, as the players had the exclusive use of the room; that the playing in question was not gaming within the meaning of section 17 of the Licensing Act, 1872; that in order to constitute such gaming there must be something staked by each party playing to be lost or won by them according to the success or failure of the person who had staked; and that from the fact that the players were playing for prizes given by someone else they (the players) had nothing to lose and could not be said to be gaming.

On behalf of the respondent, it was submitted that he was not bound to prove that the appellant had knowingly suffered the gaming to take place; that the appellant did suffer gaming within the meaning of the section; and, further, that the playing for money's worth—namely, the prizes, constituted gaming within the meaning of the section.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The justices found, as a fact, that the appellant did know that the players were playing a whist drive for prizes—money's worth. In their opinion the playing for prizes constituted gaming within the meaning of the section, and they convicted the appellant and fined him £1, including 6s. costs.

Before the justices the following cases were cited: *Somerset* v. *Hart*, 32 W. R. 594, 12 Q. B. D. 360; *Reg.* v. *Ashton*, 22 L. J. 1; *Bew* v. *Harston*, 3 Q. B. D. 454, 47 L. J. 27; *Redgate* v. *Haynes*, 1 Q. B. D. 89; *Bond* v. *Evans*, 36 W. R. 767, 21 Q. B. D. 249; *Danford* v. *Taylor*, 33 J. P. 277; *Luff* v. *Leaper*, 36 J. P. 54.

The question for the court was whether the justices had come to a correct determination and decision in point of law, and if not what should be done in the premises.

Danckwerts, K.C. (*Stutfield* with him), for the appellant.—The conviction cannot stand, because the circumstances under which the whist drive was played do not amount to the offence with which the appellant has been charged—namely, gaming. To constitute that offence either the game must be *per se* illegal or else it must be played for money, or there must be some circumstances attached to it which make it illegal. In this case there is no such element. The mere playing of a legitimate game for prizes is not illegal merely because it is played on licensed premises.

Queen v. *Ashton*, 22 L. J. M. C. 1; *Dyson* v. *Mason* 22 Q. B. D. 351, 37 W. R. Dig. 108; *Jenks* v. *Turpin*, 13 Q. B. D. 505, 32 W. R. Dig. 84, were cited.

Montague Lush, K.C., and *Cautley*, in support of the conviction.—If a game of skill for prizes given by persons not playing were played on licensed premises it might very well be apart from special circumstances that the game even on licensed premises would not be a contravention of the statute. Chess, for instance, in which it is generally said that no element of chance exists. But here the game was one of cards, and necessarily chance as well as skill comes in. The question has never been raised before, but I submit that on the finding of the justices this conviction should stand.

Lord ALVERSTONE, L.C.J.—If there was any ground here for suggesting that this was in fact a gambling arrangement by which the players one after another staked all round, different considerations would arise. The Licensing Act ought to be strictly enforced and carried out, no doubt, because it was a penal Act, but nevertheless the court must take care not to strain the words of the section beyond the principle of the decisions upon them. It is not necessary for me to say that no game played for prizes on licensed premises would not come within the mischief of the section; nor to decide that a game of skill would be exempt. Both these questions were dealt with at length in *Dyson* v. *Mason*, and also, I believe, in other cases. Here the justices found that the ladies and gentlemen of this club were competing for prizes given by their friends who were not playing, and there is no suggestion that in what they did they desired to evade the statute. The justices appear to have wished to raise the point for our decision whether playing any game of skill and chance not being an unlawful game of itself and not being played for money stakes was within the section. In my opinion we have not to decide that question here, because I think that we cannot hold that this whist drive played under these conditions was gaming at all within the meaning of the statute. For these reasons the conviction cannot be supported, and this appeal must be allowed.

WILES and CHANNELL, JJ., concurred.

Conviction quashed.

Solicitors for the appellant, *T. H. Hiscott*, for *Tasker Hart*, Scarborough.

Solicitors for the respondent, *Bockett, Stunt, & Nash*, for *J. R. Procter*, Beverley.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Nov. 10.

CORNFOOT v. ROYAL EXCHANGE ASSURANCE CORPORATION. (*a*.)

Insurance, marine—Risk, duration of—"Thirty days in port after arrival"—Days, computation of.

A policy of insurance on ship was expressed to be "from Portland, O., by any route to Algoa Bay and for thirty days in port after arrival." The policy further described the risk as continuing until the ship "hath there moored at anchor in good safety." The ship arrived at Algoa Bay on the 2nd of August, and was moored in good safety at 11.30 a.m. on that day. She remained at Algoa Bay until she was lost by a peril insured against at 4.30 p.m. on the 1st of September.

Held, that the thirty days meant thirty consecutive periods of twenty-four hours each beginning at 11.30 a.m. on the 2nd of August, and that therefore the ship was lost after the insurance had ceased.

Judgment of Bigham, J. (51 *W. R.* 527, [1903] 2 *K. B.* 363), *affirmed.*

Application by the plaintiff for judgment or a new trial in an action tried before Bigham, J., and a jury (reported in 51 W. R. 527, [1903] 2 K. B. 363).

The action was brought to recover for a total loss of the plaintiffs' ship, *Inchcape Rock*, under a policy of marine insurance dated the 4th of April, 1902, against the usual perils, of which the defendants were underwriters.

The policy, which was on a printed form with blanks to be filled in, described the insurance as "at and from Portland, O., by any route to Algoa Bay and for thirty days in port after arrival however employed." Later on the policy described the insurance as continuing "until the said ship with all her ordnance, tackle, apparel, &c., shall be arrived at as above upon the said ship, &c., until she hath there moored at anchor in good safety." This latter clause was in print except the words "as above," which were written in. The latter part of this clause as it originally stood in the printed form ran "until she hath there moored at anchor twenty-four hours in good safety," but in the policy in question the words "twenty-four hours" were struck out.

The ship arrived at Algoa Bay on the 2nd of August, and remained there until the 1st of September, when she was totally lost in a gale.

At the trial the jury found that the vessel arrived at Algoa Bay at 10 a.m. on the 2nd of August, 1902; that she was moored at anchor in good safety at 11.30 a.m. on that day; and that she was totally lost at 4.30 p.m. on the 1st of September.

Bigham, J., on further consideration, held that the "thirty days" meant thirty consecutive periods of twenty-four hours each beginning at 11.30 a.m. on the 2nd of August, and not thirty calendar days,

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

and that therefore the insurance had expired at 11 30 a.m. on the 1st of September, before the ship was lost. He accordingly gave judgment for the defendants.

J. A. Hamilton, K.C., and *D. C. Leck*, for the plaintiff.—The thirty days are thirty calendar days, commencing at midnight on the 2nd of August The insurance is described in the policy as continuing "for thirty days in port after arrival." That means after the day of arrival, and therefore the day of arrival is to be excluded in the computation of the thirty days: *The Katy*, 43 W. R. 290, [1895] P. 56; and *Goldsmiths' Company* v. *West Metropolitan Railway Co.*, *ante*, p. 21. Unless there is something to the contrary, the law construes a day as meaning a calendar day. The insurance therefore did not expire until midnight on the 1st of September, and the vessel was covered by the policy when she was lost.

They also referred to *Mercantile Marine Insurance Co.* v. *Titherington*, 13 W. R. 141, 6 B. & S 765.

Scrutton, K.C., and *Loehnis*, for the defendants, contended that the thirty days ran from the time the vessel was moored at anchor in good safety—namely, from 11.30 a.m. on the 2nd of August.

J. A. Hamilton, K.C., replied.

COLLINS, M.R.—This is an appeal from the judgment of Bigham, J., and raises a question as to the construction of a policy of marine insurance. By the policy the ship was insured at and from Portland, Oregon, by any route to Algoa Bay, "and for thirty days in port after arrival however employed." Later on in the policy the insurance is described as continuing "until the said ship, with all her ordnance, tackle, apparel, &c., shall be arrived at as above upon the said ship, &c., until she hath there moored at anchor in good safety."

This last clause defines the period during which the policy would have attached apart from the earlier provision as to the thirty days. The earlier clause involves this, that we must ascertain the date of arrival before we can see when the thirty days begin to run. The later clause seems to me to define the point of time when the ship is said to arrive, and from that point of time, and from no other, the thirty days begin to run—namely, from the point of time when she hath moored at anchor in good safety. That, to my mind, is the obvious meaning of the policy. Further, when one looks at the genesis of this later clause, the matter is made quite clear. The clause as it originally stood in print was "until she hath there moored at anchor twenty-four hours in good safety," but the parties have struck out the words "twenty-four hours," thus making the point of time from which the thirty days ran the same as that from which the twenty-four hours would have run. The twenty-four hours would clearly have run from the time of mooring in good safety. The thirty days therefore began to run from the particular point of time—namely, the particular hour of the day at which the vessel was moored at anchor in good safety. The jury have fixed the point of time when she was so moored at 11 30 a.m., on the 2nd of August. The thirty days from that point of time would expire at 11.30 a.m. on the 1st of September. Therefore the vessel would be uncovered by the policy in respect of any loss occuring after 11.30 a.m. on the 1st of September. The jury have found that the loss occurred at 4.30 p.m. on the 1st of September, and as the insurance had run out at that time the defendants are not liable.

MATHEW, L.J.—I am of the same opinion. The question we have to determine is, how are the thirty days to be calculated? The policy states that the insurance is from Portland, Oregon, to Algoa Bay, "and for thirty days in port after arrival." The meaning of "arrival" of the ship is clearly defined in the later clause as the time when "she hath there moored at anchor in good safety." In my opinion there is only one possible construction of this policy. The twenty-four hours, which have been struck out by the parties, would have run from the time that the vessel moored at anchor in good safety, and no reason has been advanced why we should place a different interpretation on the policy because thirty days are inserted instead of twenty-four hours.

COZENS-HARDY, L.J.—I am of the same opinion.

Application dismissed.

Solicitors for the plaintiff, *Botterell & Roche.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Oct. 31; Nov. 6. 7.

WILKINSON v. LLANDAFF AND DINAS POWIS RURAL DISTRICT COUNCIL. (a.)

Local authority—Sewer—Drain—Nuisance by sewage—Drainage of houses—Liability of local authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 2, 4, 14, 19, 21, 42, 43.

A channel or gutter, which was vested in the defendants as the local authority, and which ran between a road and the footpath in front of the house of the plaintiff adjoining the road, was used for carrying off the surface water from the road, and also the water from the roofs of some of the other houses bordering on the road, by means of pipes communicating therewith, and from the curtilages of these houses. In the channel itself at various intervals were gratings for conducting the water into the deep underground drains. There was also a cesspool situate in a garden adjoining the plaintiff's house. Sewage-matter had overflowed from the cesspool into the channel through no fault of the plaintiff, as it came from another house, and being permitted to remain in the channel had caused the illness of the plaintiff's infant son by means of foul and noxious smells escaping therefrom, through the defendants neglecting to keep the channel properly cleaned out.

Held, (1) *that the channel was a "sewer" within the meaning of the definition of sewers in section* 4 *of the Public Health Act*, 1875; (2) *that being a sewer the local authority were bound under section* 19 *of the same Act to keep it free from pollution; and* (3) *that the plaintiff not having himself caused the pollution, was entitled to damages and an injunction against the defendants.*

Decision of Phillimore, J., *affirmed.*

This was an appeal by the defendant council from the decision of Phillimore, J., and a cross-appeal by the plaintiff.

The action was tried at the spring assizes at Cardiff in March, 1903.

The facts were as follows: The plaintiff, a Mr. David Wilkinson, an ironfounder, resided at a house called "Thornleigh," in Mulbrook-road, in Dinas Powis. The defendants were the Rural District Council for the District of Llandaff and Dinas Powis.

In front of the plaintiff's house was a channel or gutter which ran down the side of the road and separated it from the footpath in front of the

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

plaintiff's house. The channel was used for carrying off the surface water from the road, and it also carried off the water from the roofs of some of the houses at the side of the road, and from the curtilages of these houses by means of pipes connected with the channel.

In a garden adjoining the house occupied by the plaintiff was a cesspool, which was situate between the gardens of two other houses, "Rosedene" and "Thistledene," close to the plaintiff's. Owing to the defendants' fault the channel, which at various intervals had gratings to carry the water down to the deeper underground drains, became defective, and could not carry away the water. Sewage-matter had overflowed from the cesspool into the channel through no fault of the plaintiff, and being permitted to remain there had caused injury to the health of the infant son of the plaintiff, V. A. Wilkinson, and thereby put the plaintiff to expense; he also complained that his son's illness was due to the noxious and foul gases which were said to have escaped from the cesspool in question.

It was alleged that the channel was vested in the defendants and that they neglected to cleanse it, and that they also neglected to empty and cleanse the said cesspool after taking that duty upon themselves in pursuance of the power vested in them by the Public Health Act, 1875.

The plaintiff stated that the defendants' neglect was continuous between the 21st of May and the 2nd of June, 1902, and that the sewage overflowed during that period, and that the defendants neglected to remove it from the channel during the same period and up to the 14th of June, 1902.

The plaintiff also claimed an injunction to restrain the defendants and their contractors from permitting a recurrence of the nuisance. The sewage matter had come from a house not the plaintiff's.

Frequent complaints have been made by various residents in the district about the nuisance, and the council then divided the parish into two districts, and made a separate contract in respect of each for the purpose of keeping the channel cleansed, as formerly it was done by only one contractor, which had proved to be insufficient. After this the complaints were less frequent.

The defendants admitted that they contracted for the scavenging (which included the emptying of cesspools) of the parish of St. Andrew's, in which Millbrook-road was situated, but they contended that they were not liable to the plaintiff, because he had sent them no notice as required by section 43 of the Public Health Act, 1875. They also denied that the piece of land, which, when the houses in Millbrook-road were constructed, was taken for the purpose of widening the road, wasever formally taken over by them, but they admitted having carried out work upon it—namely, the repair of the footpath for a few yards in front of the plaintiff's house, and also the laying of a covered drain along the edge of the road in the place of an open ditch which formerly existed there, and the fixing of gullies to carry away the rainwater from the surface of the road.

The defendants further contended that they were not liable, as they to take advantage of the power given to them by section 42 of the Public Health Act, 1875, to enter into a *bonâ fide* contract for the removal of sewage &c.

The main point to be decided was whether the channel was a "sewer" within section 4 of the Public Health Act, 1875 (38 & 39 Vict. c. 55). If it were a "sewer" within the meaning of the Act, the defendants were, by section 19, bound to cleanse it. The definition of "drain," in section 4 is: "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed"; and "'sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act." Section 19 reads: "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied."

Phillimore, J., held that the channel was a "sewer" within the definition in section 4, and that therefore the defendants were under a liability to keep it cleansed, so as to prevent it from being a nuisance and injurious to health. He also granted the plaintiff an injunction, and awarded him damages.

From this the defendants appealed.

S. T. Evans, K.C., and *J. Sankey*, for the appellants.—The plaintiff says that the defendants are liable under sections 42 and 43 of the Public Health Act, 1875, but where there is a contract to clear out the cesspool the defendants are not liable; there was no obligation to clear out the cesspool at all by law, but the defendants may contract with contractors to do the work, and then their duty is discharged: *Ellis* v. *The Strand District Board of Works*, 67 L. T. 307, 41 W. R. Dig. 139. If the defendants are liable under section 19 of the Act, then by section 21 any person living in the district will be entitled to use this channel as a sewer: *Graham* v. *Wroughton*, 49 W. R. 643, [1901] 2 Ch. 451. If this drain—that is, this grating, is on the surface, is it a sewer?—that is, is a channel to carry away surface water a sewer? It is not: *West Riding of Yorkshire Rivers Board* v. *Reuben Gaunt & Sons (Limited)*, 67 J. P. 183, 19 Times L. R. 140. Even assuming that this drain along the road is a "sewer" within the meaning in section 4 of the Act, it is not a sewer for all purposes: *Kinson Pottery Co.* v. *Poole Corporation*, 47 W. R. 607, [1899] 2 Q. B. 41. A drain may be a sewer for some purposes and not for others. It would be an unjustifiable straining of the use of the word to call this gutter along a country road a sewer; the channel is part of the highway. If it is a sewer; the defendants are under an obligation to cleanse, but if it is not a drain, it is not a sewer. The defendants' only duty to cleanse it would be when they themselves polluted it. If the court says that it is a sewer, then it will entitle everyone in the district to use it as a sewer; the defendants contend that it is not even a drain; it was never intended to drain water into it at all. The only notice received under section 43 was from someone not the plaintiff. It is not a sewer within the Act, for if this is a drain, and therefore a sewer, every drain pipe in a house will be a sewer. This channel is not a drain of any sort.

The following cases were referred to: *Mayor, &c., of Newcastle-upon-Tyne* v. *Houseman*, 63 J. P. 85; *Sykes* v. *Sowerby Urban District Council* [1900] 1 Q. B. 584, 48 W. R. Dig. 104. [By VAUGHAN WILLIAMS, L.J.; *Ferrand* v. *Hallas Land and Building Co.*, 41 W. R. 580 [1893] 2 Q. B. 135].

B Francis Williams, K.C., and *J. Davies Williams*, for the respondent, were not called upon.

VAUGHAN WILLIAMS, L.J.—It is no part of my business to criticise Acts of Parliament; nor to say whether they are closely drawn or loosely drawn, or easy to construe or difficult to construe. I have to construe the Act of Parliament, and in so doing I have to look at the definitions in the Act, and I have

also to follow any decisions which have been given as to the meaning of the particular section. I think, therefore, my judgment must affirm the decision of Phillimore, J. I do not see my way to differ from him either as to the facts which he has found or as to the law which he has applied to these facts. Now, what are the facts of this case? The facts are these: There are these several houses, and I believe there are some ten or twenty; the rain-water from the roofs, and I believe the surface water from the ground within the curtilage of these houses respectively, undoubtedly as a fact all drain into this space at the side of the road, and it follows from that that this space at the side of the road is a space which, if it does in fact constitute a drain, is not within the definition of "drain" which is excepted from the definition of "sewer." The definition of "sewer" is "'sewer' includes sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies." And when one turns back to see what a drain "interpreted as aforesaid" is, one finds "drain means any drain of and used for the drainage of one building only or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed" It is quite plain, therefore, that if this space over which the water flows, which we find on either side of this highway, is a drain of some sort, it is not a drain which falls within the exception I have just now read; that is, it is not a drain as interpreted in the definition clause defining it. That being so, really the only remaining question that I have to decide is whether or not the portion of the highway over or along which this surface water runs is a drain. Phillimore, J., came to the conclusion that it is something which falls within the definition "drains of every description," except the interpreted "drain" mentioned before. It was contended that it did not come within the words "drains of every description" because it was difficult to define its lateral extension. There was no edge to it as against the highway, or separating it from the highway. I do not think that makes any difference. One has to look at the purpose of this graduated hollow being made at the side of the road. I cannot doubt that the graduated hollow was made for the purpose of drainage. It certainly was made for the purpose of draining the water from the surface of the road, because it was not only that the water of the surface of the road might run down from the crown to the edge, but it was also for the purpose, having got the water to the edge there, that it should be held in a confined space until it reached the gratings which were to convey it into a sewer below. Under these circumstances it does seem to me quite plain that this was, as Phillimore, J., held it to be, something falling within the words "drains of every description" in the definition section. I think it does, as a matter of fact, carry off, not only the water from the surface of the road, but also the water from these adjacent houses. Under these circumstances it not only comes within the words "drains of every description," but it is also clearly outside the definition of "drain."

I do not myself intend to decide anything more; I am only deciding in this case that Phillimore, J., was right in finding in fact that the hollow at the edge of the road was used for and intended to be used for the purposes of drainage, and that being used among other purposes for the purpose of carrying off the water from these houses occupied by different owners, it is a sewer, and that the local authority, are under section 19 of this Act of Parliament, liable to keep this sewer free from pollution. I do not decide that every agricultural drain into which the surface water of two or three fields, or the surface or underground water of two or three fields, runs is necessarily within the words "drains of every description." I have not to decide that to-day. All I decide is that this drain, carrying the rain-water from these various houses, is a sewer, and that the local authority are bound, as it is admitted they are bound, to keep the sewer free from pollution. It was said that although it might be a sewer within the meaning of the Act, yet there was a decision in the Queen's Bench Division which decided that a drain might be a sewer for some purposes in the Act and not for others. I only want to say with regard to that case (*The Kinson Pottery Co.* v. *Poole Corporation*), that in the first place, if it did so decide I do not agree with it; and in the second place, when the judgments of Darling, J., and in particular of Channell, J., are carefully read, it does not seem to me that they did decide anything of the sort, nor does it seem to me that it was necessary for the purposes of that case that any such decision should be given. I think, under all the circumstances this appeal should be dismissed.

ROMER, L.J.—I also am of opinion that the finding of fact by Phillimore, J., that the channel which we have to consider in this case was a sewer within the definition of "sewers" in the Public Health Act, was correct. I need only very shortly point out a few leading circumstances which show, to my mind, that the decision of Phillimore, J., was right. The channel here is a well-defined channel to carry and take away the surface water, not only from the road, but also from the adjacent houses. It is a channel artificially made, and made for the purpose I have indicated; and, as I gather from the facts, there are gullies at regular intervals along the channel to allow the water passing along this channel to pass into the covered sewer below the surface of the road; and as I understand it, there are no less than about twenty houses already draining the surface water from their roofs by pipes into this channel. Those circumstances, to my mind, show that this is undoubtedly a sewer within the definition of the Public Health Act. With regard to the suggested evil consequences resulting from this decision—an argument which is always used in these cases—I may shortly observe that it does not follow because this is a sewer within the definition of the term "sewers" in the Public Health Act that it can be used by all the inhabitants of the district for sewage matter. From the finding that this channel is a sewer it results that the appeal fails, for clearly, it being a sewer, the defendants had a duty cast upon them with regard to cleansing it, among other matters. That duty they have broken, and the result of their breach of duty has been damage to the plaintiff as found by the judge, and as to that part of the case, there is no substantial appeal. That being so, it appears to me that the judgment was right, and the appeal fails.

STIRLING, L.J.—I am of the same opinion. We have to consider two questions. First, whether the channel which has been so much spoken of is a sewer within the meaning of the Public Health Act; and, secondly, whether the local authority have failed in the duties which are imposed upon them by that Act with reference to sewers within the meaning of the Public Health Act. Now, in order to decide the first question, we have to find what is the meaning of a "sewer" as that word is used in the Public Health Act. Section 4 contains a definition of the word

"sewer": "Sewer includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act." It has not been contended before us that the channel in question is a drain within the first exception, that is to say, drains to which the word "drain" as interpreted by the Act applies. And it is plain that it does not fall within the second exception, because in this case the authority having the management of the roads is a local authority under the Public Health Act. Therefore the question arises with regard to the widest ambit of the definition which makes the word "sewer" include sewers and drains of every description, and the question which we have to decide really comes back to this—a question of fact—is this channel a drain of any description within the meaning of the Act?—a drain of any description. Phillimore, J., on the facts, which I shall not repeat, came to the conclusion that it was a drain, and therefore a sewer within the meaning of the Act, and I cannot differ from that finding of fact on the part of Phillimore, J. But it has been argued that that cannot be, because, if so, then everyone under section 21 of the Act has a right to drain into it. Now I say, with all respect to those who use that argument, that that is an exaggeration of the effect of section 21. Section 21 does not provide that every owner of property within the district of a local authority shall be entitled as of right to connect every drain which he has with every sewer of the local authority. That distinctly is not the meaning of the Act. All that is given by that Act is a right to have his drain connected, or made to communicate with the sewers—with some of the sewers, that is to say, of the local authority. And the right is given subject to compliance with conditions, amongst others, that he is to comply with the regulations of the local authority in respect of the mode in which the communication to the drains is given. I do not think, therefore, that anything can be based upon that argument to prevent the court from coming to the conclusion that this is a sewer within the meaning of the Public Health Act. Then, that being so, has the local authority in this case failed to fulfil the duties imposed by the Act with reference to sewers within the meaning of the Act? Now that turns on the construction of section 19, "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health and to be properly cleansed and emptied." What is alleged against the local authority in this case is that that authority failed to keep this channel which we hold to be a sewer so as not to be a nuisance, or injurious to health and to be properly cleansed. What happened was that sewage—fœcal matter—escaped into the channel—I assume, improperly and contrary to law—and, having escaped there, was permitted to remain and was not removed, so that the sewer was not cleansed, and became a nuisance and injurious to health. It seems to me that the complainant in this case being a person who had not caused or who was not answerable in any way for the escape of the fœcal matter in question, the local authority failed in their duty; and it is no answer for them to say that sombody else was guilty of a wrongful act in permitting the escape of that fœcal matter. In that respect this case differs entirely from that which was relied on by the learned counsel for the appellant in *Kinson Pottery Co.* v. *Poole Corporation*, because there the person who was complaining, or was setting up the defence in that case, was the very person who was answerable for the improper escape of the fœcal matter into the sewer, and it was held, and, if I may say so, it appears to have been rightly held, that in that case he could not take advantage of his own wrong. Here no such question arises, and it seems to me that in this respect also the finding of the learned judge in respect of the fact is in accordance with law.

In those circumstances I agree with my brethren. The appeal fails.

The appeal was dismissed, and there was no order on the cross-appeal.

Solicitors, *Riddell & Co.*, for *E. W. Pocock*, Cardiff; *Cunliffes & Davenport*, for *L. G. Williams*, Cardiff.

From K. B. Div.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Oct. 27.

BROWN v. DIMBLEBY. (a.)

Married Woman—Separate estate—Restraint on anticipation—Wife's contracts during coverture—Judgment after cessation of coverture——Married Women's Property Act, 1893, (56 & 57 *Vict.* c. 63), s. 1.

A married woman, who was possessed of separate property with a restraint against anticipation, made a promissory note jointly with her husband. After the death of the husband an action was brought against the widow on the promissory note, and judgment was obtained against her. On an application by the plaintiff for the appointment by way of equitable execution of a receiver of the income due to the widow from the aforesaid property,

Held, that, although in consequence of her having become discovert the restraint against anticipation had ceased, still the property was protected by section 1 *of the Married Women's Property Act*, 1893, *and an order for a receiver could not be made.*

Decision of A. L. Smith and Vaughan Williams, L JJ., *in* Barnett *v.* Howard, [1900] 2 *Q. B.* 784, 49 *W. R. Dig.* 107, *approved and followed.*

Appeal from the refusal of Walton, J., to appoint a receiver by way of equitable execution.

The action was brought against a widow upon a promissory note. The defendant, who had married in 1892, made the note in question jointly with her husband in 1897. The husband died in 1902. The action was commenced in January, 1903, the plaintiff being the executrix of the payee.

On an application under order 14 the plaintiff obtained judgment against the defendant in the ordinary form.

The plaintiff then applied for the appointment of a receiver, by way of equitable execution upon the judgment, of certain income to which the defendant was entitled under the will of her father, proved in 1882, whereby certain trust funds were settled on her for her separate use for life without power of anticipation during coverture.

Walton, J., dismissed the application on the authority of *Barnett* v. *Howard*, [1900] 2 Q. B. 784, 49 W. R. Dig. 107, but gave leave to appeal.

The plaintiff appealed.

Archibald Brown, for the plaintiff.—The case turns on the true construction of section 1 of the Married Women's Property Act, 1893, which is as follows: "Every contract hereafter entered into by a married woman otherwise than as agent (a) shall be deemed

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to. Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." In *Barnett* v. *Howard*, which Walton, J., followed, the court held that the proviso to this section protected property which the married woman had during coverture been restrained from anticipating, although, in consequence of her having subsequently become discovert, the restraint against anticipation had ceased. That case, however, was decided by only two Lords Justices, and one of them doubted. The authorities on this subject are not all consistent, and it is suggested that the question as to the construction of this proviso should be reconsidered before the full Court of Appeal.

He referred to *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120; *Pelton Bros.* v. *Harrison*, 39 W. R. 689, [1891] 2 Q. B. 422; *Softlaw* v. *Welch*, 47 W. R. 626, [1899] 2 Q. B. 419.

Hume-Williams, K.C., and *T. T. Blyth*, for the defendant, were not called upon to argue.

COLLINS, M.R.—There is no ground for having this question reargued before the full Court of Appeal. In *Barnett* v. *Howard* A. L. Smith and Vaughan Williams, L.JJ., held that, while section 1 of the Married Women's Property Act, 1893, enlarged the area of the property which could be rendered available to satisfy a married woman's debts, it safeguarded the immunity of property which she was restrained from anticipating. That decision followed a series of decisions of this court which seem to me to be consistent with one another. This case is admitted to be covered by *Barnett* v. *Howard*, and therefore the appeal must be dismissed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Dunn & Hilliard.*

Solicitors for the defendant, *Blyth, Dutton, Hartley, & Blyth.*

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — July 28, 29, 30; Aug. 11, 1903.

SHEFFIELD CORPORATION v. BARCLAY & CO. (*a*.)

Company—Shares—Indemnity—Forged transfer of stock—Innocent transferee—Loss incurred by company—Liability as between company and transferee to bear loss.

The transferee of a forged transfer of corporation stock innocently and without negligence presented such transfer to the corporation requesting them to register the transfer. The corporation, acting without negligence, accepted and registered the transfer, and in due course issued certificates to the transferee, one of the defendants, as holder and owner of the stock, thereby incurring liability to the real owner of the stock, whose name had been forged, and in an action subsequently brought against them by the latter they were ordered to make good the loss sustained by him.

Held that the corporation having registered the transfer in pursuance of a statutory obligation, and not voluntarily, at the request of the transferee, no contract by the transferee to indemnify the corporation against any loss sustained in consequence of their acting on his request could be implied.

Decision of Lord Alverstone, L.C.J. (51 *W. R.* 204, [1903] 1 *K. B.* 1), *reversed.*

This was an appeal from the decision of Lord Alverstone, L.C.J. (reported 51 W. R. 204, [1903] 1 K. B. 1).

The facts are fully reported in the report of the case in the court below, but may be shortly stated as follows:

The action was brought by the Corporation of Sheffield against Messrs. Barclay & Co., bankers, to recover the sum of £11,487 17s. 5d., being the amount of principal and interest of certain corporation stock which belonged to certain trustees named Timbrell and Honnywill, and was transferred to a nominee of the defendants under a transfer purporting to be executed by Honnywill, but which, for the purpose of this action, must be taken to have been a forgery.

Prior to the 13th of April, 1893, £8,500 Sheffield Corporation Redeemable Stock was transferred to the names of A. A. Timbrell and A. O. Honnywill, who were trustees of a certain estate. The certificate of the stock in these names bearing date the 13th of April, 1893, was produced at the trial. The stock had stood in the name of Sutcliffe from 1886, but had been transferred on change of trustees to Timbrell and Honnywill on the 29th of March, 1893, and on the 13th of April, 1893, a certificate was issued in their names.

Upon the 11th of April, 1893, a transfer of £8,200 of this stock to E. E. Barclay, a representative of the defendants, purporting to be executed by Timbrell and Honnywill, was handed to the defendants Barclay & Co. For the purpose of this case it must be taken that the signature of Honnywill to the transfer of the 11th of April was a forgery.

On the 15th of April, 1893, the defendants, Messrs. Barclay & Co., sent the transfer of the 11th to the corporation, enclosed in a letter in the following terms: "54, Lombard-street, London, E.C., April 15, 1893. Messrs. Barclay, Bevan, Ransom, & Co. present their compliments to the Registrar of the Sheffield Corporation and beg to send enclosed the transfer of £8,200 3½ per cent. 1883 stock, and will be obliged by his registering the same in the company's books in the name of their Mr. E. E. Barclay, sending them the new certificates in due course. Messrs. Barclay & Co. also enclose the amount of the registration fee. The Registrar, Sheffield."

This was followed by a letter of the 17th from Mr. Sarkas, the registrar, acknowledging the receipt, but pointing out that the registration fee had not been sent; and on the 18th of April Messrs. Barclay & Co. sent the registration fee.

On the 28th of April, 1893, E. E. Barclay, the transferee named in the forged transfer of the 11th of April, executed a transfer of £8 000 of the stock to Messrs. Young & Macdonald, and, upon the 12th of May, of the balance, £200, to Mary Florence Cockayne.

Upon the 1st of June the plaintiffs issued certificates to Young & Macdonald for the £8,000 and to Mary Cockayne for the £200.

In the year 1901 an action was brought by Honnywill against the corporation, claiming the rectification

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

of the register by inserting his name as the holder of the £8,200 stock transferred to Barclay under the forged transfer and the interest and dividends paid thereon. In that action the jury found that the transfer was a forgery and, had not been executed by Honnywill or with his authority, and for the purpose of this action it was agreed that the defendants were bound by that finding."

Lord Alverstone, L.C.J., found as a fact that there was no negligence either on the part of the defendants or their agents, or on the part of the registrar or of any official of the corporation. After a full and careful review of the authorities, he came to the conclusion that in the present case, as between the two innocent persons, the plaintiffs and the defendants, the loss should be borne by the defendants, who had innocently caused the plaintiffs to act upon an instrument which turned out to be invalid. His lordship also thought that sub-section 1 of section 30 of the Sheffield Corporation Act, 1883, relied on by the defendants, did not afford them any defence, and, except upon the question of negligence, did not appear to him to affect the point he had to decide. His lordship then gave judgment for the plaintiffs for the amount claimed, and made a declaration that the plaintiffs were entitled to be indemnified by the defendants in respect of the liabilities arising from the transactions.

The defendants appealed.

Haldane, K.C., and *F. R. Y. Radcliffe*, for the appellants.—There has been no negligence or misrepresentation on the part of the defendants. The corporation was bound to keep a proper register. That being so, the doctrine of *Simm* v. *Anglo-American Telegraph Co.*, *Anglo-American Telegraph Co.* v. *Spurling*, 28 W. R. 290, 5 Q. B. D. 188, applies, and the loss must fall on the plaintiffs.

They also cited *Collins* v. *Evans*, 5 Q. B. 820; *Toplis* v. *Grane*, 3 Bing. N. C. 636; *Childers* v. *Wooler*, 8 W. R. 321, 2 E. & E. 287; *Dugdale* v. *Lovering*, 23 W. R. 391, L. R. 10 C. P. 196; *Smith* v. *Keal*, 9 Q. B. D. 340, 30 W. R. Dig. 197; *In re Bahia and San Francisco Railway*, 16 W. R. 862, L. R. 3 Q. B. 584; *Balkis Consolidated Co.* v. *Tomkinson*, 42 W. R. 204, [1893] A. C. 396; *Dixon* v. *Kennaway & Co.*, [1900] 1 Ch. 833, 48 W. R. Dig. 40; *Cottam* v. *Eastern Counties Railway Co.*, 9 W. R. 94, 1 J. & H. 243; *Johnston* v. *Renton*, 18 W. R. 284, L. R. 9 Eq. 181; *Carshore* v. *North-Eastern Railway Co.*, 33 W. R. 420, 29 Ch. D. 344; *Birmingham and District Land Co.* v. *London and North-Western Railway Co.*, 35 W. R. 173, 34 Ch. D. 261.

Danckwerts, K.C., *Bankes, K.C.*, and *Waddy*, for the plaintiffs.—The corporation was bound to accept the statement of the transferee and register the transfer, unless they could show it was fraudulent. The sending on of the transfer by the defendants to the plaintiffs was in law a representation by them to the plaintiffs that they believed the transfer to be a genuine transfer, and that they had the authority of the registered owner to do so, and the plaintiffs acted on the representation implied from the act of the defendants. The representation was a request to the plaintiffs to do a lawful act. The plaintiffs have thereby sustained the loss which they now seek to recover. There is an implied promise by the defendants to indemnify the plaintiffs. The view expressed by Lindley, J., in *Simm* v. *Anglo-American Telegraph Co.*, was dissented from by both Bramwell and Cotton, L.JJ., in the Court of Appeal.

They referred to *Venezuela Railway Co.* v. *Kisch*, L. R. 2 H. L. 99; *Redgrave* v. *Hurd*, 30 W. R. 251, 20 Ch. D. 1; *Toplis* v. *Grane*, 5 Bing. N. C. 636; *Childers* v. *Wooler*, 8 W. R. 321, 2 E. & E. 287; *Dugdale* v. *Lovering*, 23 W. R. 391, L. R. 10 C. P. 196; *Betts* v. *Gibbins*, 2 A. & E. 57; *Birmingham and District Land Co.* v. *London and North-Western Railway Co.*, 35 W. R. 173, 34 Ch. D. 261; *Carshore* v. *North-Eastern Railway Co.*, 33 W. R. 420, 29 Ch. D. 344; *Hart* v. *Frontino Gold Mining Co.*, L. R. 5 Ex. 111, 18 W. R. Dig. 57; *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82; *Dixon* v. *Kennaway & Co.*, [1900] 1 Ch. 833; *Richardson* v. *Williamson*, L. R. 6 Q. B. 276, 19 W. R. Dig. 87; *Firbank's Executors* v. *Humphreys*, 35 W. R. 92, 18 Q. B. D. 54; *Oliver* v. *Bank of England*, 50 W. R. 340, [1902] 1 Ch. 610; *Boston and Albany Railroad Co.* v. *Richardson*, 135 Mass. 473; and *Brown* v. *Howard Fire Insurance Co.*, 42 Maryland 384.

Radcliffe, in reply, referred to *Collen* v. *Wright*, 6 W. R. 123, 2 E. & B. 647; *Gibbs* v. *Guild*, 30 W. R. 407, 8 Q. B. D. 296, 30 W. R. 591, 9 Q. B. D. 59; *Derry* v. *Peek*, 38 W. R. 33, 14 A. C. 337; and *Nickalls* v. *Merry*, L. R. 7 H. L. 530.

Cur. adv. vult.

VAUGHAN WILLIAMS, L.J.—This is an appeal from the judgment of Lord Alverstone, L.C.J., in an action tried by him without a jury. The facts will be found sufficiently set forth in the judgment of the Lord Chief Justice. Shortly, they seem to me to come to this. One Honnywill was the owner of £8,200 stock of the Sheffield Corporation Redeemable Stock. This stock was created under the Sheffield Corporation Act, 1883, and the duties of the corporation in respect of the transfer of stock are controlled by sections 27 to 32 of that Act. This stock, by means of a forged transfer, purported to be transferred to Barclay, the defendant. The defendants, the firm of Barclay & Co., on the 15th of April, 1893, sent to the plaintiffs the forged transfer with a covering letter in the following terms. [His lordship read the letter, and continued:] This letter did not enclose the certificate of Timbrell and Honnywill, who purported to be the vendors and to have executed the transfer to Barclay. The Sheffield Corporation, however, had in their possession this certificate, having received it on account of the vendors from their brokers. The signature of Honnywill was a forgery, and in the year 1900 Honnywill brought an action against the corporation claiming the rectification of the register by inserting his name as the holder of the £8,200 stock transferred to Barclay under the forged transfer, and the interest and dividends paid thereon. The jury found that the transfer was a forgery, and for the purposes of this action it was agreed that the defendants were bound by that finding. The Sheffield Corporation thereupon, in compliance with the said judgment, purchased stock for the sum of £8,645 10s., and appropriated the same to Honnywill, and further paid to him a sum for dividends and interest and also his taxed costs of the said action.

The Sheffield Corporation, in the present action, claim that the defendants are liable to repay them the moneys so paid as aforesaid and to indemnify the plaintiff corporation in respect of the said liabilities. The plaintiffs shape their case in this way. They say that the plaintiffs have done a lawful act at the request of the defendants, which lawful act had caused the plaintiffs damage, and that, therefore, the defendants were liable for the damage so caused to the plaintiffs. They also say that the question whether a contract of indemnity ought to be implied is in each case a question of fact; and that the implication ought to be made in this case by reason of the defendants having sent in to the plaintiffs the forged transfer at the time when they requested, or, to use the word of the special Act, demanded registration and a certificate. Before dealing more

particularly with the terms of the Sheffield Act and the authorities bearing on the circumstances justifying an implication of a contract of indemnity. I wish to say at once that I regard what the defendants did and the act of the corporation thereupon as being aptly described by the words of Bramwell, B., in *Hart* v. *Frontino Gold Mining Co.*: "I made you a tender of myself as shareholder and you accepted me, and I have acted upon that acceptance." And I do not think that the defendants in sending in a transfer to the corporation gave any warranty to the corporation, or made any material representation to the corporation that the transferor was the registered holder of the stock: see the judgment of Lord Field in *The Balkis Consolidated Co.* v. *Tomkinson*, where he says a purchaser sending in the transfer to the corporation makes no misrepresentation which might estop him as against the corporation; see also an observation of Brett, L.J., to the same effect in *Simm* v. *Anglo-American Co.* (*Limited*).

I will now deal with the authorities. It seems to me perfectly clear that a distinction must be drawn between cases where a request is made to some one who has no duty in the matter independently of the request, and a case where the request is made to one who has a duty in the matter independently of the request. In the former case, where that which is requested to be done does not appear to be illegal, and an act is done in accordance with the request, the implication of a contract of indemnity by the person making the request will generally be made. In the latter case something more than a mere request will be required to raise the contract of indemnity. This distinction is apparent by a comparison of the cases of indemnity claimed by sheriffs with cases where an indemnity is claimed by those who have no duty in the matter. The fact is that in the latter class of cases the request or instruction is the sole cause of this act. In the former the performance of the duty is, or may be, the dominant cause. *Collins* v. *Evans* is a case in the Exchequer Chamber, in which the defendants, having reason to believe and actually believing a fact to be true and representing it as such to the sheriffs, who had a duty in the matter, were held not to be liable to an action, although it turned out in the event that they were mistaken; and Tindal, C.J., distinguished that case from the case of *Humphrys* v. *Pratt*, 5 Bligh. N. S. 154, on the ground that in that case the plaintiff pointed out the goods and required the sheriff to take them. *Childers* v. *Wooler* is a case on the same lines, in which the defendant Wooler, as attorney for the plaintiff in a suit, caused a writ of *fi. fa.* to be issued upon the judgment, and the usual indorsement of the amount to be levied was followed continuously by these words; "The defendant is a (here there was a blank), and resides at Redcar, in your Bailliewick"; and the Court of Exchequer Chamber held that the indorsement was nothing more than a mere statement by the attorney for the purpose of affording information to the sheriff, leaving the sheriff to his own discretion as to how he would act. On the other line of cases one finds as examples *Toplis* v. *Grane*, in which the defendant authorizes the plaintiffs as brokers to distrain, and the plaintiffs, after asking for an indemnity, proceeded to distrain and took some privileged goods in *bonâ fide* compliance with the defendant's direction, without, however, having obtained an indemnity, and the defendant was held liable. And, again, in *Betts* v. *Gibbins* goods were deposited with the plaintiffs for N., who took two casks away, and the defendant ordered the plaintiffs not to deliver the residue of the goods, which order the plaintiffs obeyed. The plaintiffs being sued and having paid a sum of money and costs to compromise the action, it was held in an action by the plaintiffs against the defendant that a promise to indemnify to the full amount claimed might be implied from the facts. These were cases in which there was no relation of principal and agent, and the mere request or instruction by the defendant to the plaintiffs, to withhold the goods from N., obeyed by the plaintiffs, was held to be sufficient evidence to raise a contract of indemnity. Where the relation of principal and agent exists it is *a fortiori* that a contract of indemnity may arise on the facts. These cases illustrate the distinction which I have drawn. I will now deal with the special provisions of the Sheffield Act, although I do not think that they differ materially from the provisions to be found in the Companies Act, 1862. The most material provisions seem to me to be section 25 (1), which requires the corporation to keep books in which shall be entered the names and addresses of the holders from time to time of corporation stock; and (2) that the corporation stock register shall be *primâ facie* evidence of the title of the persons entered therein as holders of stock. 26 (1) Which provides on demand of the holder of corporation stock, the corporation may if they think fit give him a certificate of proprietorship thereof; (2) that a stock certificate shall be *primâ facie* evidence of the title of the person therein named. 29 (1) Provides that where stock is transferable by deed (which is this case); (4) the deed of transfer when duly executed shall be delivered to and kept by the corporation or the registrar, and the corporation or the registrar shall enter a memorial thereof in the register of transfers; (5) the corporation or the registrar shall on demand and on delivery up of the old stock certificate, or on proof satisfactory to the corporation of its absence, deliver a new stock certificate to the purchaser; (6) until the deed of transfer has been so delivered the corporation shall not be affected thereby, and the purchaser of stock shall not be entitled to receive any dividend thereon. 30. (1) The corporation or the registrar, before allowing any transfer of stock, may, if the circumstances of the case appear to make it expedient, require evidence of the title of any person claiming a right to make the transfer.

It seems to me that in this case those who sent the old certificate to the corporation—that is to say, those who claim to be vendors—claim a right to make the transfer, and in my judgment all that Barclays did was to tender the transfer for acceptance, and the corporation accepted the transfer. The case, as pointed out by Bramwell, B., in *Hart* v. *Frontino Gold Mining Co.*, is analogous to the case of a *bonâ fide* holder of a bill of exchange presenting it for payment to a banker. If the banker pays it he cannot afterwards recover the money from the holder on the ground that the name of the drawer was forged. Lindley, J., took the same view in *Simm* v. *Anglo-American Telegraph Co.* In my judgment the provisions of the special Act bring this case within the observations of Blackburn, J., in the case of *In re Bahia and San Francisco Railway*, approved by Lord Herschell in *The Balkis Consolidated Co.* v. *Tomkinson*. Those observations run thus: "That when joint stock companies were established it was a great object that the shares should be capable of being easily transferred; that the Legislature had accordingly provided for the keeping of a register of the members, in order to keep which the company must alter the register whenever there was a transfer of its shares"; and the learned judge drew attention to section 31 of the Companies Act, 1862, which provides that a company may give certificates, and that these shall be *primâ facie* evidence of the title of the person named to the shares specified, and pointed out that

by granting the certificate the company make a statement that they have transferred the shares specified to the person named in it, and that he is the holder of the shares; that if the company have been deceived and the statement is not true, they may not be guilty of negligence, but they and no one else had power to inquire into the matter. The learned judge expressed the opinion that it was the intention of the Legislature that these certificates should be documents on which buyers might safely act, and continued thus: "It is quite clear that a statement of a fact was made by the company on which the company at the very least knew that persons wanting to purchase shares might act. And the claimants having *bonâ fide* acted upon that statement and suffered damage, can they recover from the company? I think they can on the principle enunciated in *Freeman* v. *Cooke*, 2 Ex. 654." And Lord Herschell in *Balkis Consolidated Co.* v. *Tomkinson* points out that it makes no difference whether it is the purchasers who are seeking to render the company liable by way of estoppel, or the vendor of the shares who himself received the certificate from the company, because it must equally have been within the contemplation of the company that a person receiving the certificate from them might on the face of it enter into a contract to sell the shares. It seems to me to be the fact in the present case.

I have only now to deal with the case directly bearing on the position and rights relatively of the person who tenders a transfer for acceptance and the company who accept it. It was not really contested in argument before us but that the corporation had some duties towards the person tendering the transfer. It was admitted that it was their duty to look at their register; and it was admitted that, in some cases at all events, the character of the duty was such that the issue of the certificate might raise an estoppel against the corporation if they neglected that duty. Indeed, the House of Lords in the case of *Balkis Consolidated Co.* v. *Tomkinson* affirmed the judgment in favour of the plaintiff on the basis of the estoppel arising on the issue of the certificate; and it seems to me that in the main the opinions of the law lords were rather in favour of than contrary to the opinion of Bramwell, B., in *Hart* v. *Frontino Gold Mining Co.*, and Lindley, J., in *Simm* v. *Anglo-American Telegraph Co.* It is true that Lord Macnaghten in his judgment says: "Whether under such circumstances a person ought to be permitted to rely upon a misrepresentation innocently made to which he has in a sense and to a certain extent contributed is, I think, a matter not unworthy of consideration. The point, however, was not argued; the evidence bearing upon it was not sifted, and the attention of the learned counsel for the respondents was not called to it. It would not, therefore, be right for me to say more than that in my opinion there is nothing to prejudice the question if it should ever be raised, even under circumstances similar to those which have occurred in the present case. With this reservation, I concur in the motion that has been proposed." But this doubt as to the estoppel seems to me rather to negative than to affirm that in such a case there would be evidence upon which to raise an implied contract of indemnity. Then, again, Lord Field, after affirming in general terms the view of Lord Herschell, and agreeing in the view that a transferor who has entered into a contract to deliver valid shares upon the face of a certificate of his ownership issued to him by the company is in the same position as a purchaser, goes on to say: "I can very well understand that there may be cases in which, the untruth of the statement not depending upon any fact within the knowledge of the company as to which they have means of knowledge, which they reasonably ought to have recourse to, and the person setting up the estoppel having equal means of knowledge, and having applied for and obtained the certificate upon an alleged transfer, I say there may be such cases in which no such estoppel may exist." And he goes on to say that such a state of things existed in *Simms* v. *Anglo-American Telegraph Co.*, and to agree with the Court of Appeal in that case that there was no duty upon that company to inquire of a registered holder whether the signature was genuine, although it was the practice to do so. This passage raises a doubt as to estoppel in other cases; but the next passage seems to me distinctly to negative the raising of any contract of indemnity against the person presenting the transfer, in case it turns out in fact not to have been executed by the person purporting to be the transferor, for he says, "In sending in a transfer to a company for registration it does not appear to me that the applicants give any warranty or even make a material representation to the company that the transferor is the registered holder of the shares." But in the same judgment he says that it is at least the duty of a company, before affixing the seal of the company to a representation which they know that the applicant requires as evidence of title upon which he may go into the market and make contracts of sale, according to the regulations of the Stock Exchange, and involving the duty of making a complete delivery of genuine shares, to ascertain by reference to their own register whether the proposed transferor appears to be the holder of the shares which he purports to transfer or is the registered holder of the shares. How can it be said, in a case in which the corporation had a statutory duty to accept or reject the transfer, a contract of indemnity is raised against the person who, in presenting the transfer, gave no warranty and made no material representation? So to hold, in my judgment, would be inconsistent with business and would materially impede that traffic in shares and stocks which is essential to the very existence of joint stock companies and to the floating of loans to municipal corporations. In my judgment, the judgment of the Lord Chief Justice was wrong and ought to be reversed.

ROMER, L.J.—I have come to the same conclusion. After the judgment of the Lord Justice I will only say a few words. In the first place it is important to remember that the sole question before us is whether a contract of indemnity can be implied. I say this, because it may well be that the transaction between the parties gave rise to some rights on the part of the corporation against the defendants. For instance, if the corporation had been fortunate enough to discover the forgery in good time, and before the defendants had in any substantial way altered their position on the faith of the certificate issued to them, it would have been entitled to bring an action against the defendants to recover the certificate, and to establish the right of the corporation to remove the name of the defendant E. E. Barclay from the register of stockholders in respect of the stock in question. But can a contract of indemnity be implied? Now that kind of contract is a very onerous one on the part of the person who has to indemnify, and is one not lightly to be implied. And in the circumstances of this case it appears to me that it ought not to be implied. This is not the case where a person, having no independent duty or obligation to do a particular act, does that act at the request and for the purposes of another. In such a case, if the act is one not known by him at the time to be illegal, but is one that turns out to be wrongful, the person doing the act may make the

person requesting it indemnify him under an implied contract. But in the present case it was in the interests of the corporation itself to keep the register of stockholders and issue certificates, and the corporation was bound to keep the register correctly. The defendants were obliged to send in the transfer to E. E. Barclay, and to get the transferee registered by the corporation, assuming (as the facts were) that they believed the transfer to be genuine, and desired, accordingly, to be duly recognized as holders of the stock. The corporation did not act voluntarily on the request for registration made by the defendants. It acted because of the duty cast upon it, and (partly, at any rate) for its own purposes. When it received the transfer it had a duty or obligation cast upon it, as between itself and the transferors, to see that the transfer was really the act of the transferors. Accordingly the corporation took such steps as seemed to it sufficient to satisfy itself that the transfer was genuine. It compared the signatures of the transferors in its possession with the signatures to the transfer, and sent notice to the transferors that it was going to act on the transfer if no objection was taken by them. In fact, the corporation judged and acted for itself in dealing with the transfer, and did not act merely on the request of the defendants. Nor is this a case where, as between these parties in favour of the corporation, the authenticity of the signatures of the transferors is to be taken to be a matter exclusively in the knowledge of the defendants. As a matter of business it cannot be that the corporation was entitled to assume that the transferee of stock in ordinary course had personally the means of seeing, or ought by self or agent to see to the actual execution of the transfer by the transferors. The purchase and transfer of stocks and shares on the Stock Exchange and elsewhere could never practically be carried out if the purchaser was in each case, having regard to his possible future dealings, bound to see by himself or his agent personally to the execution of the transfer by the transferor. And I think the corporation must be taken to have known this. The transferee is not, in reference to the transfer, in the same position as the corporation is with regard to the position of the transferor as registered owner of the stock; for the register of stockholders is in the possession of the corporation, and the corporation is bound to keep it correctly. This being so, it appears to me that all that could be assumed by the corporation as against the transferee sending in the transfer for registration was that the transferee had taken reasonable care in the matter, and had reasonable ground for believing and did believe that the transfer, which, on the face of it, purported to be executed by the transferor, was, in fact, so executed. No representation could, in my opinion, be implied, under the circumstances, against the transferee beyond what the corporation was entitled to assume against him as above stated. I think, therefore, that no warranty of the execution of the transfer by the transferor ought to be implied as between the transferee and the corporation. But I may point out that, even if some representation beyond what I have above stated could, under the circumstances, be implied as against the defendants, or even if a warranty could be implied as against them, it would not of necessity follow that a contract of indemnity should be implied. A warranty and a contract of indemnity are distinct; one important difference being the period from which the Statute of Limitations would run. And, in the present case, whatever other implications might be made against the defendants, I think it would not be right to imply a contract of indemnity.

STIRLING, L.J.—The facts which gave rise to this action may be stated very shortly. The plaintiffs are the corporation of Sheffield, and have, under the authority of a private Act of Parliament, issued certain stock, bearing interest at 3½ per cent. The Act imposes on the plaintiffs duties with respect to the registration of transfers of such stock and the issue of certificates to stockholders. The defendant Barclay is a member of a banking company (his co-defendants), who made an advance to customers on the security of what purported to be a transfer to him of £8,200 of the corporation stock. This transfer he sent to the plaintiffs with a request that it might be registered and new certificates issued. With this request the plaintiffs complied. The defendants' customers then sold the stock, and the defendant Barclay concurred in a transfer to the purchasers. Some years afterwards it was discovered that the transfer to the defendant was a forgery, and the plaintiffs were compelled to make good the loss to the true owners of the stock. This action is brought by the plaintiffs to obtain indemnity from the defendants against the loss thus sustained by the plaintiffs. It is admitted, on the one hand, that the plaintiffs acted without any negligence; and, on the other, that the defendants acted in perfect good faith. The provisions of the plaintiffs' Act as to keeping a register of transfers and the issue of certificates do not materially differ from from those contained in the Companies Act, 1862; and with reference to them it was pointed out by the court in *In re Bahia and San Francisco Railway* that the effect was to make the shares of the company more easily dealt with, and, consequently, of greater value. This view was adopted, and acted on by the House of Lords in *Balkis Consolidated Co.* v. *Tomkinson*. The provisions of the plaintiffs' Act, although they impose a burden on the plaintiffs, are, nevertheless, to their advantage; for in the absence of them it might be presumed that the stock could not have been issued with equal advantage to the plaintiffs. The Act does not expressly confer any right of indemnity on the plaintiffs; and if any such right exists it must arise by implication of law. The main contention before us is that there is on the part of the defendants an obligation so arising. Now the mere performance of a duty imposed by law on any one holding a definite legal position does not constitute a consideration sufficient to support a promise to him by the person to whom the duty is owed. If, however, the person who owes the duty at the request of him to whom it is due departs from the strict legal course of performance of that duty or puts himself in a different position from that created by law, then a consideration may arise for a promise express or implied. This is illustrated by the cases relating to the indemnity of sheriffs, which were much relied on in the argument on behalf of the plaintiffs. It was decided in *Bridge* v. *Gage*, Cro. Jac. 103, that a promise to pay money to a sheriff in consideration of his executing a writ of *elegit*, which the sheriff by the common law was bound to execute without remuneration, could not be enforced by action. In *Arundel* v. *Gardiner*, Cro. Jac. 652, it was held that a promise made by an execution creditor to a sheriff to save him harmless in consideration that he would execute a writ of *fi. fa.* by seizing particular goods was enforceable. In *Humphrys* v. *Pratt* a sheriff who had at the request of the execution creditor seized particular goods was held by the House of Lords to be entitled to an indemnity, although not expressly agreed to by the execution creditor. There is, unfortunately, no report of what was said by the noble and learned lords who addressed the House; but in *Collins* v. *Evans* the *ratio decidendi* is explained by Tindal, C.J., in delivering the judgment of the Exchequer Chamber.

If, then, the goods are simply pointed out to the sheriff and he is left to follow his discretion—that is to say, to take the legal course—he is not entitled to indemnity; but if he is required to seize them he is. The sheriff in the latter case gives up his right to make inquiry as to the ownership of the goods and take steps for his own protection, in case there should be forthcoming a claim as to them other than the judgment claim, and puts himself in the position of a mandatory or agent of the execution creditor for the purpose of taking the goods; and is held to be entitled to the benefit of an implied agreement for his indemnity. In the present case the plaintiffs were under a statutory obligation to register transfers and issue certificates; the defendant called on them to perform their duty under the statute with regard to the transfer which he forwarded to them; and, as it seems to me, he did nothing more. The plaintiffs were left to perform their legal obligations; they gave up no right, and assumed no different position to the defendant than that created by the statute; and, in my judgment, are not entitled to the indemnity sought in the action. Inasmuch as the defendant Barclay was admittedly innocent of anything in the shape of fraud, the plaintiffs had not and did not in fact claim to have any cause of action based on misrepresentation. It was suggested, though somewhat faintly, that the defendant warranted to the plaintiffs the genuineness of the transfer. In my judgment the defendant did not give any such warranty. I think that the true nature of the transaction between the plaintiffs and the defendants is as stated by Lord Lindley (then Lindley, J.) in his judgment in the case of *Anglo-American Telegraph Co.* v. *Spurling;* but, further, it seems to me that, even if the warranty was given, the Statute of Limitations, which is pleaded, is an answer to any claim founded on it; for the warranty was broken and the cause of action (if any) accrued more than six years before the commencement of this action. The learned Lord Chief Justice based his decision on that of the Court of Appeal in *Simm* v. *Anglo-American Telegraph Co.*, which he held to be an authority for the proposition that, as between two innocent parties, one who had innocently and without negligence handed in a forged transfer upon which a joint stock company (under the Companies Act, 1862) was asked to act, the loss was to fall upon the person who handed in the transfer. I desire to point out that the position of the plaintiffs in that case does not in all respects resemble that of the defendant Barclay in the present. The bank for whom the plaintiffs in *Simms* v. *Anglo-American Telegraph Co.* were trustees had, before action brought, received payment of their advances in full from their customers, who had not dealt with the stock or acted on the certificate issued by the company; whereas in the present case the defendant Barclay and his customers have dealt with stock on the faith (as I understand) of the certificate issued by the Corporation of Sheffield. The materiality of this circumstance is shown by *The Balkis Consolidated Co.* v. *Tomkinson*, to which, unfortunately, the attention of the Lord Chief Justice does not appear to have been called. The House of Lords there held that a person who has procured the registration of an invalid transfer of shares in a joint stock company, and to whom certificates have been issued, is entitled, if he has sold the shares on the faith of those certificates, to recover damages from the company upon a refusal to register his purchasers as owners of the shares. It is quite true that there the invalidity was not the result of forgery, and that this was one of the grounds by which the case of *Simm* v. *Anglo-American Telegraph Co.* was distinguished; but, at the same time, it seems to have been the opinion of Brett and Cotton L.JJ., that the plaintiffs in that action would, notwithstanding the forgery, have had a good title as against the company so long as the advances made by the bank remained unpaid. However this may be, all the learned judges of the Court of Appeal expressly leave open the question raised by the action of *Anglo-American Telegraph Co.* v. *Spurling*, which Lindley, J., had decided adversely to the company. With that decision I agree; and, in my judgment, this appeal ought to be allowed.

Appeal allowed.

Solicitors, *Maples, Teesdale, & Co; R. F. & C. L. Smith*, for *H. Sayer*, Sheffield.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — June 30, 1903.

VAN LAUN & CO *v.* BARING BROTHERS & CO. (LIMITED). (*a.*)

Practice—Interpleader—Appeal—Summary decision at chambers—Ord. 57 *rr.* 9, 11—*Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 1 (*b*); *s.* 5; *Schedule.*

Where upon an interpleader summons the judge decides the question under ord. 57, *r.* 9, *without directing an issue or ordering a special case to be stated, there is no appeal from his decision, even with leave, the Judicature Act*, 1894, *not having modified or in any way altered section* 17 *of the Common Law Procedure Act*, 1860.

Appeal from an order of Phillimore, J., at chambers in interpleader proceedings.

The defendants, Baring Bros. & Co. (Limited), guaranteed to the plaintiff the payment of moneys which should become due to him under a contract which he had made with the Russian Government. Subsequently an action was brought by the plaintiff against the defendants to recover a sum of money under the guarantee. A charge was given by the plaintiff to one Chatterton upon the moneys received under the contract, and two separate charges were also given by the plaintiff upon the moneys received under the contract over and above the sum of £15,565 in favour of one Mosino and one Lewison for the repayment of sums of £2 000 and £1,000 respectively. By the judgment in the action the defendants were ordered to pay to the plaintiff the sum of £2 748. These moneys were claimed in the hands of the defendants by Chatterton, and also by Mosino and Lewison. The defendants thereupon took out an interpleader summons, and the master directed an issue to be tried as to the title to the moneys.

On appeal Phillimore, J., set aside the order of the master, and heard the matter summarily under ord. 57, r. 9, being of opinion that the question was one of law turning upon the construction of the documents. The learned judge made an order that the claims of Mosino and Lewison should be barred upon the ground that their charges had not come into effect, as the plaintiff had not received in all the sum of £15,565 under the contract, and he ordered the £2 748 to be paid out to Chatterton. He gave leave to appeal.

Lewison appealed from the order so far as it barred his claim.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

J. A. Hamilton, K.C., and *J. R. Atkin*, for Chatterton, took the preliminary objection that no appeal lay even with leave.—The learned judge having decided the merits of the claims in a summary manner under ord. 57, r. 9, no appeal lies from his decision, and there is no power to give leave to appeal: *Waterhouse* v. *Gilbert*, 15 Q. B. D. 569, 33 W. R. Dig. 158; *Bryant* v. *Reading*, 34 W. R. 496, 17 Q. B. D. 128; *Lyon* v. *Morris*, 35 W. R. 707, 19 Q. B. D. 139; *In re Tarn*, 41 W. R. 397, [1893] 2 Ch. 280. Unless the Judicature Act, 1894, has altered the law, there is no appeal. That Act has not altered the law. Section 17 of the Common Law Procedure Act, 1860, stands unaffected by that Act. Section 5 of the Act of 1894 gives power to make rules with respect to matters contained in and regulated by the enactments described in the schedule, and among those enactments is section 17 of the Common Law Procedure Act, 1860. No rules have, however, been made under that section giving a right of appeal in such a case as this. No appeal therefore lies.

Montague Lush, K.C., and *Lewis Thomas*, for Lewison.—The effect of section 5 of the Judicature Act, 1894, is to repeal or modify section 17 of the Common Law Procedure Act, 1860, and to allow a limited right of appeal by leave. That section, read with the schedule to the Act, gives power to make rules as to matters regulated by section 17 of the Common Law Procedure Act, 1860. As no rules have been made, it must be taken that ord. 57, r. 11, is to be deemed to be a rule made under the powers of section 5, and therefore an appeal lies with leave. Moreover, an appeal lies with leave under section 1, sub-section 1 (*b*), of the Judicature Act, 1894. *Waterhouse* v. *Gilbert* is not in point, because that case only decided that no appeal lay from the Divisional Court to the Court of Appeal.

They referred to *Robinson* v. *Tucker*, 32 W. R. 697, 14 Q. B. D. 371; *Dawson* v. *Fox*, 33 W. R. 514, 14 Q. B. D. 377; *Webb* v. *Shaw*, 34 W. R. 415, 16 Q. B. D. 658.*

J. R. Atkin replied.

COLLINS, M.R.—This is an appeal from an order of Phillimore, J., at chambers in an interpleader matter disposing of the merits of the claims in a summary manner. The question appearing to the learned judge to be one of law, he decided it under ord 57, r. 9. The objection has been taken that no appeal lies from that decision even with leave.

It seems to me that upon the authorities we are bound to hold that no appeal lies. To my mind, considerable difficulty was involved in taking the first step and saying that ord. 57, r. 11, was not incompatible with section 17 of the Common Law Procedure Act, 1860, and did not modify that section. Rule 11 provides that, except where otherwise provided by Statute, the decision of the court or a judge in a summary way, under rule 8, shall be final and conclusive, unless by special leave of the court or judge, or of the Court of Appeal. That was the difficulty, but it was explained by the Court of Appeal, the explanation being that the words at the beginning of the rule, "except where otherwise provided by statute," compelled the court to ascertain whether the matter had been regulated by statute. The statute which regulates it is section 17 of the Common Law Procedure Act, 1860, and that section makes the decision of the court or judge in a summary manner final and conclusive against the parties and all persons claiming by, from, or under them; and it has been decided that that section prohibits an appeal. That has been laid down as the proper construction of rule 11. In the present case the decision of the learned judge was a decision in a summary manner, and though he gave leave to appeal it does not prevent the decision from being final and conclusive under section 17. That is involved in *Waterhouse* v. *Gilbert*, which is the foundation of the present law. In that case the master decided the case summarily at chambers against the execution creditor, but gave leave to appeal. The judge at chambers held that no appeal would lie, and the leave to appeal was of no avail. There was then an appeal to the Divisional Court, who again held that no appeal lay. From that there was an appeal to this court, and this court held that no appeal lay to them. It is contended that the Court of Appeal only decided that no appeal lay from the Divisional Court. But the question was considered one of sufficient importance for the full court to determine it, and it is obvious that the court were not deciding the mere question whether an appeal lay from the Divisional Court to the Court of Appeal. The whole object of having the full court, was to decide whether rule 11 had modified section 17 so as to let in an appeal by leave. The court decided that the rule had not in any way affected section 20 of the Appellate Jurisdiction Act, 1876, and applying section 20 to section 17 of the Common Law Procedure Act, 1860, they held that in such a case as the one before them there was no appeal from the decision of the Divisional Court, nor any power in the Divisional Court or in this court to give leave to appeal to this court. Though not expressly decided, the real ground of the decision was that the provisions of section 17 were unaffected by rule 11, and that, therefore, the decision of the judge at chambers was final. That was followed in the next year (1886) in *Bryant* v. *Reading*, and in 1887 in *Lyon* v. *Morris*. Lastly came the case of *In re Tarn*, where it was decided that, where in interpleader proceedings a judge decides a question under ord. 57, r. 9, without directing an issue or stating a special case, his decision is a summary decision within the meaning of the Common Law Procedure Act, 1860, s. 17, and is not subject to appeal. That is an express decision upon the point in question. Those decisions establish conclusively that there is no appeal in such a case as this, and any *dicta* of judges before *Waterhouse* v. *Gilbert* which are inconsistent with those decisions must be taken to be wrong.

It is next contended that section 5 of the Judicature Act, 1894, has to some extent repealed or modified section 17 of the Common Law Procedure Act, 1860, and that as that section gives power to make rules it must be taken that ord. 57, r. 11, is now a rule made in the exercise of that power. Section 5 gives power to make rules with respect to the matters contained in and regulated by the enactments described in the schedule to the Act; and one of the enactments described in the schedule is section 17 of the Common Law Procedure Act, 1860. That seems to me to be as clear a statement as possible by the Legislature that section 17 remains unrepealed. It would be a curious result if we were to say that the effect of it was to repeal that which the Legislature says is in force. So far from saying that it is repealed, the Legislature has asserted its continued vitality. The appeal must therefore be dismissed.

MATHEW, L.J., concurred.

COZENS-HARDY, L.J.—I am of the same opinion.

* They also contended that Phillimore, J., acted under a misapprehension in dealing with the matter summarily where the amount in dispute was so large, thinking that there was an appeal, and that he would not have done so if he had thought that no appeal lay. They therefore asked the Court to refer the matter back to him in order that he might direct an issue to be tried.

We are asked in effect to overrule four decisions of the Court of Appeal from *Waterhouse* v. *Gilbert* to *In re Tarn*. It is impossible for us to say that the matter is now open unless it can be said that the Judicature Act, 1894, has made some alteration in the law as so laid down. I confess that I am unable to see how that Act has done so. The Act contains an express assertion that section 17 of the Common Law Procedure Act, 1860, is still in force.

Appeal dismissed.

Solicitor for the appellant, *Swepstone & Stone.*

Solicitor for the respondent, *H. W. Chatterton.*

High Court of Justice.

Chan. Div. } Farwell, J. } Nov. 10.

In re HOUSTOUN'S SETTLEMENT.
SPARKES *v.* HUTCHELL. (*a.*)

Practice—Costs—Copies of documents for the judge.

Where the court is asked to construe the terms of a document, a copy should be provided for its use, and the costs of such copy should be allowed on taxation.

In this case the decision depended entirely on the construction which the court might place on the terms of two indentures of settlement. No copies of these deeds had been provided for the use of the judge, it being stated in explanation that costs of such copies were commonly disallowed by the taxing-master.

Vaughan Hawkins, for the trustees, the plaintiffs.

Fowler and *M. D. Warmington*, for defendant tenants for life.

Wood, for defendant remaindermen.

FARWELL, J., said that it was quite impossible for a judge to decide on the construction of documents without having copies before him. In his opinion the costs of copies supplied for the use of the judge ought always to be allowed, and if it was not the practice to allow them he was prepared to make an order in every case before him which turned on the construction of documents that such costs should be allowed.

Solicitors, *Farrer & Co.; Hunter & Haynes.*

Chan. Div. } Farwell, J. } July 31; Aug. 1, 3, 12, 1903.

TENDRING HUNDRED WATERWORKS CO. *v.* JONES. (*b.*)

Solicitor—Partnership—Fraud of partner—Liability of partners—Partnership Act, 1890 (53 & 54 *Vict c.* 39), *s.* 11 (b).

J. & G., who were solicitors, entered into a partnership deed by which all appointments held by G. were to be comprised in the business. G. was secretary to a company. The company, for purposes of their own, had property bought by them conveyed into the name of G., who retained the title-deed. The transaction was carried through by the firm of J. & G. It was no part of the duty of G., as secretary, to take a conveyance of real estate of the company or to take charge of the title-deeds of the company. G. raised money on deposit of the title-deed, and subsequently executed a legal mortgage to N. J. had no notice of the conveyance to G., except in so far as the firm of J. & G. had acted for the purchasers in the matter.

Held, that J. & G., being partners only as far as the secretaryship of the company was concerned, and the company by vesting the legal estate in G., having thus enabled him to withdraw the deed in his capacity as trustee, there was no implied contract that the firm of J. & G. were to be responsible for the deed after it had been handed over to G., as the legal owner; and consequently that J. was not liable for his partner's fraud.

On the 30th of September, 1895, the defendant Jones took C. E. Garrard into partnership with him in the business of a solicitor at Manningtree. Jones had another business as solicitor at Colchester, with which Garrard had nothing to do.

The first clause of the partnership deed was as follows: "The said H. W. Jones and C. E. Garrard will become and remain partners in the profession of solicitors at Manningtree aforesaid, but not elsewhere or otherwise, such partnership business to consist of the ordinary business of a solicitor of the High Court of Justice and Bankruptcy, and shall include conveyancing and all other matters of business usually undertaken by solicitors, and shall comprise and include all present appointments now or hereafter during the said partnership, held by the said H. W. Jones in the Tendring Hundred but not elsewhere, and by the said C. E. Garrard in the said Tendring Hundred or elsewhere, or either of them, as well as all premiums payable to either partner in respect of any articled clerk in the said Tendring Hundred, and which premiums shall be deemed part of the partnership profits of the year in which such premium or premiums shall be received, but all sums received by either partner in his capacity as a commissioner to administer oaths, for swearing affidavits, or taking declarations shall not be included or form part of the partnership business aforesaid, but all receipts and income from the said H. W. Jones's appointment as clerk to the Tendring Hundred Justices, and all receipts and income from the said C. E. Garrard's present appointments as well as any future appointments to be obtained by the said C. E. Garrard and H. W. Jones . . . shall constitute and form part of the said partnership business and assets as from the 24th of June, 1895, during the term of fourteen years if the said H. W. Jones and C. E. Garrard shall so long live under the style or firm of 'Jones & Garrard.'"

Garrard was secretary of the Tendring Hundred Waterworks Co., the present plaintiffs.

In the month of October, 1897, the plaintiffs were desirous of buying some land, but did not wish their name to appear in the negotiations as the intending purchasers; and accordingly they instructed the firm of Jones & Garrard to negotiate for the purchase. This was done, and on the 4th of August, 1898, an agreement was entered into between the owners and Garrard for the purchase by Garrard of the property in question. In due course this was reported to the plaintiffs, who resolved "that the land be conveyed to the secretary (C. E. Garrard) for the present, on his undertaking to convey to the company when called upon," and a cheque for £503 11s. 11d. was drawn in favour of Garrard. This cheque was paid into Garrard's private account, but the amount subsequently passed into the firm's account in two sums at two different dates.

On the 21st of October, 1898, the conveyance, duly executed by Garrard, was sent to London with the firm's cheque for £510, and on the 27th of October

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

(*b.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

it was executed by the vendors and returned to Jones & Garrard. It was a simple conveyance to Garrard in fee, but contained a covenant by him to fence off the purchased property and keep such fence in good repair.

On the 4th of November, 1898, the completion of the purchase was reported to the board. Neither the plaintiff company nor anyone else ever informed the defendant Jones that the conveyance was taken in Garrard's sole name; nor had he any notice or knowledge of the transaction until after Garrard's fraud, hereinafter mentioned, had been committed, except so far as he was fixed with notice by reason of the approval of the conveyance by his firm and the receipt of payment for the same.

From the 10th of February, 1893, until the 10th of April, 1902, plaintiffs rented a safe in the Chancery Lane Safe Deposit Co. It was no part of the duty of the secretary of the company to hold the company's deeds, or to accept conveyances of their land in his name. No resolution of the board expressly referring to the custody of the deed of conveyance of the land was ever passed.

On the 23rd of November, 1899, Garrard deposited the deed with F. J. Nunn to secure £500 lent to Garrard by Nunn.

On the 12th of September, 1900, the deeds were returned by Nunn to Garrard "for the purpose of obtaining the money elsewhere."

On the 1st of March, 1901, Garrard resigned his secretaryship of the plaintiff company under compulsion, in consequence of the complaints of the auditors of his neglect in keeping the books.

On the 27th of March, 1901, the defendant commenced proceedings for dissolution of partnership against Garrard; and on the 29th of March he was appointed receiver and manager; and on the 5th of August, 1901, there was judgment for dissolution as from that day.

Meanwhile, on the 10th of May, 1901, Garrard executed a legal mortgage of the land, and handed over the deed to Nunn, who was assumed for the purposes of the action to be a purchaser for value having the legal estate without notice.

The plaintiff company now sought to charge the defendant Jones with the amount necessary to redeem the estate from Nunn.

Upjohn, K.C., and *A. à B. Terrell*, for the plaintiffs.—Section 11 (*b*) of the Partnership Act, 1890, applies, "where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss." Here Garrard misapplied the deed while in the custody of the firm. The fact that Garrard was a secretary makes no difference. He is a mere servant: *Barnett* v. *South London Tramways Co.*, 35 W. R. 640, 18 Q. B. D. 815; *George Whitechurch (Limited)* v. *Cavanagh*, 50 W. R. 218, [1902] A. C. 117, 124.

Jenkins, K.C., and *Whinney*, for the defendant.—The fact that the conveyance was made in Garrard's name was an authority to hand the deeds over to him: *Carritt* v. *Real and Personal Advance Co.*, 37 W. R. 677, 42 Ch. D. 263; *Ex parte Eyre*, 1 Pn. 227.

FARWELL, J., stated the facts and proceeded: Under these circumstances the plaintiffs seek to charge the defendant with the amount necessary to redeem the estate from Nunn. I will assume that the partnership contract bringing Garrard's secretaryship into the common partnership fund imposes on the defendant liability for Garrard's default in the performance of his duty as secretary; but it was no part of such duty either to accept a conveyance of the company's real estate or to take charge of their deeds, or to advise them. The functions of a secretary are *primâ facie* clerical and ministerial only. To quote Lord Macnaghten in *George Whitechurch (Limited)* v. *Cavanagh* "They are of a limited and of a somewhat humble character. A secretary, said Lord Esher, is 'a mere servant.'" No loss has been occasioned to the plaintiffs by anything done or omitted by Garrard in his capacity of or within the scope of his employment as secretary. Indeed, Mr. Upjohn did not put his claim on this ground at all. His contention is that the defendant is liable as Garrard's partner under section 11, sub-section (*b*), of the Partnership Act, 1890, that the defendant's firm drew the conveyance and received the completed deed in the course of their ordinary employment as solicitors for the plaintiffs, and that they have therefore received the property of a third person, and such property has been misapplied by Garrard, one of the partners, while in the custody of the firm. Now, if a client leaves his deeds with his solicitor in the ordinary course of business, and a member of their firm fraudulently deposits them with another in order to raise money on them, I apprehend that the firm would be liable for the loss of the deeds, because such deeds when misapplied were in their custody. The solicitor could of course give no title to the estate comprised therein, but the firm would have to pay the costs incident to their recovery. But that is not this case. The real cause of the loss here is not the loss of the deed, but the conveyance of the legal estate by Garrard. Without such estate he could have made no title, and this loss would not have arisen. Now it is no part of the ordinary duty of a solicitor to accept conveyances of land belonging to his clients into his own name, still less when such conveyances contain covenants by the grantee to expend money. The plaintiffs for their own convenience, and without the consent of or any communication to the defendant personally, have chosen to vest the legal estate in this property in Garrard. Garrard has dealt fraudulently with that estate. How can the plaintiffs charge the loss arising from that fraud to the defendant? They by their own act enabled Garrard to commit it by putting him in a position which it was not within the scope of the partnership business for him to accept, and which gave him the legal title to the estate and the deeds relating thereto. This title enabled him at law to withdraw the deeds from the firm unless some duty was cast on the firm to prevent it. Accordingly it has been argued that the defendant's firm has been guilty of negligence in not preventing the withdrawal of the deeds. It is said that when A. instructs a firm of B. & C. to prepare a conveyance of land to B. in fee, who is in fact, though not so stated in the deed, a trustee for A., and leaves the deed with the firm, the firm is guilty of negligence if it allows B. to have possession of the deed without A.'s assent; and the argument was pushed to the length of applying it to every case of a conveyance to a bare trustee, whether a member of the firm or not, and of keeping the duty alive for any length of time until A. determines it. The argument excludes cases where the trustee is not a bare trustee; and it might perhaps be enough to say that Garrard was not a bare trustee in the present case, but had to perform covenants and was entitled to a lien on the trust property for his indemnity: *Morgan* v. *Swansea Urban Sanitary Authority*, 27 W. R. 283, 9 Ch. D. 582.

I do not, however, propose to rest my judgment on this ground alone; for in my opinion no contract can be inferred by the firm in the simple case above stated to do more than to exercise due care and skill

in the preparation of the deed and to hand it over to the legal owner. The liability of a solicitor for negligence is a purely common law liability. Such negligence is tort founded on contract, so that an action *ex contractu* may be brought for the breach of contract or an action *ex delicto* for the tort. But in either case it is at common law; no bill would lie in equity for the purpose: *British Mutual Investment Co.* v. *Cobbold*, 23 W. R. 687, L. R. 19 Eq. 627. The plaintiff has to prove retainer by him of the solicitor for reward to do certain work and negligence in doing it. In this case the solicitors were retained simply to prepare the conveyance to Garrard and to receive the deed when executed and hand it over to the legal owner. They were not asked to advise on the form of the deed or the advisability of taking the conveyance to Garrard, nor were they asked to advise as to the custody of the deed.

In order to succeed, therefore, the plaintiffs must allege and prove that the solicitors were retained for reward to keep possession of the deed until the equitable owner concurred with the legal owner in demanding it, involving the duty of refusing to hand over the deed to the legal owner without such concurrence. There is, of course, no evidence of any such contract in fact; but I am asked to imply it from the plaintiffs' instructions to Garrard, and through him to the firm, to draw the conveyance to Garrard in his own name. It certainly cannot be said that such a contract is usual, so that it can be imported on the ground of known usage. I am not aware of any case in which any such contract is mentioned or suggested, nor were counsel able to refer me to any. It is an onerous duty, involving the possibility of disputes with the legal owner and the necessity of bearing the circumstances in mind during an indefinite period, possibly many years, and no extra remuneration is paid or payable by reason of its existence. But an implied contract (which assumes, of course, the non-existence of any actual contract) is founded on that obligation which ought "in justice and fair dealing" to be deemed to have been undertaken by the party sought to be charged: *Freeman* v. *Jeffries*, L. R. 4 Exch. 189, 17 W. R. Dig. 86. I fail to see the justice or fairness in any case of imposing on the partner who knows nothing of the circumstances an onerous duty without reward; but, in the case before me, having regard to the conduct of the plaintiffs, it would be, in my opinion, positively unjust and unfair. The defendant knows nothing of the conveyance of the legal estate to Garrard. The acceptance of it was not within the scope of their partnership agreement. If it has the effect contended for by the plaintiffs, such acceptance was a breach of article 13 of the partnership deed, whereby neither partner was without the consent of the other to contract any liability on account of the partnership or in any way pledge the credit thereof except in the usual and regular course of business. No consideration for this extra liability is given to the firm, and the plaintiffs, who rely on justice and fair dealing themselves, directed Garrard, as their secretary, to take this conveyance for their own convenience and neglected to take such steps as the usual ordinary rules of prudence would have suggested to direct and see that the deeds went to their proper destination. I am of opinion that the plaintiffs, by their own acts and conduct, gave Garrard the legal title to the deed, and that Garrard by virtue of such title withdrew the deeds so that they were not "in the custody of the firm" within section 11, sub-section (*b*), of the Partnership Act when Garrard handed them over to Nunn. I am further of opinion that no such contract by the firm as alleged can be implied, and that there has therefore been no negligence. I should add that the good faith and honesty of the defendant are undoubted and unchallenged. Nothing that I have said would have any application to a case of collusion with the guilty partner by the other member of the firm. The action fails, and is dismissed with costs.

Solicitors for the plaintiffs, *Free & Winckworth.*

Solicitors for the defendant, *Doyle, Devonshire, & Woodhouse*, for *Jones & Son*, Colchester.

Chan. Div. Buckley, J. — June 23, 24, 25, 27, 1903.

In re GEIPEL'S PATENT. (*a*.)

Patent—Petition for revocation—Disclaimer—Terms—Form of order—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict.* c. 57), *ss.* 18, 19, 20.

On a petition for the revocation of a patent it was held that the patent was valid subject to disclaimer in two respects. In the exercise of its discretion under section 19 of the Patents, Designs, and Trade-Marks Act 1883, *the court ordered that the patent should be revoked unless within three months the patentee obtained leave to amend his specification by making the necessary disclaimer.*

Held in the absence of special circumstances, that it should be a term of the court making such order, that if the specification were amended, no injunction should be asked in any action brought for infringement of the patent in respect of any goods made prior to the date of the order, unless the patentee established to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill and knowledge.

This was a petition for the revocation of a patent, granted in 1893, for improvements in steam traps, which are appliances for the removal from pipes and cylinders of water arising from the condensation of steam therein.

Attached to the complete specification were certain plans, hereinafter referred to as figures 2 and 6, describing modes of using the invention, which his lordship held must be disclaimed—figure 2 on the ground of non-utility, and figure 6 on the ground of disconformity with the provisional specification.

In other respects his lordship held that the patent was valid, and proposed to make an order for revocation unless within three months, or such further period as the court might allow, the patentee should obtain leave to amend the specification by disclaiming figures 2 and 6.

T. Terrell, K.C., Astbury, K.C., and *J. H. Gray*, for the petitioners.—We ask that it be a term of the patentee being allowed to amend his specification under section 19 of the Patents, Designs, and Trade-Marks Act, 1883, that if the specification be amended, no action shall be brought or maintained for infringement of the patent in respect of any steam traps made prior to this date. This is similar to the order which was made in *Deeley* v. *Perkes*, [1896] A. C. 496; *In re Pitt's Patent*, [1900] 1 Ch. 508, 17 Rep. Pat. Cas. 745; and *In re Allison's Patent*, 17 Rep. Pat. Cas. 298, 513. Unless such a term be imposed we shall suffer an injustice. Since 1893 we have established a trade, and the patentee has brought actions not against us, but against our customers. The result has been that we have been forced to bring this petition. Instead of applying at the outset to amend his specification

(*a*.) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

under section 18, he has fought out the action. Section 20, which enables a patentee to recover damages in actions in respect of the use of the invention before the disclaimer, "if the patentee establishes to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill and knowledge," has reference only to the case of an amendment under section 18. It is no guide to the court as to the discretion which ought to be exercised, under section 19, in imposing terms on a patentee whose patent would, but for the indulgence of the court, be declared invalid. Not to impose such a term would be to render our previous acts tortious. Even if the orders in the cases cited were made on the ground of special circumstances, we say that there are special circumstances in the present case.

They also referred to *Moses* v. *Marsden*, 13 R. P. C. 31.

A. J. Walter (*Moulton, K.C.*, with him), for the respondent.—I object to an order like that which was made in *Deeley* v. *Perkes*. In the present case there are no special circumstances in favour of the petitioner. He did not commence business with the knowledge that the patent was invalid, or take advice on the subject.

BUCKLEY, J., delivered judgment to the following effect: In *Deeley* v. *Perkes* the House of Lords imposed the terms, "That if the specification be amended, no action shall be brought for infringement of the patent in respect of any guns or parts of guns made prior to the date of the appeal" The meaning of that order was that persons who had manufactured articles under that part of the patent which, when the disclaimer had been made, had become valid, should not be sued in respect of work which had been done before the date of the order which enabled the patentee to set himself right by disclaimer.

In *In re Pitt's Patent* the form of order in *Deeley* v. *Perkes* was considered. The Court of Appeal held that it was not to be adopted as a common form. Lindley, M.R., said: "It does not at all follow that it would be proper to impose those terms in other cases simply because liberty is asked to apply for leave to amend a specification by way of disclaimer or otherwise." By that he meant, that in the absence of special circumstances, it is not a matter of course to leave the person who, when the patent has been amended by disclaimer, would thereafter be an infringer if he did the acts complained of, in possession of the profits of having done those acts at a period when the patent was invalid. In that case it was held that there were special circumstances, and the same order was made as in *Deeley* v. *Parkes*.

The discretion which I have to exercise is under section 19 of the Act, under which section I might, on finding that the patent requires a disclaimer in order to make it valid, instead of dealing with the matter at once, direct the hearing of the petition to stand over on such terms as I thought fit, till after disclaimer had been made, and then have dealt with it on the new state of facts by refusing to make any order on the petition. The order which I make, that the petition be revoked unless something happens, has the same effect.

The question, then, which I have to consider in the exercise of my discretion is as to what is fair between the petitioner and the respondent. Thinking, as I do, that I ought to give the patentee an opportunity of disclaiming, as in *Deeley* v. *Perkes*, ought the person whom I will call the infringer to be protected in respect of the goods which he has manufactured under the infringed patent prior to the date of the order giving leave to amend, or ought he to be exposed to an action in respect of them? Under special circumstances he ought so to be protected; that is shown by *In re Pitt's Patent* and *Deeley* v. *Perkes*. Under ordinary circumstances, it does not follow that he ought to be protected in respect of them.

I have held that the patent requires amendment in respect of two particulars. One of these is figure 2, which represents a method of working the machine which cannot be made to work. The infringer, as I shall continue to call him, has not used figure 2, but he has used another part of the invention which will work. Then there is figure 6, which represents a particular way of producing distortion, and which I have held to be bad for disconformity, because it is not in accordance with the provisional specification.

The question, then, which I have to consider is this: If the "infringer" has availed himself of that part of the patent which after disclaimer will become good, ought he, as against the person who will become the patentee, to be allowed to continue to sell goods made in infringement of that which will hereafter become a valid patent? If he has availed himself neither of figure 2 nor of figure 6, but only of other parts of the patent, and the "original claim was framed in good faith and with reasonable skill and knowledge," it seems to me that it is fair that there should be room to restrain him, or those who are dealing with his goods, from disposing of the goods thus made.

Section 20 has nothing to do with the case before me, but I think that it indicates the line upon which I ought to exercise my discretion. The effect of that section is this. Suppose a disclaimer is made, and then an action is subsequently brought, damages may be given in respect of the use of the invention in a certain event, and if that event does not happen, then damages cannot be given. There is power to give damages in respect of acts which were rightful when they were done, because the disclaimer had not been made, but which, by reason of the disclaimer, subsequently become wrongful, if it is proved that "the original claim was framed in good faith and with reasonable skill and knowledge." I think that I ought to make an order here in a form similar to that—that is to say, that the person whom I have called the infringer ought to be protected from an injunction in an action brought for an injunction if the original claim was not framed in good faith and with reasonable skill and knowledge, but if the original claim was so framed, then he ought not to be protected in such an action.

I therefore make an order in this form: That if the specification be amended no injunction shall be asked in any action brought for infringement in respect of goods made prior to this date unless the patentee establishes that his original claim was framed in good faith and with reasonable skill and knowledge. I put the order in that form because, of course, I cannot control any subsequent judge who may have to deal with such an action, but I can control the plaintiff in that action, and I impose the term on him that he shall not ask for an injunction in those circumstances. I therefore make the order in that form.

Solicitors, *Frank Evelyn Jones*, for *W. T. Hill*, Manchester; *Faithfull & Owen*.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Nov. 5.

BOSTON v. BOSTON. (a.)

Frauds, Statute of—Interest in land—Memorandum in writing—29 Car. 2, c. 3, s. 4.

A wife verbally agreed with her husband that if he bought a certain house she would make him a present of it. The husband accordingly bought the house, and sued his wife to recover the amount of the purchase-money.

Held, that this was merely an agreement by the wife to pay her husband the amount of the purchase if he bought the house, and was not a contract for or concerning an interest in land within section 4 of the Statute of Frauds, and that therefore the action was maintainable though there was no memorandum or note of the contract in writing.

Application by the plaintiff for judgment or a new trial.

The action was brought by a wife against her husband to recover possession of certain furniture. The husband counterclaimed to recover £1,400 in these circumstances: In September, 1895, the husband and wife were living together and the wife became entitled to a sum of money under her father's will. The wife told her husband that she wanted to live in a larger house, and he said that he could not afford the expense of it. She then said to him, "If you will buy Charlwood" (the house in question), "I will make you a present of it." In consequence of this promise by the wife the husband bought Charlwood for £1,400 and they lived together there until November, 1901. The wife did not pay the husband the £1,400, though she received sufficient money under her father's will to enable her to do so. The wife, in answer to the counterclaim, pleaded, so far as material, the Statute of Frauds.

At the trial before Wills, J., and a jury, the wife obtained judgment on the claim, and the jury found a verdict for the husband on the counterclaim for £1,400.

Wills, J., held that section 4 of the Statute of Frauds did not apply, and gave judgment for him upon the counterclaim.

The wife applied for judgment or a new trial.

Montague Lush, K.C., and *J. R. Macoun*, for the plaintiff.—This contract is a "contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them" within section 4 of the Statute of Frauds, and is not enforceable without some note or memorandum thereof in writing. It is not necessary, in order to bring the case within the section, that the contract should be for the sale or transfer of an interest in land by one party to the other. Where the primary object of the contract is an acquisition of an interest in land by either party the contract must be in writing: *Cocking* v. *Ward*, 1 C. B. 858; *Horsey* v. *Graham*, 18 W. R. 141, L. R. 5 C. P. 9. It is sufficient if the contract "concerns" an interest in land. In *Mann* v. *Nunn*, 43 L. J. C. P. 241, the court did not treat section 4 as relating only to a transfer of an interest in land by one party to the other.

Pickford, K.C., and *J. D. Crawford*, for the defendant.—This is not a contract within section 4 of the Statute of Frauds. The only agreement here is one by the wife to pay the husband a certain sum of money in the event of his buying a certain house. There is no case in which it has been held that section 4 applies except where the contract itself provides for the acquisition of an interest in land by one party from another. *Mann* v. *Nunn* is almost exactly the same case as the present; and *Angell* v. *Duke*, 23 W. R. 307, L. R. 10 Q. B. 174, shows that such an agreement as this is merely collateral to an agreement for an interest in land. In *Cocking* v. *Ward* the court construed the agreement as one for the surrender of the premises, and therefore within section 4. This is no more a contract for or concerning an interest in land than a contract by a house agent to be paid commission on letting a house.

Montague Lush, K.C., replied.

COLLINS, M.R.—This is an appeal from a judgment of Wills, J., in an action which was tried by him with a jury. The question turns upon the counterclaim, and by it the husband claims £1,400 against his wife upon a verbal contract made in these circumstances. The wife said to her husband, "If you will buy Charlwood, I will make you a present of it." The husband accordingly bought Charlwood and gave £1,400 for it, and thereupon the promise of the wife to pay him the amount of the purchase-money arose. The husband's claim is founded upon that bargain between the parties. The wife says that the case comes within section 4 of the Statute of Frauds, and that the contract is not enforceable as there is no memorandum or note thereof in writing. The contention on her behalf is that the contract is a contract for the sale of land, or at any rate of some interest in or concerning land within section 4. Unless the contract is for one of those things, section 4 is not applicable. It seems to me that when one looks at this contract, it does not involve, as a part of the contract, any "contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." It is not part of the contract to acquire an interest in land. The bargain merely amounts to this, that if the husband buys Charlwood the wife contracts to pay him the amount of the purchase-money. There is no case, so far as I know, in which it has been held that the statute applies unless by the terms of the contract some interest in or concerning land is dealt with by the contract. In the present case there is a contract by the wife to pay her husband a sum of money to be measured by the amount of the purchase-money which he might pay for an interest in land. The husband did not by the contract undertake to acquire an interest in land. If and when he did acquire such an interest in land he could claim to be reimbursed by his wife under the contract the amount of the purchase-money, upon the ground that he had performed something which gave rise to a promise by her to pay the money. The case is outside the Act both upon principle and upon the authority of *Angell* v. *Duke*. The appeal therefore fails.

MATHEW, L.J.—I am of the same opinion. The contract is, in my opinion, not within the statute. Section 4 needs construing as it stands, for it speaks of a "contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." The contract referred to there must be one operating on an interest in land. In the present case the contract, which must be taken as having been made for good consideration, is one which did not affect the owner of the land, and did not create or deal with any interest in land. It only dealt with a sum of money to be applied in a particular way. It was a contract by the wife to indemnify the husband against the amount of the purchase-money if he bought the land. It was a

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

contract purely collateral to any contract for an interest in the land. *Angell* v. *Duke* seems to me to be very much in point, and particularly the judgment of Lush, J., upon the subject of what contracts are within section 4. This contract therefore is not within section 4.

COZENS-HARDY, L.J.—I agree, and have nothing to add.

Application dismissed.

Solicitors for the plaintiff. *Lawson Lewis, Welch, & Wenham*, for *Leonard Broadbent*, Darwen.

Solicitors for the defendant, *Monro, Slack, & Atkinson.*

Appeal.
(Collins, M.R., and Stirling and Mathew, L.JJ.) April 24; July 25, 1903.

POMFRET v. LANCASHIRE AND YORKSHIRE RAILWAY CO. (a.)

Master and servant—Employers' liability—Accident—Compensation—Arising out of and in the course of employment—Unexplained accident—Burden of proof—Inference of fact—Presumption—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the deceased workman, who was a fireman in the service of a railway company, was travelling by train, as he had a right to do, after he had finished work for the day, from the place where he had left his engine to the station where it was his duty to report himself, and that he fell from the train and was killed. It was admitted that the fall was the result of an accident, and that the accident happened in the course of his employment. The evidence as to how the accident happened was that he had a basket with him when he got into the train, and that he stood up to put it into the rack, that the train began to move on while he was standing by the door, and that almost immediately afterwards he fell out.*

Held, that there was evidence to justify the county court judge in drawing the inference of fact, apart from any question of presumption, that the accident not only happened in the course of the employment, but also arose out of the employment.

Appeal by the employers from an award of the judge of the Manchester County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of a fireman in the employment of the Lancashire and Yorkshire Railway Co., who met with his death under the following circumstances: It was his duty to report himself every evening, after he had finished his day's work, at Newton Heath Station, and he had the right to travel to that station by any train from the place where he left his engine. While so travelling from Charleston Station on the 27th of December, 1902, he fell from the train and was found lying on the railway line at a place about 300 yards from Charleston Station, suffering from very serious injuries, from which he shortly afterwards died.

It was admitted on the part of the railway company that the fall from the train was accidental, and that the accident happened in the course of the deceased's employment; but it was contended that there was no evidence that it arose out of the employment.

The only evidence as to how the accident happened, was the evidence of a man named Moulton. He stated that he and the deceased and an engine-driver named Williams got into the same compartment at Charleston, that as the train moved out of the station the deceased lowered the window at his end of the compartment, that he (Moulton) was conversing with Williams, and that they had only gone 300 yards when he heard a bang and a crash and the deceased disappeared.

The county court judge held that, the fact of an accident being admitted, and the fact of employment being admitted, and the employers not having proved that the injuries arose from some cause which relieved them from responsibility, the case came within the Act. He accordingly made an award in favour of the applicant.

C. A. Russell, K.C., and *A. Spencer Hogg*, for the employers.—The applicant has failed to establish that the accident arose out of the deceased's employment as well as in the course of the employment. The county court judge was wrong in throwing upon the employers the burden of showing that the accident did not arise out of the employment. This is a case of an unexplained accident, and the principle of *Wakelin* v. *London and South-Western Railway Co.*, 35 W. R. 141, 12 App. Cas. 41, applies. The evidence is quite consistent with the supposition that the deceased opened the door for some purpose outside the scope of his employment: *Smith* v. *Lancashire and Yorkshire Railway Co.*, 47 W. R. 146, [1899] 1 Q. B. 141.

J. R. Randolph, for the applicant.—The county court judge was right. There is no ground for inferring that the deceased was acting outside the scope of his employment and for his own purposes: see *McNicholas* v. *Dawson & Son*, 47 W. R. 500, [1899] 1 Q. B. 773. If the county court judge ought to have required further evidence in support of the applicant's case, the evidence of Williams, who was in the same compartment with the deceased, and Moulton, is available.

COLLINS, M.R.—I regret to say that the court are not unanimous in this matter, but we are all of opinion that the case had better go back to the learned county court judge. My own view is that the learned judge misdirected himself. His direction is this: "I hold that, the fact of an accident being admitted, and the fact of employment being admitted, unless the respondents can prove that the injuries arose from some cause which relieved them from responsibility, I should hold the case to be within the Act." That, in my judgment, involves a misdirection. I think that the burden in this case, as in other cases, is on the person who is in the position of plaintiff; and that, as two conditions of obtaining relief are imposed by the statute—viz., that the accident must arise out of and in the course of the employment, the person who comes to claim relief under the statute must show that both of the conditions have been fulfilled. Here the only evidence is that an accident happened during the deceased man's employment. But the learned judge thinks that that is enough, unless the employers give evidence to show that it did not arise out of his employment. That is to say, he throws the onus on the employers. In my judgment, that is wrong. The whole burden of proving the conditions essential to relief rests upon the applicant, and if his case leaves it in doubt whether the conditions are fulfilled or not, if it is equally consistent with the fact of their having been fulfilled and with the fact of their not having been fulfilled, he has not discharged the onus. In my judgment the evidence in this case is wholly consistent with the accident

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

having happened through something which did not arise out of the employment. There seems to me to be no presumption in favour of one view more than another. This brings in the principle of *Wakelin* v. *London and South-Western Railway Co.* There negligence was an essential factor, but as the case was entirely consistent with there being negligence or with there not being negligence, the House of Lords held that the onus was not discharged. So here, in my view, the case is entirely consistent with either one or other of the two suppositions, that the accident arose out of the employment, or that it did not arise out of the employment. Therefore, in my judgment, this case has been wrongly decided; but as it is possible that other evidence may be given, we think it desirable that it should go back to the county court judge for further evidence and for reconsideration.

STIRLING, L.J.—I am of the same opinion. The right to compensation only accrues where a workman has suffered personal injuries from an accident arising out of and in the course of his employment. This court has held that the words "out of" are as essential as the words "in the course of": *Smith* v. *Lancashire and Yorkshire Railway Co.*; *Armitage* v. *Lancashire and Yorkshire Railway Co.*, [1902] 2 K. B. 178, 50 W. R. Dig. 112. Here the learned county court judge omitted to give effect to the provision that the accident must arise out of as well as in the course of the employment. If the deceased opened the door in order to get on to the footboard, and the accident happened through that, it clearly would not have arisen out of the employment, for his sole duty at that time was to travel from one station to another by this particular train. I therefore think the case should go back to be further investigated. I do not wish to be understood as saying that it is not competent for the judge from any particular state of facts which may be proved to draw an inference of fact that the accident arose out of as well as in the course of the employment.

MATHEW, L.J.—I agree that this is a case which had better go back to the learned county court judge, but I confess my view, although it is not a final view, is that there is abundant evidence to justify the conclusion which the learned judge came to. I think he drew the inference that the deceased, at the time of the accident, was doing no more than an ordinary passenger might do. If that is so, I do not see how it is possible to resist the conclusion that the accident arose out of and in the course of his employment. The learned judge has, it is true, stated his view of the law, and if that view of the law is to be treated as applicable to all cases, it might lead to the conclusion that it was sufficient to prove that the accident arose in the course of the employment without its being shown that it arose out of the employment. But with reference to this particular case it seems to me that the learned judge might possibly come to the conclusion that the words of the statute were abundantly satisfied by the facts, and that no distinction in such a case as this ought to be drawn between the words "out of" and the words "in the course of." Cases were put in which such a distinction must be drawn, but they do not appear to me to be any guide in this particular case. It was admitted on the part of the company that the deceased was being employed and was performing his duty when he was going back by train, and that an accident happened to him while he was going back. I should have thought that that was sufficient to establish liability, but, as there is some doubt as to what the grounds of the learned judge's decision were, I agree that the case should go back.

Case remitted.

The case accordingly came before the county court judge again, and the evidence of Williams was taken. He stated that when he got into the train he sat down just inside the door facing the engine, Moulton being opposite to him. The deceased went to the other end of the compartment. The deceased had a basket with him, which he put on the rack nearest to the engine. The train was on the move then. The deceased stood by the door on his side with his back towards the witness and his face towards the door. The witness did not notice the window or see the deceased do anything else. He heard a crash, and the deceased had disappeared.

The county court judge adhered to his former decision.

July 25.—*C. A. Russell, K.C.* (*A. Spencer Hogg* with him), for the employers.—The fresh evidence does not throw any new light on the case. The second decision of the county court judge is, therefore, open to the same objections as the first.

They cited *Goodlet* v. *Caledonian Railway Co.*, 4 Fraser, Ct. of Sess. Cas., 5th series, 986.

J. R. Randolph, for the applicant, was not called upon to argue.

COLLINS, M.R.—I adhere to what I said on the last occasion as to the necessity for the onus of proof, in the case of a proceeding to obtain a statutory relief, being discharged by the person on whom it is laid. But the fresh evidence which has been taken throws new light on the facts. The case is near the line, but I think there was enough evidence to justify a judge in leaving the case to a jury. We begin with an admission on the part of the employers that the fall from the train was an accident, which negatives the idea of deliberation. Then the new evidence is to this effect, that the deceased when he got into the train had a basket with him, and that he stood up in order to put it into the rack, and that while he was so doing the train began to move on. This new evidence, in my opinion, involves the supposition that the deceased lost his balance and fell against the window, and that he was not doing anything which an ordinary passenger might not do. I cannot say there was no evidence fit for the consideration of a jury. This is not a naked case like *Wakelin* v. *London and South-Western Railway Co.*, in which there was no evidence to connect negligence with the accident, and where it was held that no presumption ought to be drawn one way or the other, and that, the onus being on the plaintiff, the action failed. If the county court judge had rested his judgment on the presumption that the deceased was doing everything that was right, I think that would have been wrong. But it appears to me that the county court judge drew an inference from the facts proved, quite apart from any question of presumption, that this accident was an accident which not only arose in the course of the deceased man's employment, but also arose out of his employment. In my opinion there was evidence sufficient to justify such an inference being drawn, and therefore I think the appeal fails.

STIRLING and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the employers, *Woodcock, Ryland, & Parker*, for *Moorhouse*, Manchester.

Solicitor for the applicant, *Wheatley, Son, & Daniel*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

From P. D. & Ad. Div.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) July 8, 1903.

"THE VILLE DE ST. NAZAIRE." (a.)

Ship—Wharf—Negligence—Damage to vessel lying in berth—Liability of wharf-owners.

Judgment of Bucknill, J. (51 *W. R.* 590), *on the facts, affirmed.*

Appeal from the judgment of Bucknill, J. (51 W.R. 590), in favour of the plaintiffs, the owners of the steamship *Ville de St. Nazaire*, in an action against the Briton Ferry Works (Limited), to recover the damage sustained by the plaintiffs' vessel through straining while lying aground at the defendants' wharf, owing to the alleged negligence of the defendants in omitting to take proper care to have the berth in a safe condition for the vessel.

R. M. Bray, K.C., and *Bailhache*, for the defendants.

Pickford, K.C., F. Laing, K.C., and *F. W. Stubbs*, for the plaintiffs.

THE COURT (COLLINS, M.R., and MATHEW and COZENS-HARDY, L.JJ.) dismissed the appeal on the facts.

Appeal dismissed.

Solicitors for the plaintiffs, *Stokes & Stokes.*

Solicitors for the defendants, *Everett & Hodgkinson.*

From K. B. Div.
(Vaughan Williams, Romer, and Stirling, L.JJ.) July 1, 2, 1903.

RATHBONE BROS. & CO. *v.* DAVID MCIVER, SONS, & CO. (b.)

Ship—Bill of lading—Construction—Exceptions—Unseaworthiness—Unfitness of ship to receive cargo—Liability of shipowners.

The obligation cast by the common law upon a shipowner to provide a ship which is seaworthy, not only in the sense of being fit to meet the perils of wind and waves, but also in the sense of being reasonably fit to carry cargo, can only be got rid of by clear and unambiguous words in a bill of lading. A bill of lading contained the following exceptions: "Loss or damage arising from the consequence of any damage, breakdown, injury to or defect in hull, tackle, boilers, or machinery . . . however such damage, defect, or injury may be caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel, collision, stranding . . . or other perils of the seas, and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by . . . unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness." Cargo shipped under this bill of lading was damaged by water from a pipe used for the supply of water to a tank for domestic purposes. This pipe was broken when the cargo was put on board, and it was admitted that the ship was not fit to receive the cargo when put on board, and that all reasonable means had not been taken to provide against such unfitness.

Held, that the warranty implied by the common law on the part of the shipowners was not got rid of by the exceptions in the bill of lading, and that the shipowners were consequently liable for the damage to the cargo.

This was an appeal from a decision of Wills, J.

The plaintiffs, who were indorsees of bills of lading, sued the defendants, who were the owners of the steamship *Barbary*, for damage to bales of sheepskins.

The sheepskins were stowed in the 'tween-decks of the vessel, and whilst there were damaged by fresh water, which escaped from a broken pipe.

This pipe supplied a fresh water tank for domestic service, and was already broken at the time when the cargo was loaded at the commencement of the voyage.

The material portions of the bills of lading were as follow:

"Shipped in apparent good order and condition . . . at Buenos Ayres . . . to be delivered in the like good order and condition at . . . Liverpool (the act of God . . . thieves . . . restraints of princes . . . loss or damage resulting from effects of climate, heat of holds, vermin, rain, spray, insufficiency in strength of wrappers and packages, non-marking, obliteration, or insufficiency of marks, and all injury to the same, sweating . . . and all damage arising from other goods . . . or from errors, obliteration, insufficiency or absence of marks . . . risk of lighterage to or from the vessel, risk of craft or hulk or storage or transhipment, or transhipment from or to craft, explosion, heat, fire, before loading, or in the ship, or after unloading, and at any time and place whatever, boilers, steam machinery, or their appurtenances, or from the consequence of any damage, breakdown, injury to or defect in hull, tackle, boilers, machinery, or their appurtenances, refrigerating engine, or chamber, or any part thereof, outfit, tackle, or other appurtenances, however such damage, defect, or injury may be caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel, collision, stranding, or any other peril of the seas . . . and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by the . . . negligence . . . of the . . . owners, master, officers . . . crew . . . and whether before, or after, or during the voyage, or for whose acts the shipowners would otherwise be liable, or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any cause whatever excepted)."

At the trial it was admitted that the vessel was not fit to receive cargo at the time when the sheepskins were loaded, and that reasonable means had not been taken to provide against such unfitness.

Wills, J., held that the latter part of the exception as to "unseaworthiness" extended only to unseaworthiness of the ship as a ship—*i.e.*, to her unfitness to meet the perils of navigation, and not to her unfitness to carry the cargo. The loss, therefore, resulted "from the consequence of any injury to or defect in the hull, tackle . . . machinery, or their appurtenances," and the defendants were not liable.

The plaintiffs appealed.

Pickford, K.C., and *Leslie Scott*, for the plaintiffs.—Though the exception of loss or damage from any injury to or defect in hull, or machinery, or their appurtenances might cover this loss if it stood alone, yet the general clause at the end binds the shipowner to the usual warranty of seaworthiness if he does not take reasonable means to make the vessel

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(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

(b.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

seaworthy, and if the two provisions are inconsistent the warranty must prevail. "Unseaworthiness" in this bill of lading is used in its wider sense—*i.e.*, unfitness to carry the cargo, and reasonable means were not taken to provide against such unfitness.

They cited *Rowson* v. *Atlantic Transport Co.*, 51 W. R. Dig. 146, [1903] 1 K. B. 144, 8 Com. Cas. 74; *Morris* v. *Oceanic Steam Navigation Co.*, 16 Times L. R. 533; *The Maori King* v. *Hughes*, 44 W. R 2, [1895] 2 Q. B. 550; *The Carron Park*, 39 W. R. 191, 15 P. D. 203; and Carver on Carriage by Sea, ss. 16 and 17.

Horridge, K.C., and *Maurice Hill*, for the defendants.—"Unseaworthiness" in this bill of lading means unfitness of the ship to meet the perils of navigation with safety to the ship.

They cited *The Laertes*, 36 W. R. 111, 12 P. D. 187; *The Waikato* v. *New Zealand Shipping Co.*, 46 W. R Dig. 154, [1898] 1 Q. B. 645, [1899] 1 Q. B. 56, 47 W. R. Dig. 180; *Tattersall* v. *National Steamship Co.*, 32 W. R. 566, 12 Q. B. D 297; *Steel* v. *State Line Steamship Co.*, 3 A. C. 72, 26 W. R Dig. 216; *Gilroy* v. *Price*, [1893] A. C. 56 41 W. R. Dig. 223; *Borthwick* v. *Elderslie Steamship Co.*, 19 Times L. R. 313; *Queensland National Bank* v. *Peninsular and Oriental Co.*, 46 W. R. 324, [1898] 1 Q. B. 567; *Stanton* v. *Richardson*, 24 W. R. 324, 7 C. P. 421, 9 C. P. 380; *Cohn* v. *Davidson*, 25 W. R. 369, 3 Q. B. D. 455; and Carver on Transit by Sea, s. 103*a*.

Pickford, K.C., replied.

VAUGHAN WILLIAMS, L.J.—I do not think that this judgment can be supported. I am not sure that it is necessary for us to differ from Wills, J., on any point that he really decided, but I may say at once that we should be prepared, if it were necessary, to take a wider view of the meaning of the word "unseaworthiness" in this bill of lading than that which was taken by Wills, J.

I want, before I go more into detail in this case, to point out the broad principle which I think ought to be applied in the construction of a bill of lading, or of any other contract relating to carriage by sea, just as much in the case of a charter-party as of a bill of lading. It is the principle that was laid down both by Bigham, J., and by the Court of Appeal in *The Waikato* v. *New Zealand Shipping Co. (Limited)*, that with reference to carriage by sea the law implies certain warranties on the part of the shipowner. It puts upon him certain obligations which will always bind him unless there are clear and express words which, without ambiguity, relieve him from what I will call for short his common law obligations.

Bigham, J., says at the beginning of his judgment (p. 647 [1898] 1 Q. B. D.): "The common law obligation of a shipowner is to provide a ship reasonably fit to carry the cargo that is shipped upon it. If a shipowner desires to evade this responsibility, he must, I think, use very plain and distinct words to give notice of his intention to get out of that obligation." That obligation applies, in my judgment, to all these common law warranties which are implied by the law in the absence of words excluding them. Then, Collins, L.J., in the appeal in the same case, says (on p. 58 [1899] 1 Q. B. D.): "I am of the same opinion. I am not sure myself that the shipowners did not really mean to cover by the exception all defects at the beginning of the voyage whether latent or patent. I am inclined to think that they probably did mean to do so. But they are the persons setting up the exception, and who have to make out their exemption. I do not think they can sustain that onus, unless by unambiguous language they have excluded the liability which would *primâ facie* rest upon them. I think that the language used in this case is far too ambiguous." Shortly, the basis of my judgment here is the same as that expressed by Collins, L.J. The same thing was really said by A. L. Smith and Rigby L.JJ., but I have selected the judgment of Collins, L.J., because it happens to be very conveniently expressed. I think that those observations apply to the present case and that the language here is far too ambiguous to exclude the common law warranties.

Before dealing further with the case I wish to say that Lord Blackburn in *Steel* v. *State Line Steamship Co.*, in the passage that is quoted by Kay, L.J., in the case of *The Maori King* v. *Hughes*, at p. 558 in [1895] 2 Q. B., says: "I take it to be quite clear, both in England and in Scotland that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." I shall have to allude to this passage again when I am dealing with the question of the meaning of the word "unseaworthiness" in this particular bill of lading, but I am reading it now to show the view that Lord Blackburn took of these warranties and how they can only be got rid of by a clear and express stipulation.

Having said that, I will call attention to the terms of this bill of lading. [His lordship read it down to the exceptions as to the defects in hull and tackle, and continued:] I have only got to say with regard to those exceptions, and in particular in regard to this exception which I have just read, that it is perfectly obvious that the words there are wide enough to cover loss and damage arising in consequence of things which in themselves might constitute unseaworthiness, and I take as an example defect in hull. Then comes collision, and a quantity of other things are mentioned, and then these words, "And whether any of the perils above-mentioned or the loss or injury arising therefrom be occasioned by the wrongful act or negligence of the persons mentioned whether before or after or during the voyage, or by the unseaworthings of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any cause whatever." With regard to that passage which I have just read, the last words make it perfectly plain that it was not intended by this clause relating to unseaworthiness to create any new exception or to add to the list of exceptions. It is quite impossible to put that construction upon these words. In my judgment the clause is a qualification which overrides the exceptions before mentioned, and it is not a new exception.

Now, having dealt thus with the bill of lading, I wish to deal with the case first with regard to the point on which Wills, J., seems to me to have based his judgment solely and entirely—namely, the construction of the word "unseaworthiness" in this bill of lading. The report I am reading from is in the 8th volume of the reports of Commercial Cases, and the case is reported on p. 1. It will be seen on p. 4, that Wills, J., considered that the effect of the clause that has just been commented upon was to add an additional exception; but whether he did so or not, he bases his judgment upon the meaning of the word unseaworthiness, and he says on p. 5, "But in my

opinion the words which follow the expression 'unseaworthiness' in this bill of lading—namely, 'at the beginning or at any period of the voyage,' conclusively show that the expression 'unseaworthiness' as used means what I may call unseaworthiness proper, because if it were used with regard to the cargo and the fitness of the particular portion of the vessel to receive it, the phrase by which it is followed, instead of being 'at the beginning or at any period of the voyage,' would certainly be 'at the time of loading,' or some equivalent phrase, because the time of loading would be the critical time at which provision would be made for the obligation of seaworthiness to arise. But in the bill of lading it is not till the beginning of the voyage that the obligation arises, and it therefore seems to me that the intention was to confine the meaning of the word to unseaworthiness proper—that is to say, unseaworthiness of the ship as a ship." In my judgment it is not right to put this narrow construction on the word "unseaworthiness." I think if the passage which I read from *The Maori King* v. *Hughes*, in the course of the judgment of Kay, L.J., and the other judgments of the Lords Justices there are read, it is reasonably certain that we ought not so to limit this word "unseaworthiness," but to make it cover not only the unseaworthiness of the ship in the sense that it was not fit to meet the perils of the winds and the waves and the voyage, but also in the sense that the ship was not in a condition which rendered it fit to carry the cargo.

This opinion of mine, if it is right, does not, however, dispose of the whole case, because counsel for the respondents urged upon us an argument which was not urged before Wills, J., at all, and as to which I cannot find out that he has expressed any opinion whatsoever. Now, the point is this: Accepting the proposition that the shipowners cannot get rid of what I will call the common law obligation—whether the common law warranty of seaworthiness includes fitness of the ship to receive the cargo, or whether the warranty of seaworthiness and the warranty of fitness of the vessel to carry the cargo, are to be treated as separate warranties—without some plain and unambiguous words in the bill of lading excluding that obligation, it is said that express words of exclusion are found here. The way in which the express words are found is this. The plaintiffs take these words "before the loading or sailing of the vessel" and say that in this particular case there are two admissions by the defendants; it is admitted that the vessel was not fit to receive the cargo at the time when the sheepskins were loaded, and that reasonable means had not been taken to provide against such unfitness. Then they say that the words that are employed in these exceptions are wide enough to cover this particular defect; that here, therefore, you have got a defect which existed before the loading, or at all events at the time of loading, and that this loss has resulted from that defect so existing, and whether that defect amounts to unseaworthiness or whether it amounts to unfitness of the vessel to carry the cargo, it is equally covered by these words; that under these circumstances they are entitled to say: "Accepting the common law warranty and accepting that the shipowner must get rid of his common law liability by some plain words in the bill of lading or other shipping contract, you have got those words here, because this particular defect is saved by the exception." It seems to me that the answer is tolerably plain. It is impossible for anyone who reads that proviso at the end of the exceptions to say that it is manifest upon the face of this bill of lading that the parties intended the shipowner to have no responsibility for unseaworthiness; on the contrary, it says in the plainest possible manner that his exemption from his common law liability for unseaworthiness is to be limited to the particular case mentioned in the proviso. Well, it seems to me that it is impossible, if you take unseaworthiness there in its widest sense, to say that it is plain, reading the exceptions and this qualification of the exceptions together, that the shipowner was to have been relieved from all liability for unseaworthiness. Then for the moment, although it does not agree with my judgment and opinion, I will assume that you ought to read "unseaworthiness" as limited in the way that Wills, J., limited it. Well, what then? The argument amounts to this, that having regard to the earlier portion of the clause which contains the exception, the final clause exempts the shipowner from all liability in respect of things occurring before the loading or at the time of the loading of the vessel, and therefore exempted the shipowner from the warranty of seaworthiness generally. They say that if you read the word as meaning unseaworthiness proper, then there is nothing here to prevent the exceptions applying to the warranty of fitness, because having regard to the words about the time of the occurrence of the peril, or of the damage or loss resulting from the peril, the warranty of fitness is not in any way asserted by the clause at the end of this proviso: all that is asserted there is by implicating the continuance of the warranty of seaworthiness in its proper sense, but the assertion of that is not the assertion of the continuance of the warranty of fitness, and therefore the warranty of fitness is excluded by these words in which the exceptions are couched. The answer is that really this argument must go the length of saying that the words of the exception exclude every defect and every loss resulting from a defect which was in existence before or at the time of the sailing. If that is so, it follows that they must exclude the warranty of seaworthiness in its widest sense. But the respondents are bound to admit that the words cannot, having regard to the express mention of unseaworthiness, have that effect. What is the result? The result is that it is plain that their contention that the parties ought to be taken on the words of this contract to have included everything in the exceptions which occurred before or at the time of loading is an unsound argument, and if you once get rid of that, the result is that the common law warranty of fitness is untouched.

In my judgment we ought in this case to treat the parties as having said nothing to exclude the warranty of fitness if the warranty of fitness is treated as a separate warranty. On the other hand, if the warranty of fitness is treated as part of the warranty of seaworthiness, then it seems to me upon any reasonable construction of this document that that warranty, so far from being negatived, is positively affirmed, unless the shipowners can save themselves under the words in the proviso.

For the reasons which I have given I think that the warranty of fitness really is untouched by anything in the bill of lading. If that is so I have no doubt, having regard to the admissions, that the warranty of fitness at all events has been broken, and I think that under those circumstances the shipowners must be held liable for the consequences following upon that.

As I have said before, though I base my judgment on this ground I need not differ from Wills J., at all. Not only was this point not argued before him, but he expressed no opinion upon it at all. But if it should be necessary to fall back on the question of what is the proper meaning of the word "unseaworthiness" in this bill of lading, in my judgment the wider and not the narrower meaning is the right one.

ROMER, L.J.—I cannot say that the question we have to decide on this appeal is an easy one, but after the best consideration that I can give to it, I also am of opinion that this appeal ought to succeed.

Now, a bill of lading in respect of the matter that we have to consider on this appeal has been the subject of a very large number of decisions, and the general principles under which bills of lading should be interpreted are well known at the present day, and the general construction to be given to them, in some respects of an artificial character, is well ascertained. In my opinion it is advisable not to depart from these principles in dealing with any special bill of lading that comes before the court, and as far as possible not to allow small variations in the form of the bill of lading to affect the general construction which has hitherto been put upon such documents. Now, I understand that for a long time shipowners have been trying to limit the general liability cast upon them as sea carriers by putting in special exceptions without going the length of refusing or seeking to exclude their liability in respect of the warranty of seaworthiness, and they have, as I understand, from time to time been extending the special exception. I think, however, that I am right in saying that as a principle of construction in these cases the warranty of seaworthiness will not be held to have been excepted by the special exceptions unless it plainly appears that it was intended to except the warranty. In others words, the court will not readily infer an exception of the warranty. I think, moreover, that nowadays, whatever views may have been entertained in years gone by, the warranty of seaworthiness includes, and is well known to include, the warranty that the ship and her equipment are fit for the purpose of safely carrying to their destination the goods which the shipowners know are to be carried; and further I think that in a bill of lading of the present day the expression "seaworthiness" or "unseaworthiness" would be used and would be understood as being used with reference to the well-known extent of the warranty as above stated. Now in the present bill of lading the special exceptions are very numerous. Sometimes you find used very general expressions, and in parts you find expressions minutely detailing special injuries or injuries arising in respect of special parts of the ship or its equipment, but for my present purposes let me read the exceptions so far as they are general and essential. The exceptions are: "From all loss or damage arising from the consequence of any injury to or defect in hull, tackle, machinery, outfit, or appurtenances, however the damage may be caused, notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel, and whether the loss or injury was occasioned by the negligence of the officers and crew before or after or during the voyage or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means had been taken to provide against such unseaworthiness." Now, that is the clause that we have to construe in this bill of lading. In the first place I ask myself does that make it clear to me that the general warranty of seaworthiness is intended to be swept away, as it would undoubtedly practically be if you treat all the special exceptions enumerated as being absolutely without limit? In my opinion, not only is it not clear that that was intended, but I think the wording shows that the numerous and wide exceptions to which I have referred are not intended to extend to unseaworthiness unless all reasonable means had been taken to provide against such unseaworthiness.

To my mind the very way in which these exceptions are wound up by reference to unseaworthiness points to this, that the shipowners were, notwithstanding the prior exceptions, intended to be made liable for unseaworthiness unless reasonable means had been taken to provide against it, and I think therefore on the construction of this bill of lading that the list of exceptions must all be taken to be subject to this, that the shipowners were to be under liability as specified as to unseaworthiness. Therefore it follows that in my opinion the general argument for the respondents that the special exceptions must first have given to them their full operation, and then that the warranty as to unseaworthiness must be cut down accordingly —that is to say, practically destroyed—really fails. I agree that the construction which I have put upon these provisions in this bill of lading cuts down to a very great extent the operation of the special exceptions, but it does not destroy the effect of those special exceptions. Cases were referred to in the course of the argument before us by way of illustration which show that that is so, and I have no doubt that other examples could be given if necessary. Therefore, as I have said, the first argument, and really the main argument on behalf of the respondents, appears to me to fail.

There is, however, a further argument that has to be dealt with on behalf of the respondents, and which I understand was the one acceded to by Wills, J. It is said that in this bill of lading the word "unseaworthiness" is not to receive its ordinary meaning, but is to be limited to unseaworthiness of the ship as a ship, without special regard to the cargo, to meet the ordinary perils of navigation. On consideration of the case I think that it would not be right on this bill of lading to cut down the meaning of the term "unseaworthiness" as contended for by the respondents. In the first place it is important to bear in mind that this word unseaworthiness is being used in a mercantile document for and by mercantile men, and it ought to receive what I have previously referred to as its now well-known meaning unless there are other and overwhelming considerations which compel the court to depart from that meaning. Now, to my mind there is nothing in this bill of lading, taken as a whole, which prevents the court from giving to the word unseaworthiness its ordinary meaning. If the earlier words in the clause in which it occurs, the special exceptions to which I have referred, could be said only to have a limited operation, which could only be given effect to by giving a limited construction to the word unseaworthiness, then I should have felt more difficulty than I do in dealing with the present argument; but I may point out that the exceptions cover defects in the hull itself before, during, or after the voyage, and if all the exceptions are to be given their full effect the word unseaworthiness cannot even have the limited meaning that Wills, J., seeks to give it, and therefore, consistently with giving to the special exceptions their meaning according to their terms, you could not cut down the meaning of the word unseaworthiness even to the extent pointed out by Wills, J. It would take away from the term unseaworthiness the whole, practically, of its meaning. Then last with regard to the point relied upon by Wills, J., which depended upon the expression used in the bill of lading "unseaworthiness of the ship at the beginning or at any period of the voyage" I think that it is not sound to infer from that phrase that it was intended to exclude the period of loading. I think that the expression "unseaworthiness at the beginning or at any period of the voyage" was a common one, used not with a view of narrowing the term "unseaworthiness," but with a view of showing that it was not to be limited. There are cases in which similar expressions

have had to be dealt with by the courts in which it is shown that those expressions are to have the full meaning that I am indicating now, and ought not to have such a limited construction as is sought to be put upon those words here. For example, in the case of *The Carron Park* the shipowners had stipulated that they should not be liable for neglect and so forth of their servants "during the voyage," and it was contended that "during the voyage" would only apply to the time at which the voyage commenced and that at any rate the voyage could not begin before the ship's loading was completed. But it was pointed out in that case, following other authorities, that the expression, being a general one, would cover the period during which the ship had to go from her then berth to the port of loading. In fact the expression a warranty of seaworthiness "at the beginning of and during the voyage," by itself, without any context to cut it down, would clearly, I think, cover, so far as regards the cargo, the period of loading. The fact is that for the purposes of the cargo and of that part of the warranty which extends to the ship being fit to receive the cargo, the voyage really begins when the cargo is put on board, and I think that the *primâ facie* meaning of the expression that we have to deal with here ought not to receive another interpretation, as contended by the respondents. To my mind there is nothing to sufficiently justify us in giving it another interpretation.

It appears to me, therefore, that this argument on behalf of the respondents also fails, and it follows that in my opinion the appeal must succeed.

STIRLING, L.J.—I have come to the same conclusion, and substantially for the same reasons as have been given by my learned brothers; but as we are differing from Wills, J., and out of respect to the very able arguments which have been addressed to us, I shall endeavour as shortly as possible to give the general grounds on which I come to the conclusion that the appeal ought to be allowed.

Now we have here to deal with a bill of lading which presents difficulties of construction on the face of it. It bears marks of not having been all framed at the same time, but of having been added to or altered from time to time, probably to meet the exigencies of commerce as various difficulties arose; but the general object is to limit the liability of the shipowners in respect of the general obligations imposed on them by law. The shipowners contract to deliver the goods in good order and condition at the port of discharge, but they except from such liability various matters, and amongst others all damage arising from the consequences of any defect in the hull or machinery or other appurtenances of the ship, "however such damage may have been caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel." Now, stopping there, it is contended on behalf of the respondents that if those words stood alone they would be sufficient to exonerate the shipowners from liability by reason of unseaworthiness of the vessel, which is one of the liabilities attaching by law. Cases were referred to to establish this, and it may be that such would be the effect of the clause in the absence of any context. But in construing documents, especially documents of this kind, it is not safe to deal with the contract piecemeal, but one must examine, in ascertaining the meaning of one portion of it, whether there is any context that follows. Now in the later portion of the document we find that it proceeds "whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by the wrongful act, default, negligence, or error in judgment of the owners, masters, officers, pilots, mariners, crew, engineers, stevedores, workmen, or other persons employed in or about the ship, or otherwise, and whether before or after or during the voyage, and for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness or by any cause whatever." This portion of the document is not introduced for the purpose of enlarging the perils, causes, or things which are to be excepted, because it begins by a reference to "the perils, causes, or things above mentioned." The object of it, therefore, must be to define the limits of exemption with reference to the perils, causes, and things which have been already mentioned in the prior part of the bill of lading. Consequently it seems to me that the earlier part of the document cannot be read in the wide sense in which the respondents desire that it should be read—as excluding all liability whatever on the part of the shipowners by reason of unseaworthiness. I think the two portions must be read together, and so reading them I come to the conclusion that the shipowners were to be liable in respect of unseaworthiness unless all reasonable means had been taken by them to provide against it.

Now, that being so, the question arises, What is the meaning of the word "unseaworthiness"? The learned judge in the court below says that it admits of two meanings—one relating to the fitness of the ship to encounter the perils of the sea, and the other including not only that fitness but also the fitness of the ship and her equipment to carry the particular goods with which she is to be loaded. The learned judge arrives at the conclusion that the word unseaworthiness is appropriate with reference to both species of fitness, and in that I agree with him. He, however, comes to the conclusion that in this particular bill of lading it is limited to what he calls the narrower sense of seaworthiness—namely, that which relates to the unfitness of the ship to encounter the perils of the sea. I am unable to agree with the learned judge in that respect. Looking at the object of this clause, I cannot doubt myself that the shipowner intended to exempt himself as widely as possible from liability, and that the meaning was that everything which the term "unseaworthiness" would appropriately cover was to be within the exemption. But it is not necessary absolutely to decide that. On this portion of the document it must be admitted that some meaning is to be attached to unseaworthiness. If the more limited meaning is to be attached to it, then it is said that the earlier portion of the document still remains in force, and that excludes all liability in respect of the fitness for the carriage of particular goods. I am unable to assent to that contention for when we find that the words in the earlier part of the document are sufficient to exclude all liability for any unseaworthiness in the widest sense, and when we find in the document a context which shows that it cannot have such a wide meaning and that it must certainly not be taken to include unseaworthiness in the narrower sense, then it seems to me that it cannot be intended to exclude unseaworthiness in the wider sense. At all events it is certainly in accordance with the cases already referred to on the part of the shipowner that when he desires to relieve himself of a common law liability he must do so in plain and unambiguous language. The result is that either unseaworthiness must be read in the wider sense or else that the unfitness of the ship with respect to the cargo to be carried is not to be excluded. In either view the shipowners fail.

Appeal allowed.

Solicitors, *Field, Roscoe, & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool; *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, Dickinson, & Hill*, Liverpool.

High Court of Justice.

Chan. Div. }
Farwell, J. } Aug. 6, 7, 1903.

PULSFORD *v.* DEVENISH. (*a.*)

Company—Voluntary winding up—Debts—Duty of liquidator—Negligence—Liability—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 107, 133, 138, 143—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 25.

The liquidator of a company, knowing of a debt due by the company, and having sufficient assets in his hands, did not, on the winding up of the company, pay the said debt. The creditor, upon hearing of the dissolution of the company and the distribution of assets, brought an action against the liquidator for breach of his statutory duty in not providing for the claims of the creditors, and, further, claimed damages against him.

Held, that the liquidator was liable.

By an agreement in writing of the 2nd of March, 1900, between the plaintiff Pulsford, as agent for and on behalf of his co-plaintiffs, the Société Centrale d'Electricité et de Lampes à Incandescence (a French company) of the one part, and the Hiram S. Maxim Electrical Corporation (Limited) (hereafter called the licensees) of the other part, it was agreed that the licensees should as from the date thereof have the grant from, the plaintiffs as beneficial owners of a licence to make, use, and exercise a certain invention during the unexpired residue of the term of the letters patent in respect thereof at a rent of £300 a year, the payments for 1900 and 1901 to be made on the signing thereof, and the next payment on the 1st of March, 1902, and subsequent annual payments on the 1st of March of each year. It was also agreed that the said agreement should be deemed to be a contract made in England, and should be governed and construed according to the laws of England. The payment for the licence for 1900 and 1901 was made to the plaintiff Pulsford on the signing of the agreement.

By written agreement of the 22nd of January, 1901, between the licensees and the Maxim Electrical and Engineering Co. (Limited), the licensees agreed to sell their business undertaking and assets, including book debts and the full benefit of all agreements which were then vested in the licensees or wherein the licensees had directly or indirectly a beneficial interest, and also all other agreements connected with the licensees' business, whereunder the licensees were entitled to any benefit, to the said electrical engineering company.

It was further provided that the said company would pay and discharge all the trade debts and liabilities of the licensees of every kind in due course of business, and within six months from the date thereof would carry out and complete all the existing contracts the licensees might have entered into and would indemnify the licensees against all claims and responsibilities arising out of the debts, liabilities, and contracts. For the purpose of carrying out this agreement the licensees went into voluntary liquidation early in March, 1901, and the defendant was appointed the liquidator and was authorized when and so soon as the debts and liabilities of the licensees had been paid and satisfied to distribute among the contributories of the licensees the number agreed upon of fully paid-up shares.

The defendant accordingly proceeded to divide such shares among the shareholders of the licensees. Prior to his appointment as liquidator the defendant had been a director of the licensees, and had on their behalf signed the agreement of the 2nd of March, 1900, with the plaintiff, and the defendant consequently had, as the plaintiffs contended, both as director and liquidator, full knowledge of the provisions of that agreement and of the plaintiffs' rights under it.

Neither of the plaintiffs at any time received notice of the liquidation, or saw the advertisements which were inserted in six London papers calling upon creditors to send in their claims.

In April and May, 1900, the plaintiff Pulsford, as agent for the plaintiff company, supplied the licensees with lamps to the value of £124, and that sum was owing to the plaintiffs at the date of the voluntary liquidation.

The defendant wrongfully, and in breach of his duty, as the plaintiffs now contended, as liquidator, made no provision either for the plaintiffs' rights under the agreement of the 2nd of March, 1900, or for their claims in respect of the sum of £124 and distributed the assets of the licensees without making such provision.

The creditors of the licensees, other than the plaintiffs, were paid in full, and the assets in the liquidation were more than sufficient to pay the plaintiffs also in full.

On the 6th of August, 1901, an account purporting to show the manner in which the liquidation had been conducted, was laid before a general meeting of the licensees, and on the following day the defendant made a return to the registrar of such meeting having been held, and on the 7th of November, on the expiration of the statutory three months, the licensees were deemed to be dissolved. Neither of the plaintiffs had notice or knowledge of the liquidation until June, 1902, nor of the dissolution of the licensees till a later date.

The plaintiffs now claimed £1,800 damages under their agreement, and £124 for the lamps supplied.

It appeared from the defendant's evidence that he had no knowledge whatever of the plaintiffs' claim for the lamps, and that beyond inserting the advertisements in the six newspapers as above stated he had done nothing to ascertain who were the creditors of the licensees, and had not paid a single creditor, but had left everything to the new company, relying on their covenant in the agreement of the 22nd of January, 1901.

Gore-Browne, K.C., and *S. R. Earle*, for plaintiffs.—We have no statutory remedy, the old company being dissolved, neither can we apply to the court under section 138 of the Act of 1862 as extended by section 25 of the Act of 1890. Under section 133 of the Companies Act, 1862, the liquidator has a statutory duty to distribute the assets of the company *pari passu* among the creditors: *Ross* v. *Rugge-Price*, 24 W. R. 786, 1 Ex. D. 269; *In re London and Caledonian Marine Insurance Co.*, 27 W. R. 713, 11 Ch. D. 140.

Upjohn, K.C., and *A. Adams*, for the defendant.—The case is covered by *Knowles* v. *Scott*, 39 W. R. 523, [1891] 1 Ch. 717. The statute did not impose any duty on the liquidator except as far as his own principals were concerned.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

FARWELL, J., said that the present case could be distinguished from *Knowles* v. *Scott*. The defendant as liquidator took no steps to ascertain what debts the company owed except by inserting advertisements in six London papers. The defendant knew of the plaintiffs' claims under the agreement, but he said he was not aware that the lamps had been supplied, as he never examined the books. He did not pay one single creditor, but apparently relied upon the covenant by the purchasing company. He received the purchase consideration, and distributed it among the shareholders of the old company, he himself receiving over 2,000 shares. A more gross dereliction of duty on the part of a liquidator he had seldom heard of. The question now arose, Was the defendant under any liability to the plaintiffs, the company having been dissolved, and the plaintiffs not having known anything about the liquidation? It would be shocking, in his opinion, if no remedy existed, and he was glad to think he was able to find one. Section 133 of the Companies Act, 1862, provided that upon the voluntary winding up of a company the property of the company should be applied in satisfaction of its liabilities *pari passu*, and that the liquidators should pay the debts of the company and adjust the rights of the contributories amongst themselves. Section 138 of the same Act provided that, where a company was being wound up voluntarily, the liquidators or any contributory might apply to the court to determine any question arising in the matter of the winding up, and by section 25 of the Companies Act, 1900, that power was extended to creditors. The effect of these sections was, in his opinion, to impose a statutory duty on the liquidator to pay the debts of the company and to provide a remedy for creditors by application to the court so long as the liquidation was actually going on, but when the company was finally dissolved there was no longer any remedy under the Act. When the statutory remedy was thus gone, then, in his opinion, the ordinary rule applied that the common law remedy remained to the creditor, and he could bring what used to be called an "action on the case": *Ross* v. *Rugge-Price*. The direction to the liquidator by the Act of 1862 was not limited by time, and the duty imposed remained though the company was dissolved. That was the view of James, L.J., in *In re London and Caledonian Marine Insurance Co.* In the case of *Knowles* v. *Scott* the liquidation was still pending and the contributory there had his statutory remedy.

Romer, J., there said: "All I hold is that the liquidator is not liable to an action for damages for delay in performing his duty when that delay was not wilful or fraudulent and in no way arose from *mala fides* on his part." The Lord Justice had not to consider the circumstances which had to be considered in the present case, the company having been dissolved and the statutory remedy lost: The plaintiffs had not charged fraud, and he did not therefore rest his judgment on fraud; but it was difficult to see how any liquidator could honestly permit himself to bring about a dissolution of a company when he knew that a large debt of that company remained unpaid. Further, the liquidator had not attempted to compel the new company to perform its obligation of payment of such debt, though he was himself interested as a shareholder in the new company.

The result is that I hold the defendant to be liable, his liability extending to the amount payable under the agreement of the 2nd of March, 1900, subject to the usual discount, and to the amount due for the lamps supplied, which will be reduced to a shilling if the lamps be restored to the plaintiffs.

Solicitors for plaintiffs, *Braby & Macdonald.*
Solicitors for defendants, *Terrell, Terrell, & Varley.*

Chan. Div. } May 4, 1903.
Farwell, J. }

In re CORBETT.
CORBETT *v.* VISCOUNT COBHAM. (*a.*)

Will—Legacy—Subsequent gift—Particular purpose—Ademption.

A testator by his will gave a sum of £10,000 to the trustees of the endowment fund of a hospital. Subsequent to the date of his will he sent a cheque to the trustees for the sum of £10,000.

Held, that the legacy in the will was for a particular purpose, and was adeemed by the subsequent gift of the same sum in the testator's lifetime.

The testator, John Corbett, by his will, dated the 5th of May, 1898, made *inter alia* the following bequest: "I bequeath the following charitable legacies, for which the receipts of the treasurer or other proper officer of the respective institutions hereinafter named shall be sufficient discharges—that is to say, to the trustees of the Infirmary, Worcester, £1,000; to the trustees of the endowment fund of the Corbett Hospital, Stourbridge, £10,000."

On the 6th of August, 1900, the testator wrote to Lord Cobham, who was one of the trustees of the hospital, in the following terms: "I am desirous of redeeming a promise which I think I made some time ago to advance a sum of £10,000 in addition to the sum I have already advanced to endow the hospital in which I am interested at Stourbridge." Subsequently the testator sent a cheque for the sum mentioned.

Testator died on the 22nd of April, 1901, and his will was proved on the 30th of October, 1902.

The question to be determined was whether the gift of £10,000 made by the testator operated as an ademption of the legacy of £10,000 bequeathed in the will.

Upjohn, K.C., and *Henderson*, for executors.—This was a gift for a particular purpose, and the legacy is therefore adeemed: *Debeze* v. *Mant*, 2 Bro. C. C. 165; *In re Pollock, Pollock* v. *Worrall*, 28 Ch. D. 552, 33 W. R. Dig. 242; *In re Fletcher, Gillings* v. *Fletcher*, 36 W. R. 841, 38 Ch. D. 373; *In re Smythies, Weyman* v. *Smythies*, 51 W. R. 284, [1903] 1 Ch. 259.

Butcher, K.C., and *W. L. Richards*, for the defendants, referred to Roper on Legacies (4th ed.), p. 381; *Monck* v. *Lord Monck*, 1 B. & B. 298; *Rosewell* v. *Bennett*, 3 Atk. 27; *Pankhurst* v. *Howell*, 19 W. R. 312, L. R. 6 Ch. 136.

Upjohn, K.C., replied.

FARWELL, J., stated the facts and continued: The testator made two consecutive gifts. One was "To the trustees of the Infirmary, Worcester, £1,000," the other was the gift in question. The first one was obviously a general gift, but the object of the testator's bounty in the second one was the endowment fund of the Corbett Hospital. The trustees could not do what they pleased with it, because they were precluded from spending it and were bound to use it on an endowment fund, using only the income thereof. I suggested to the learned counsel in argument that if there were a gift to trustees for the purpose of apprenticing A. B., a stranger, of a sum say of £1,000, clearly that would be a particular gift. So, again, to the trustees for the purpose of making an endowment fund for A. B., a stranger, and then to his children, in my opinion that would be a particular purpose. The case of *In re Smythies*, before Swinfen Eady, J., does not really touch this point, because

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

that case went on the fact of a gift to A. in trust for B., an infant to whom the testator was not *in loco parentis*. The creation of the fund here is a case of perpetuity for a particular department of the hospital, and not for its general purposes. In my opinion, therefore, the gift in the will is for a particular purpose, and the subsequent gift of the £10,000 operates as an ademption.

Solicitors, *Crowders, Vizard, & Oldham; A. E. Bale*, for *Harward & Co.*, Stourbridge.

K. B. Div. (Kennedy, J.) July 31, 1903.

CRONON *v.* STANIER. (*a.*)

Insurance, marine—Constructive total loss only—Sue and labour clause—Claim by underwriters for work and labour done, or as salvors—Common law—Maritime law.

A vessel was insured against total and/or constructive total loss only, and the policy contained the sue and labour clause. During the continuance of the policy the vessel was stranded and the crew left her. Before the insurers' representatives arrived to take charge of the vessel considerable damage was done by looting. The insurers, through a contractor on the no cure no pay system, raised the vessel and brought her into port. The insurers claimed for an award as salvors or for an amount for work and labour done.

Held, that there was no constructive total loss, and that the underwriters were not entitled to an award as salvors, and that there was no common law right to recover.

The Pickwick, 16 *Jurist* 669, *distinguished.*

Action tried in the commercial court before Kennedy, J., sitting with a jury.

This was an action brought to recover as for a constructive total loss on a policy of marine insurance, dated the 30th of August, 1900, on the vessel *Izidoro Antunes*. The plaintiff was the mortgagee of the vessel, and the defendant was an underwriter at Lloyds. Of the mortgage debt there remained due and owing the sum of £6,000.

The policy, which was for "twelve calendar months, say from the 20th of September, 1900, to the 19th of September, 1901, both days inclusive, date of leaving Para or from expiry of voyage policy whilst in rivers and basins of the Amazon," contained the following clauses: "The said ship, &c., goods and merchandizes, &c. . . . are and shall be valued at £5,950; on hull and materials valued at £9,000, machinery and boilers, &c., valued at £5,000—£14,000. This insurance is against the risk of total and/or constructive total loss of vessel only"; " . . . and in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants and assigns, to sue, labour and travel for, in, and about the defence, safeguard and recovery of the said goods and merchandizes, and the ship, &c. . . ." "Warranted nevertheless free of capture, seizure, and detention, &c. . . . piracy excepted . . . "; "The insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss."

The facts were as follows: On the 18th of May, 1901, the *Izidoro Antunes* ran on a bank in the River Amazon. Twice a day the vessel, with the exception of the awning-deck, promenade deck, and part of the fore-part of the vessel was submerged by a four-knot tide.

The crew landed and encamped on the shore, which was half a mile distant. On the 19th of May they left for Para, leaving six men to guard the vessel. This guard was withdrawn on the 23rd of May, since the owners considered it was the duty of the underwriters to guard the vessel, as the former alleged the vessel to be a constructive total loss.

On the 8th of June the representatives of the underwriters arrived and took charge of the vessel.

Between the 23rd of May and the 8th of June the vessel had been looted by the inhabitants of the banks of the Amazon, who removed a large quantity of fittings, deck planks, &c., causing considerable damage.

The defendants raised the vessel through one Faria Barbosa, contractor, on the "no cure no pay" principle, and brought her into Para.

The plaintiffs claimed as for a constructive total loss and alleged that notice of abandonment had been given; the defendants denied the constructive total loss or that notice of abandonment had been given, or that the loss was caused by perils insured against, and alleged that the loss was caused by the wilful act and default of the insured in withdrawing the crew from the vessel when stranded and by taking no steps to protect the vessel from further damage. The defendants counterclaimed (1) for £4,500, the expense incurred in raising and bringing the vessel into Para; (2) for such an award as salvors as might be just.

The jury returned the following findings: The reasonable cost of raising and taking the vessel into Para would be £3,500; the costs of repair at Para would be £6,000; the reasonable cost of repairing the damage caused by plundering would be £3,000; that the damage caused by plundering was all done prior to the 8th of June; that the underwriters did not have the opportunity of preventing the plundering, but that the owners could have prevented the plundering to the full extent.

Hamilton, K.C., and *Maurice Hill*, for the defendants. On the counterclaim the defendants are entitled at common law to recover the expense incurred in raising the vessel and bringing her into Para as work and labour done on an implied promise to pay. If the defendants are not entitled to recover at common law, then under the maritime law they are entitled to an award as salvors. All the elements of salvage are present, and the mere fact that the defendants had an interest does not of itself disentitle them to an award as salvors.

Scrutton, K.C., and *Lochnis*, for the plaintiffs.—The defendants cannot recover for work and labour done. If, however, they can recover, they were the "factors, servants, or assigns" within the meaning of the sue and labour clause, and can be paid; but under the sue and labour clause the defendants would have to repay such amount to the plaintiffs, and, therefore, to prevent circuity of action, the defendants cannot recover. The services rendered were not salvage services. Further, since the defendants are underwriters, and had an interest, they are not entitled to an award as salvors.

The following cases were cited: *The Pickwick*, 16 Jur. 669; *The Liffey*, 58 L. T. 351; *Newman* v. *Walters*, 3 Bos. & P. 612; *Towle* v. *The Great Eastern*, 2 Rep. Maritime Law Cases 148; *The Hannibal* v. *The Queen*, L. R. 2 A. & E. 53, 16 W. R. Ad. Dig. 20; *The Blairmore*, [1893] A. C. 593; *Johnston & Co.* v. *Hogg and Others*, 31 W. R. 768, 10 Q. B. D. 432; *The Solway Prince*, 44 W. R. Dig. 153, [1896] P. 120; *Uzielli & Co.* v. *Boston Marine Insurance Co.*, 33 W. R. 293, 15 Q. B. D. 11; *Van Laun* v. *Thames and*

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

Mersey Insurance Co., ante, p. 59; *Western Insurance Co.* v. *Poole*, 8 Com. Cas. 108.

KENNEDY, J.—In this case the jury have come to the conclusion that the vessel was not a constructive total loss, and it only remains for me to deal with the counterclaim. This is a counterclaim in respect of services rendered to the insured vessel, and the persons who put forward the claim are the underwriters on that vessel. The policy is a policy against total or constructive total loss only, and contains the usual suing and labouring clause, which is not struck out. Under the policy it appears to me that the word "only" does not operate to strike out the suing and labouring clause; in other words, it is a policy under which, if, as a fact, efforts are successfully made to avert either a total or a constructive total loss by the labours of the assured, there would be a right to recover for those labours under the suing and labouring clause. When this vessel stranded on a reef in the Amazon, the person who claimed, at any rate, to be the assured at Para protected the wreck for a few days, and then took the crew away, and said he treated the casualty as a loss, and that the underwriters were the proper persons to deal with it, because it was a total loss; the underwriters then made a contract for employing a certain firm Faria Barbosa, to do the salvage work, the work of bringing the vessel off the reef to Para, on the principle of "no cure no pay," and fixed a sum in case it was successfully done. It was successfully done, the sum has been paid, and either in full discharge of that sum, or by way of obtaining some money which will go in part reduction, the underwriters who have successfully resisted an action brought by the plaintiff to recover as for constructive total loss say in their counterclaim that they are entitled either as salvors to an award or to recover under a common law count for work and labour done. It is impossible on the construction that I give to this policy for me to say that there is any common law right. What the underwriters did they had a right to do for themselves under the policy, without prejudice to their contention that there was no constructive total loss; they as well as the assured had the right to do work and try to keep the property safe. As the assured at Para were not going to take any further step in the matter, the underwriters did what the assured, if he had done it himself, would have been entitled to recover back from the underwriters, and therefore it would be simply to give effect to a claim which might be recovered back by the assured directly it was paid over. The insurers through the salvage association accepted the position, and it seems to me they were entitled to accept it, and it seems to me there is no claim on which they can sue the assured, or any implied contract at law to treat it as work and labour done for the assured; because if it were so done for them, and at their request they would have a right under the policy to ask back any sum that was given. As to the question of the salvage. It is said that the underwriters paid Faria Barbosa, with whom they contracted under an agreement of "no cure no pay," which is said to be strictly a salvage class of agreement; further that they have salved that vessel which by the verdict of the jury was after all the plaintiffs' vessel and not the underwriters'. They say they are entitled to a salvage award for that, and the claim, unless the case of *The Pickwick* raised the point, is practically a novel one. In this particular case I should feel great difficulty if there were any right to salvage on the evidence before me in dealing with the claim, because the salvage would have to be given on the value of the property as salved, and the value of the property as salved on the evidence before me would be a very difficult thing to appraise. But I am not deciding the case on that ground. I could come to some computation of value, but it would only be very small. I do not feel justified in treating the underwriters, who have taken on themselves (I think that is really the position on the facts of this case) to do the suing and labouring, with the assured person sitting by and knowing of it, to be doing it other than as persons who were no doubt acting in their own interests, because it was to their own interest that there should be no constructive total loss, and they were entitled under the policy so to act without affecting the safety of their position. But at the same time they were in that sense acting in suing and labouring for the vessel through Barbosa, and, as such, I think on two grounds I should have a difficulty which I do not see my way of getting over. In the first place I think that they were not volunteers but as insurers, apart from the special facts and circumstances, interested persons, salving for themselves to prevent a constructive total loss; but I think further as to the particular facts they were doing with the assured's knowledge that which he could properly allow them to do, and safely because they were doing that which would cause him no liability, because as to suing and labouring he would be protected from cost and expenditure under the policy. But then comes the case of *The Pickwick*, 16 Jurist, p. 669, which was a decision of Dr. Lushington. There a vessel, *The Pickwick*, which was insured by underwriters, Potter & Co. and Rawson & Co., had been abandoned by her crew, and the underwriters chartered a steamer to go in search of her, and, ultimately in the view of the court, that vessel, though not alone, did render salvage service to the barque, and brought her into safety. A claim was put forward then apparently by the underwriters who hired the steamer, and that is what I wish to call attention to, for the owners do not appear to have been parties to that case at all, and a question apparently was taken whether the party who hired was not entitled to claim as owner of the property for the time being. There is a considerable discussion by the learned judge as to the position of the claim. He says: "If the owners of the property had hired the vessel at their own peril to save the ship, then I might have doubted whether I could have allowed them to appear in the character of salvors; still I should have had great hesitation in excluding the persons who actually performed the service. But it is not pretended that the parties who now claim are owners at all. It is said that they are insurers to the extent of £1,170, and that, as brokers, insurances are effected by them to the extent of £12,000. If that be so, on what grounds would they be entitled to sue?" Then he proceeds to the position of the insurers as persons who remained on shore and merely hired the vessel to do it; and he points out that owners who remain on shore may be still, if their property is at risk, entitled to be salvors, though they remain on shore, and do not take part themselves in the act of salving. Then he says: "The true question, however, is whether the party who hired is not entitled to claim as the owner of the property for the time being? Am I to exclude the persons to whom the owners have transferred their right, by virtue of what they must have deemed a remunerative contract for the risk run and the services performed? I shall decree to them what I should decree to the owners of *The President* if they were suing here—namely, the proportion they would take for the performance of a beneficial service" And a little later on he says: "With regard to the steamer I will only observe that, with respect to Potter & Co. and Rawson & Co., I do not allot one sixpence to them in their capacity as salvors." That great judge

was acting, it seems to me, simply upon the view that for the time being the underwriters under their contract for employment ought to be treated as owners of the vessel, the vessel which was at risk, the vessel which was the instrument of the salvage service, and as such he allowed them to have a salvage award.

It appears to me that in this case the circumstances are not the same. Were they the same I should simply follow that decision. But here there was no such contract for the employment of a ship at all. The only contract was for the personal services of Faria Barbosa & Co. under a contract by which Faria Barbosa might have been under obligation not to claim salvage themselves, in the sense of claiming it by exercising a lien or suing for salvage in respect of the vessel salved; but nevertheless it seems to me that this is distinguishable. Just as a shipowner is entitled to reward for the use of a vessel and men during salvage, the judge in the case of *The Pickwick*, gave the underwriter in that position the right, not to salvage reward, but to reward which the owners of the chartered vessel would have been entitled to as owners, according to the practice of the Admiralty Court. Here there is nothing of the kind; there were certain services which did result successfully rendered by persons who were employed to sue and labour for the safety of that vessel by the insurers, who were not only interested in the safety of the property as such, and therefore were not pure volunteers, but who were (as indeed the common law counterclaim of the defendants assumes they were) doing that which, under the circumstances, was successful in preventing constructive total loss with the knowledge and consent, and in a sense on behalf of the assured person; in other words, suing and labouring for him, he knowing that under the suing and labouring clause they were entitled to do that at the expense of the underwriters. There will be judgment for the defendant on the claim, and for the plaintiff on the counterclaim.

Solicitors for the plaintiff, *Thomas Cooper & Co.*

Solicitors for the defendant, *Waltons, Johnson, Bubb, & Whatton.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) July 2, 1903.

FERRAND v. BINGLEY URBAN DISTRICT COUNCIL. (a.)

Highway — Repair — General district rate — Alleged exemption by reason of liability to repair ratione tenuræ*—Evidence not forthcoming that in* 1835 *predecessor in title was "legally exempt"—Highway Act,* 1835 (5 & 6 *Will* 4, *c.* 50), *s.* 33*—Public Health Act,* 1875, *ss.* 210, 211, 269.

Where a general district rate is levied and the owner of property assessed thereto claims exemption from so much of the rate as relates to the cost of the repair of a highway, under section 33 *of the Highway Act,* 1835, *he must not only prove that he or his predecessors in title had, previous to* 1835, *been under liability to repair* ratione tenuræ, *but must also prove the fact of non-payment of rates or other circumstances giving rise to the presumption of the existence of the exemption claimed.*

Case stated by the Court of Quarter Sessions for the West Riding of Yorkshire, at the instance of the respondents, upon the allowance of an appeal by a landowner under section 269 of the Public Health Act, 1875 against a general district rate made by the respondents, an urban district council, which included the cost of repairs of highways within their district in accordance with section 216 (i.).

The ground of the appeal to quarter sessions was that the appellant's property in the district had, previous to the passing of the Highway Act, 1835, been legally exempt by reason of liability to repair *ratione tenuræ* certain highways in the district; that these had been repaired *ratione tenuræ*, and that therefore the property was exempt under section 33 of the Highway Act, 1835, from payment of so much of the rate as was made to defray the cost of repairs in the district.

No evidence was given as to whether or not prior to 1835 the owners or occupiers of the appellant's lands had performed statutory duty or paid composition in lieu thereof, or paid highway rates.

The court of quarter sessions found as a fact that the appellant and his predecessors had repaired the highway in question from time immemorial *ratione tenuræ*, and that such lands as were liable to its repair were exempt.

The question for the opinion of the High Court was whether the court of quarter sessions was right in allowing the appeal.

The material facts set out in the case were that down to 1862 the hamlet of Harden was a separate highway parish as defined by the Highway Act, 1835. A highway called the Harden and Cullingworth-road runs through the village of Harden and extends outside the actual village 2,070 yards in an easterly direction and 1,150 yards in a westerly direction; this was the highway in respect of which the question arose. There were also within the old highway parish of Harden other highways, which were repairable by the inhabitants at large; the portion of the highway in question within the actual village of Harden had also always been, and still was, repaired by the inhabitants at large. In 1862 the Bingley Township Local Board was formed and one of the constituent parts of that district was the hamlet of Harden. In 1894 that local board became the Bingley Outer Urban District, the area remaining as before. In 1898 the present urban district of Bingley was duly formed, comprising three separate urban districts—viz., the Bingley outer urban district, the Bingley urban district, and the Wilsden urban district. Mr. Ferrand was the owner, but not the occupier, of some of the lands alongside that length of the highway lying within the actual village of Harden upon the south side of that highway. This land was acquired by Mr. Ferrand's predecessors in title in comparatively recent times. Mr. Ferrand was also the owner of all the land on both sides of the said highway outside the actual village of Harden, occupying part of such land himself; this land as to the whole thereof had been in the ownership, and as to part thereof in the actual occupation, of himself or his predecessors in title continuously from a date long anterior to 1831. Mr. Ferrand was also the owner of extensive lands throughout the remainder of the area of the district council.

On the 17th of November, 1902, the council duly made and levied, under sections 210 and 211 of the Public Health Act, 1875, a general district rate at 2s. 2d. in the pound, and demand thereof was duly made from Mr. Ferrand. The cost of repairs of high-

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

ways was included in the said rate in accordance with section 216 (1) of the Public Health Act, 1875, inasmuch as the whole of the council's district was rated for works of paving, water supply, and sewerage.

Mr. Ferrand gave notice of appeal against such rate on the ground above stated. No evidence was given as to whether or not down to the date of the Highway Act, 1835, the owners or occupiers of the lands of Mr. Ferrand performed statute duty, or paid composition in lieu thereof, or paid highway rates. It was admitted that from 1862 to 1898, both inclusive, they paid highway rates, and since 1898 they had paid general district rates. No evidence was given as to whether or not they had paid highway rates between 1835 and 1862. On the part of Mr. Ferrand a book containing entries between the years of 1731 and 1751 was produced, which showed that payments made for repairing portions of the highway in question were entered as items chargeable against the estate. In 1886 Mr. Ferrand and two of the tenants of portions of his estate lying immediately alongside the highway in question were called upon by the Bingley Township Local Board to repair that portion of the highway lying to the west of Harden village, on the ground, as the board alleged, that they were liable to do so under section 94 of the Highway Act, 1835, and later a summons was issued against one of the tenants charging "non-repair of highways" The proceedings against the tenant were not gone on with, in consequence of liability being accepted; and so much of the highway lying outside the actual village of Harden had ever since been repaired by Mr. Ferrand or his tenants. Upon these facts Mr. Ferrand asked the court to infer and to find as facts that he and his predecessors in title or their tenants had repaired the highway in question outside the actual village from time immemorial, and under an obligation *ratione tenuræ*; it was further contended by Mr. Ferrand that such part of a general district rate as was made to defray the cost of repairs of highways was still levied by the district council as surveyors of highways acting under or by virtue of the Highway Act, 1835, and could be dealt with separately from the rest of the rate. For the district council it was contended that there was no evidence that Mr. Ferrand and his predecessors in title or their tenants had repaired the highway from time immemorial, or that they did so (if at all) under a liability to repair *ratione tenuræ*; that there were no facts to show a legal exemption under section 33 of the Highway Act, 1835; that that section had no application to any part of a general district rate, inasmuch as no part of a general district rate was imposed under or by virtue of the Highway Act, 1835; and that, even if prior to 1835 Mr. Ferrand's predecessors were entitled to any "legal exemption" within the meaning of section 33, it was incumbent upon him to prove affirmatively to what particular lands such "legal exemption" attached in the year 1835, and that he had not attempted to do so.

The court of quarter sessions found as a fact that Mr. Ferrand and his predecessors in title had repaired the road—*i.e.*, the highway in question so far as lying outside the actual village of Harden—from time immemorial, and that the road had been so repaired *ratione tenuræ*; and upon these findings the court found that in respect of such lands he was exempt from such portion of the general district rate as was attributable to the repairs of the highways; the court accordingly allowed Mr. Ferrand's appeal against the rate.

The urban district council appealed.

Macmorran, K.C., and *J. Scholefield*, for the district council.—There was not sufficient evidence of a liability to repair *ratione tenuræ* to justify the court of quarter sessions in holding that there was a legal exemption proved under section 33 of the Highway Act, 1835, and therefore the court of quarter sessions have come to a wrong determination in law. Even if the evidence showed generally that prior to 1835 the respondent's predecessors were entitled to some legal exemption within section 33, he must nevertheless prove affirmatively to what particular lands, now in his possession, such legal exemption attached at the passing of the Highway Act, 1835. That he has not attempted to do. There must be evidence of exemption in fact, and there is none in the present case. Liability *ratione tenuræ* can exist with or without exemption from other burdens, and in each case it is a question of evidence: *Heath* v. *Weaverham Overseers*, 42 W. R. 478, [1894] 2 Q. B. 108; *Reg.* v. *Browne*, 13 Q. B. 654; *Esher and Dittons Urban Council* v. *Marks*, 50 W. R. 330, 71 L. J. K. B. 309; *Lyme Regis Corporation* v. *Henley*, (1834) 3 B. & Ad. 77, 2 Cl. & Fin. 331; *Reg.* v. *Rollit*, 24 W. R. 26, L. R. 10 Q. B. 475. Further, the exemption given by section 33 does not apply to a general rate: *Dyson* v. *Greetland Local Board*, (1884) 13 Q. B. D. 946, 32 W. R. Dig. 88.

A. T. Lawrance, K.C. (*T. R. D. Wright* with him), for the respondent.—The court of quarter sessions was entitled, on the evidence, to find that Mr. Ferrand was exempt from paying so much of the rate as was levied to repair so much of the highway as is disputed. [He referred to the same cases as *Macmorran* had cited, and also to 6 Co. Rep., pt. XIII., p. 33; *R.* v. *Ecclesfield, Inhabitants of*, (1818) 1 B. & Ald. 348, Lord Ellenborough, C.J., at p. 356; *Freeman* v. *Read*, 11 W. R. 802, (1863) 4 B. & S. 174; *Great Western Railway Co.* v. *Deuchwait*, (1861) 25 J. P. 342; *Dalton Overseers* v. *North-Eastern Railway Co.*, [1900] A. C. 345, 48 W. R. Dig. 67; sections 144, 149, 211 of the Public Health Act, 1875; and Glen on Highways (1st ed.), p. 113] It is sufficient to show that the road was repaired, although no rate for that purpose existed, to establish a *primâ facie* presumption of liability to repair *ratione tenuræ*. Once that presumption is made out from the evidence, as is the case here, then the onus of proving liability to the rate is shifted on to the district council. To discharge that burden the appellants here must prove, and they have failed to do so, that prior to 1835 Mr. Ferrand's predecessors in title had paid a highway rate in respect of the lands in question. Therefore this appeal should be dismissed.

[On the question whether the exemption given by section 33 applied to a general rate the court did not desire to hear argument, as they were not prepared to decide that question.]

Macmorran, K.C., in reply.—The burden is not upon the district council to show any payments were made by the respondent's predecessors in title towards the repair of the highway. No books or records before 1862 can be found, and there is no evidence one way or the other. Mr. Ferrand is claiming exemption, and he, like any other plaintiff, must prove his case and produce evidence if he can, that highway rates were not in fact paid.

Lord ALVERSTONE, L.C.J.—In my opinion this appeal succeeds upon the ground that on the evidence before us we cannot hold that the condition for exemption given by section 33 of the Act of 1835 has been proved. That section is in these terms: "When property, or the owner or occupier in respect thereof, has, previous to the passing of

this Act, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property and the owners or occupiers thereof shall be exempt from the payment of the rate hereby imposed." I do not desire to express any final opinion now on the second point raised by Mr. Macmorran, that the exemption, even if the court of quarter sessions was right in taking it as proved, would not avail the respondent here, because this was a general district rate, and therefore a rate not contemplated by the section I have just read. I am not prepared to assent to or dissent from that argument, because I am going to deal with the case as if the objection was taken by Mr. Ferrand to the payment of an ordinary highway rate. Mr. Lawrance's argument — and he pressed us very strenuously to accept it—was that if it was found in a case like this that in fact the person who claimed to be exempted had repaired or was liable to repair, a highway *ratione tenuræ*, he had fulfilled his obligation in the sense that he came within the exemption in section 33 and was not liable for the payment of highway rates. I think his argument failed, because for his argument he had to assume that it was sufficient to show liability to repair *ratione tenuræ* without showing non-payment in fact or other circumstances which gave rise to the presumption. In all the cases that have been cited there has been shown either non-payment of rates or some other circumstances which rendered it necessary for the court only to consider whether or not the exemption claimed was a legal exemption. For example, that was the point the court had to decide in *Freeman* v. *Read*, 4 B. & S. 174, and Wightman, J., in his judgment on p. 185 so deals with it. Again, in *Reg.* v. *Heath*, L. R. 1 Q. B. 218, the same consideration arises. In the more recent case of *Heath* v. *Weaverham Overseers*. 42 W. R. 478, [1894] 2 Q. B. 108, Charles, J., says—"What is the meaning of the words 'legally exempt'? Clearly the exemption must be a legal one; and it has been decided that, although the mere omission to rate premises is not sufficient evidence of exemption, yet the circumstance that the occupiers have always repaired a particular road is enough to establish a 'legal' exemption." Obviously the learned judge there assumed that the exemption in fact existed, for he was speaking of a case in which the root and foundation of the claim to exemption was that there had been non-payment. In all the cases the arguments proceeded upon that basis. There must be facts which show that the person sought to be charged has not contributed to the highway rates, although payment by mistake would not of course show a liability. In the present case it is stated that "no evidence was given as to whether or not down to the date of the Highway Act, 1835, the owners or occupiers of the lands of Mr. Ferrand performed statutory duty or paid compensation in lieu thereof, or paid highway rates," and we were also told that no books or records were forthcoming prior to 1862. Having regard to the statement in the case and what was said about the books and records, it must, I think, be taken that there is, as Mr. Macmorran pointed out, no evidence here one way or the other on this point. That being so, it is quite impossible to come to the conclusion that there was evidence upon which the court of quarter sessions could hold, as they did, that any claim to legal exemption from payment of the rate was made out by Mr. Ferrand. Such a claim must be based on legal grounds, and unless there is authority to show that the liability to repair some highway *ratione tenuræ* would of itself found and give rise to an exemption from the payment of highway rates, the respondent here does not come within the authorities and the decision appealed from is wrong. In my opinion as I have already pointed out, the cases all fall short of laying down any such proposition.

WILLS and CHANNELL, JJ., gave judgment to the same effect.

Appeal allowed.

Solicitors for the appellants, *Church, Adams, & Prior*, for *A. & M. W. Platts*, Bingley.

Solicitors for the respondents, *Patersons, Snow, Bloxam, & Co.*, for *Mossman, Atkinson, & Blankley*, Bradford.

IN BANKRUPTCY.

K. B. Div. (Wright, J.) — Oct. 26.

In re MORGAN.
Ex parte THE BOARD OF TRADE. (*a.*)

County court—Bankruptcy—Taxation of costs—Execution—High bailiff's fees—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71) *s.* 11, *sub-section* 1—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 146 — *County Court Rules*, 1889, *ord.* 25, *r.* 12c — *Order as to County Court Fees*, 1901, *Schedule B, Part I., r.* 35.

Where the high bailiff of a county court seizes separate sets of goods of the same debtor, and in the same house, under separate warrants of execution, he is entitled to a separate possession fee on each set of goods so seized.

Appeal from a decision of the taxing-master of the High Court in Bankruptcy, affirming the decision of the registrar of the County Court of Glamorgan as to the allowance of certain fees to the high bailiff.

In the month of March, 1903, the high bailiff of the County Court of Glamorgan levied the following executions by seizure of goods of the debtor Morgan, viz.: On the 17th of March, one execution at the suit of Hume for £21 4s. 6d., and a second execution at the suit of Winterman and Chenter for £11 3s. 8d. On the 19th of March, a public execution at the suit of Armsworth for £22 1s. 6d.

Distinct goods were seized in respect of each of such executions, but only one man in possession was put in, who held the goods seized on the 17th of March for seven days, and those seized on the 19th of March for five days.

All the goods seized were sold on the 23rd of March.

The high bailiff charged £3 10s. on the first execution, £2 12s. on the second, and £2 10s. on the third.

When these fees came before the registrar for taxation the Board of Trade were represented and contended that only one possession fee at the rate of ten shillings per day should be allowed in respect of all the seizures. The registrar allowed the three separate fees, whereupon the Board of Trade brought the taxation up for review by the taxing-master of the High Court in Bankruptcy, who affirmed the decision of the registrar.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

The Board of Trade appealed.

Muir Mackenzie, for the appellants.—The Board of Trade contend that only one possession fee should be allowed in cases like the present. Section 146 of the County Courts Act, 1888, describes the warrant of execution which is issued to the high bailiff as "in the nature of a writ of *fieri facias*," and it has been laid down in the case of writs of *fieri facias* that only one fee can be allowed although the sheriff may have seized under several writs: see *Hutchinson* v. *Johnston*, 1 T. R 729; *In re Wells and Croft, Ex parte The Sheriff of Kent*, 10 Morr. 69, 41 W. R. Dig. 221; *In re Broster, Ex parte Pruddah*, 45 W. R. 576, [1897] 2 Q. B. 429. Rule 35 of Part I of Schedule B. of the order of 1901, which regulates the amount of fees, also contemplates that the maximum allowance shall not exceed ten shillings per day, and is as follows: "35. For keeping possession of goods till sale on any process of execution, per day (including expenses of removal, storage of goods, and all other expenses), not exceeding seven days, sixpence in the pound on the value of the goods seized, to be fixed by appraisement in case of dispute, so that the total amount does not exceed 10s. per day: and in addition for feeding animals the actual cost thereof."

Frank Mellor, for the respondent.—If an execution by a high bailiff were on all fours with an execution under a writ of *fieri facias* the respondents' case would be unarguable, but both the law and the scale of fees applicable are totally different. By the earliest County Courts Act, 1846 (9 & 10 Vict. c. 95) it was enacted in section 94 that the clerk of the court "shall issue a writ of *fieri facias* as a warrant of execution to the high bailiff," and by Schedule D of the same Act the high bailiff is allowed the same fees for mileage, &c., as would be allowed to a high sheriff. These fees were, however, altered by the Act of 1856 (19 & 20 Vict. c. 108), Schedule B, which is as follows: "For keeping possession of goods till sale, per day (including expenses of removal, storage of goods, and all other expenses), not exceeding five days, sixpence in the pound on the value of the goods seized, to be fixed by appraisement in case of dispute." This, like the present order as to fees, allows only the one fee for all the high bailiff's work, and ever since that scale came into force it has been the universal practice to allow high bailiffs a separate fee on each execution. The Act of 1888 also evidently intends to draw a distinction between a *fieri facias* and a county court warrant, for it rejects the wording of the Act of 1846, "a writ of *fieri facias*," and adopts the words "a warrant of execution in the nature of a writ of *fieri facias*." Finally, there is this important distinction, that a sheriff seizes all the goods on the premises once for all, while a high bailiff seizes separate and distinct goods in respect of each execution, and is only paid according to the value of the goods he seizes, while a sheriff is paid according to the amount of the judgment under which he seizes.

Muir Mackenzie replied.

WRIGHT, J.—This is a case of some importance, as it deals with a practice which has existed ever since 1856. By section 146 of the County Courts Act, 1888, the high bailiff has issued to him "a warrant of execution in the nature of a writ of *fieri facias*," which empowers him to levy "by distress and sale of the goods and chattels . . . such sum of money as shall be so ordered," that is, he is told how much money he has to raise, and would do wrong if he seized more goods than were necessary to satisfy that amount. Nothing turns upon any other section of that Act, but it is necessary to consider, as applied to the facts of this case, the meaning of Rule 35, Part I., Schedule B, of the Order as to Fees, 1901: "For keeping possession of goods on any process of execution . . . sixpence in the pound on the value of the goods seized." Here there were three "processes of execution," but, if the same goods had been seized under each process, then, quite apart from the analogy of seizure by a sheriff, it would be reasonable to say that only one fee ought to be allowed. Such, however, is not the case here, the high bailiff seized thirty pounds' worth of goods to satisfy the first execution, fourteen pounds' worth to satisfy the second, and twenty-seven to satisfy the third. I do not think it would be right to apply rule 35 so as to make possession of each set of goods all one possession. Although they were all in the same house, I think that under the plain language of the rule a maximum fee of ten shillings per day was payable for the possession of the goods taken under the first seizure, and a similar fee upon each of the subsequent seizures.

It was admitted that if the rules applicable to a writ of *fieri facias* applied here, the conclusion would be different, but I am not sure that that admission need be made in a case where separate sets of goods are seized. It may be that the order now in force ought to be altered, but so long as it remains unchanged the established practice must continue.

Appeal dismissed.

Solicitor for the appellants, *The Solicitor to the Board of Trade.*

Solicitor for the respondent, *E. F. Turner.*

House of Lords.

From C. A. (England). } Aug. 7, 1903.

FENTON (PAUPER) *v.* THORLEY & CO. (LIMITED). (*a.*)

Master and servant—Employers' liability—"Accident"—Compensation—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

A workman of average health and strength unintentionally injured himself by overstrain while turning a machine in the course of his ordinary work for his employer.

Held, that this was an "accident" within the Workmen's Compensation Act, 1897, *where the word is used in the popular and ordinary sense, and the workman was therefore entitled to compensation thereunder.*

Decision of the Court of Appeal *reversed.*

Hensey *v.* White, 48 *W. R.* 257, [1900] 1 *Q. B.* 481, *overruled.*

This was an appeal from the Court of Appeal (Collins, M.R., and Mathew and Cozens-Hardy, L JJ.) affirming the decision of the county court judge of Surrey.

The appellant, who was a workman in the employment of the respondents, ruptured himself whilst turning or adjusting a machine in the course of his work, and for this accident he claimed compensation.

The whole circumstances of the case are set out in Lord Macnaghten's judgment.

Cyril Dodd, K.C., and *F. Mellor* (*E. A. Jelf* with them), for the appellant.

A. Powell, K.C., and *W. Shakespeare*, for the respondents.

Lord MACNAGHTEN.—Fenton, the appellant, was a workman in the employment of the respondents, who manufacture for sale an article called Thorley's Food for Cattle. He was employed to look after one of the machines used in preparing the food. It seems to have been a sort of combination of kettle and press. The actual operation performed by this machine takes about six or eight minutes. At the end of that time the workman in charge moves a lever and then turns a wheel for the purpose of raising the lid and removing the contents, which come out, or ought to come out, dried and pressed into separate layers of cakes. On the 3rd of December, 1901, Fenton was at work at his machine. He had got through the operation on that day a good many times without hitch or difficulty; but about 9 p.m. or a little later, when the time came for opening the vessel, the wheel would not turn. He then called a fellow-workman to his assistance, and the two men together set to work to move the wheel. Suddenly Fenton felt something which he describes as a "tear" in his "inside," and it was found that he was ruptured. Fenton was a man of ordinary health and strength. There was no evidence of any slip, or wrench, or sudden jerk. It may be taken that the injury occurred while the man was engaged in his ordinary work, and in doing or trying to do the very thing which he meant to accomplish. There is evidence that the wheel was short of one spoke or handle, which may have made it more difficult to grasp than usual, and it was discovered afterwards that there was a leak in the kettle which let moisture into the vessel below, glueing its contents together, and so causing the lid to stick. I mention these circumstances merely for the purpose of putting them aside. It was, indeed, argued by the learned counsel for the appellant that if the mishap that befell Fenton was not of itself and apart from all other circumstances an accident within the meaning of that word as used in the Act, then these two things—the loss of a spoke in the wheel and the leak in the kettle—introduced an element of accident—a fortuitous element it was called—which would satisfy the terms of the enactment, however narrowly it may be construed. In my opinion, they do not affect the question in the least.

The Court of Appeal held that the injury which Fenton sustained was not "injury by accident" within the meaning of the Act. In so holding they followed an earlier decision of the court in the case of *Hensey* v. *White*, 48 W. R. 257, [1900] 1 Q. B. 481, which in its circumstances is not distinguishable from the present case. In *Hensey* v. *White* a passage was cited from the opinion of Lord Halsbury in *Hamilton, Fraser, & Co.* v. *Pandorf & Co.*, 36 W. R. 369, at p. 370, 12 App. Cas. 518, in which his lordship says: "I think the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'" Founding themselves upon that expression the learned judges of the Court of Appeal held in *Hensey* v. *White*, as they have held here, that there was no accident, because (to quote the leading judgment) there was "an entire lack of the fortuitous element." What the man "was doing," it was said, "he was doing deliberately, and in the ordinary course of his work, and that which happened was in no sense a fortuitous event." To the expression as used by Lord Halsbury in the passage in which it occurs, no possible objection can be taken; but it is, I think, to be regretted that the word fortuitous should have been applied to the term injury by accident in the Workmen's Compensation Act. If it means exactly the same thing as accidental the use of the word is superfluous. If it introduces the element of haphazard (if I may use the expression), an element which is not necessarily involved in the word "accidental," its use, I venture to think, is misleading, and not warranted by anything in the Act. And now I must ask your lordships' attention to the Act itself; but before doing so there are two observations I should like to make. If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him. One other remark I should like to make. It does seem to me extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the Act some injuries ordinarily described as accidents which beyond all others merit favourable consideration in the interest of workmen and employers alike. A man injures himself by doing some stupid thing, and it is called an accident, and he gets the benefit of the insurance. It may even be his own fault, and yet compensation is not to be disallowed unless the injury is attributable to "serious and wilful misconduct" on his part. A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is to be told that his case is outside the Act because he exerted himself deliberately, and there was an entire lack of the fortuitous element! I cannot think that that is right. I do not think that if such were held to be the true construction of the Act, the result would be for the good of the men or for the good of the employers either in the long run. Certainly it would not conduce

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

to honesty or thoroughness in work. It would lead men to shirk and hang back, and try to shift a burden which might possibly prove too heavy for them on to the shoulders of their comrades. Now I turn to the Act.

The title of the Act is "An Act to amend the Law with respect to Compensation to Workmen for Accidental Injuries Sufferred in the Course of their Employment." It has been held that you cannot resort to the title of an Act for the purpose of construing its provisions. Still, as was said by a very sound and careful judge, "the title of an Act of Parliament is no part of the law, but it may tend to show the object of the legislation." Those were the words of Wightman, J., in *Johnson* v. *Upham*, 2 E. & E. 263; and Chitty, J., observed in *East and West India Docks* v. *Shaw, Savill, and Albion Co.*, 39 Ch. D., 531 that the title of an Act may be referred to for the purpose of ascertaining generally the scope of the Act. Surely, if such a reference is ever permitted, it must be permissible in a case like this, where Parliament is making a new departure in the interest of labour, and legislating for working men presumably in language that they can understand. The first section of the Act, sub-section 1, declares that "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman" his employers shall be liable to pay compensation. Now, the expression injury by accident seems to me to be a compound expression. The words "by accident" are, I think, introduced parenthetically as it were to qualify the word injury, confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design. Then comes the question, do the words "arising out of and in the course of the employment" qualify the word "accident" or the word "injury" or the compound expression "injury by accident." I rather think the latter view is the correct view. If it were a question whether the qualifying words apply to "injury" or to "accident," there would, I think, be some difficulty in arriving at a conclusion. I find in section 4 the expression, "accident arising out of and in the course of their employment." In section 9 I find the words, "personal injury arising out of and in the course of his employment," while in section 1, sub-section 2 (6), the qualifying words seem to be applied to the compound expression "injury to a workman by accident." The truth is that in the Act, which does not seem to have had the benefit of careful revision, "accident" and "injury," that is, injury by accident, appear to be used as convertible terms; for instance, in section 4, "notice of the accident" has to be given, and that notice is referred to immediately afterwards as "notice in respect of an injury under the Act." I come, therefore, to the conclusion that the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed. It would serve no useful purpose to review the English cases on the subject. The decisions before *Hensey* v. *White* are curiously conflicting. It would seem almost as if the court, in some cases at least, simply confirmed the finding of the county court judge as a finding of fact, however opposed the finding might be to a previous decision of the court on facts precisely similar. With the decision in *Hensey* v. *White* and the decisions in which that case has been followed, including *Roper* v. *Greenwood*, (1901) 49 W. R. Dig. 113, 83 L. T. 471, speaking with all deference, I am unable to agree. There is, however, a recent decision of the Court of Session in Scotland to which I should like to call your lordships' attention, and in which I agree entirely. It is the case of *Stewart* v. *Wilsons and Clyde Coal Co.* (*Limited*), 5 Fraser, 120. A miner strained his back in replacing a derailed coal hutch. The question arose, Was that an accident? All the learned judges held that it was. True, two of the learned judges expressed an opinion that it was "fortuitous," but they could not have used that expression in the sense in which it was used in *Hensey* v. *White*. What the miner did in replacing the hutch he certainly did deliberately and in the ordinary course of his work. There was nothing hapazard about it. Lord MacLaren observed that it was impossible to limit the scope of the statute. He considered that "if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in" . . . "this is accidental injury in the sense of the statute." Lord Kinnear observed that the injury was "not intentional," and that "it was unforeseen." "It arose," he said, "from some causes which are not definitely ascertained, except that the appellant was lifting hutches which were too heavy for him. If," he added, "such an occurrence as this cannot be described in ordinary language as an accident, I do not know how otherwise to describe it." The learned counsel for the respondents, in his able address, referred to several cases on policies of insurance intended to cover injuries described either as arising from accidental, violent, and external causes, or in somewhat similar terms. I do not think that these cases throw much light upon the present question. They turn on the meaning and effect of stipulations for the most part carefully framed in the interest of the insurers. But, on the whole, they do not, I think, make against the construction which I ask your lordships to put on the word accident in the Workmen's Compensation Act. I will not trouble your lordships by going through the cases which Mr. Powell cited. I will only only refer to one—a case of considerable authority, for it was a case in the Supreme Court of the United States. It is reported in 131 U.S. Supreme Court Reports, 100. A jury had found in favour of the assured, who had injured himself fatally in jumping off a platform some four or five feet high. There was a motion for a new trial on the ground of misdirection. The court refused to disturb the verdict. In the course of the judgment two cases were referred to with approval as supporting the conclusion at which the court arrived. One was an English, the other an American case. I give them both as stated in the judgment. In *Martin* v. *Travellers' Insurance Co.*, 1 F. & F. 505, the "policy was against any bodily injury resulting from any accident or violence, 'provided the injury should be occasioned by any external or material cause operating on the person of the insured.' In the course of his business he lifted a heavy burden and injured his spine. It was objected that he did not sustain bodily injury by reason of an accident. The plaintiff recovered. In *North American Insurance Co.* v. *Burroughs*, 69 Penn. St. 43, the policy was against death in consequence of accident, and was to be operative only in case the death was caused solely by accidental injury. It was held that an accidental strain resulting in death was an accidental injury within the meaning of the policy, and that it included death from any unexpected event happening by chance and not occurring according to the usual course of things." I have no doubt that in the present case the county court judge ought to have found in favour of the appellant, if he had not been compelled to decide the other way by recent decisions in the Court of Appeal. I move your lordships that

the decision of the Court of Appeal and of the county court judge be reversed, with costs in both courts, and that the action be remitted to the county court with a direction to the judge to ascertain the amount of compensation to which the appellant is entitled. The costs here will follow the rule laid down for pauper appeals.

Lord SHAND concurred.

Lord DAVEY concurred.

Lord ROBERTSON.—It is not disputed that this man, being a person of ordinary strength, suffered personal injury while working at his employer's business, because he applied such force to his work as to rupture him. Nor is it suggested that he hurt himself intentionally. The plain fact is that he miscalculated, or by inadvertance did not compare, the relative resisting forces of the wheel and his body. In this state of facts I am of opinion that his personal injury arose, by accident, out of and in the course of the man's employment in the sense of the 1st section of the Workmen's Compensation Act, 1897; and I think that there was an accident in the sense of the other sections in which the word accident is used, whether preceded by "an," "any," or "the."

Much poring over the word "accident" by learned counsel has evolved some subtle reasoning about these sections. I confess that the arguments seem to me to be entirely over the heads of Parliament, of employers, and of workmen. No one out of a law court could ever hesitate to say that this man met with an accident; and, when all is said, I think this use of the word is perfectly right. The word accident is not made inappropriate by the fact that the man hurt himself. This use is indeed directly sanctioned by this Act itself, for 1 (2) (*c*) plainly implies that an accident giving right to compensation may be attributable to the fault of the injured man himself. In the present instance the man by an act of over-exertion broke the wall of his abdomen. Suppose the wheel had yielded and been broken by exactly the same act, surely the breakage would be rightly described as accidental. Yet the argument against the application of the Act is in this case exactly the same, that there is nothing accidental in the matter, as the man did what he intended to do. The fallacy of the argument lies in leaving out of account the miscalculation of forces, or inadvertence about them, which is the element of mischance, mishap, or misadventure.

In this view, I do not rely on the historical circumstances that the sticking of the wheel was caused by an accidental leak. I think myself that the leak is too remote to impart its own accidental character to the injury which ultimately resulted to this man.

I am for allowing the appeal.

Lord LINDLEY.—The Workmen's Compensation Act, 1897, contains no definition of the word accident, but the interpretation and legal effect of the Act, when applied to ascertained facts, are clearly questions of law as distinguished from questions of fact. I will assume for the present that it is for the plaintiff to prove personal injury caused by an accident. But when personal injury and its cause or causes have been ascertained, the question whether such cause or causes amount to an accident within the meaning of the Act is a question of law on which the decision of the county court judge is not final, and is not a question of fact on which his decision is not open to appeal. Upon this point I will only remind your lordships of the observations of Lord Brampton in *Hoddinott* v. *Newton, Chambers, & Co. (Limited)*, 49 W. R. 380, [1901] A. C. 47, see p. 68, which were concurred in by the other noble lords who heard that case, although they differed in the result.

The word accident is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause, and if the cause is not known the loss or hurt itself would certainly be called an accident. The word accident is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness, but for legal purposes it is often important to distinguish carelessness from other unintended and unexpected events.

In this Act of Parliament the word is used in a very loose way. The title speaks of "accidental injuries," section 1 (1) uses the expression "personal injury by accident." Personal negligence and even a wilful act on the part of an employer or any one for whom he is responsible is not called an accident, but it can be dealt with as if it were an accident, section 1 (2) (*b*). Serious and wilful misconduct on the part of a workman precludes him from obtaining the benefit of the Act, section 1 (2) (*c*), but mere carelessness on his part does not. Further, section 1 (4) shows that the Act applies to cases where a workman sustains injuries for which, but for the Act, he would have no remedy. In section 2 "accident" and "accident causing the injury" are used indiscriminately in fixing the time within which notice of it has to be given. In the schedule the word "injury" is used, and the word "accident" does not occur.

It is impossible to read the Act without coming to the conclusion that the object of the Legislature was to throw upon certain classes of employers of labour the obligation to compensate their workmen for personal injuries for which such employers were not responsible before, and it becomes necessary to determine what injuries are within the Act and what are not.

The governing section is section 1 (1), which runs thus: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman," his employer shall be liable to pay compensation. What is meant by personal injury by accident? Mr. Powell, in his very able argument, contended that there must be: 1st, a personal injury; 2nd, that there must be an accident causing it; 3rd, that such accident must be the proximate cause of the injury and that nothing more remote than the proximate cause can be properly taken into account. I cannot accede to this contention. Assuming that there must be something unintended and unexpected besides the personal injury sustained, or, in other words, assuming that there must be a personal injury and an accident causing it, I cannot agree with Mr. Powell that this statute ought to be construed as if it were a policy of insurance against accidents.

In an action on a policy the *causa proxima* is alone considered in ascertaining the cause of loss; but in cases of other contracts and in questions of tort the *causa causans* is by no means disregarded. This was pointed out by Willes, J., in *Grill* v. *General Iron Screw Colliery Co.*, L. R. 1 C. P. 611, and is strikingly illustrated by *Siordet* v. *Hall*, 4 Bing. 607, and numerous other cases of a similar kind. *Siordet* v. *Hall* was an action against a steamship owner for injury to cargo caused by water escaping from a pipe which had been burst by a sharp frost. The defence was that the accident was an act of God for which the defendant was not responsible. The judge, however, told the jury that if the water had been un-

necessarily placed in the boiler, or, considering the season of the year, improperly left there without heat to prevent the action of the frost upon the pipe, the mischief was not occasioned by the act of God but by gross negligence. The jury found for the plaintiff. A new trial was applied for on the ground of misdirection. The court held that the loss was attributable to negligence and was not caused by the act of God so as to exonerate the defendant from liability. In other words, attention was paid to the circumstances under which the proximate cause produced the damage complained of. The rule that in contracts of insurance the proximate cause of loss can alone be regarded is carried so far that if it were rigidly applied to this Act of Parliament its evident object would in many cases be clearly defeated. No doubt the rupture in this case was the result of an effort voluntarily and strenuously made, and it may be that a policy of insurance against accidents might be so worded as not to cover an injury so caused. But if we look further and inquire what called forth this unusual effort, we find it was an unexpected difficulty in moving the wheel of the machine, and that this difficulty arose from an unobserved leakage which caused the material in the machine to choke the mechanism. The machine was accidentally put out of order. It had worked properly until it was stopped by an accident. It is not straining language but using it in its ordinary sense to describe the personal injury as caused by an accident. The personal injury was the rupture; the cause of it was the unintended and unexpected resistance of the wheel to the force applied to it. Such a case appears to me to fall within the Act.

Every injury must have a cause. The proximate cause may be an internal strain; but if, as in this case, the strain is occasioned by an effort to overcome an obstacle accidentally presented to a workman in the course of his employment, I am not prepared to say that the Act does not apply. I think it clearly does, and that the interpretation put upon the Act in Scotland in *Stewart* v. *Wilsons and Clyde Coal Co. (Limited)*, 5 Fraser 120, is to be preferred to the narrower construction occasionally adopted in this country.

In this case the cause of the injury is known, and it is proved that the cause was an accident. It is not, therefore, necessary to consider whether the Act applies to cases in which the cause of the injury is not known or in which the only unforeseen occurrence is the personal injury itself. But if personal injury is caused to a workman, and it arises out of and in the course of an employment to which the Act applies, it appears to me that *primâ facie* the Act entitles him to compensation; but that this inference may be displaced by proof that the injury is attributable to his own serious and wilful misconduct or to some other cause which shows that the injury was not accidental. The Scotch case above referred to is a valuable authority on this point.

The appeal in this case ought to be allowed, and the case remitted to the county court judge to assess compensation as proposed by my noble and learned friend on the woolsack (Lord Macnaghten).

Order of the Court of Appeal and award of the county court judge reversed, with costs here and below.

Solicitors, *C. F. Appleton; William Hurd & Son.*

Court of Appeal.

From K. B. Div. (Mathew and Cozens-Hardy, L.JJ.) — Nov. 16.

BIRMINGHAM EXCELSIOR MONEY SOCIETY *v.* HAYWOOD. (*a.*)

Married woman—Separate estate—Restraint on anticipation—Ante-nuptial debt—Property available to satisfy debt—Form of judgment—Validity of restraint—Exception—Settlement of woman's own property by herself—Money payable by husband under separation deed—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 19.

In an action against a married woman, who married after the passing of the Married Women's Property Act, 1882, *on an ante-nuptial debt, judgment was signed against her for a sum to be paid out of her separate property, whether subject to any restraint against anticipation or not. Subsequently she separated from her husband under a deed of separation, which contained a covenant by the husband to pay her a yearly sum by monthly instalments for her separate use without the power of anticipation.*

Held, that, on the true construction of section 19 *of the Married Women's Property Act,* 1882, *the money payable under the covenant could not be made available to answer the judgment debt, and that the judgment ought to be rectified by limiting its operation to separate property of the married woman not subject to any restraint against anticipation.*

Axford *v.* Reid, 37 *W. R.* 291, 22 *Q. B. D.* 548, *distinguished.*

Appeals from two orders of Ridley, J.

The action was brought against several defendants on a promissory note.

One of the defendants, Clara Anne Lane, who was sued as a surety, was, at the time when she signed the promissory note, an unmarried woman. She married in 1902, and judgment in the action was signed against her on the 31st of December, 1902.

By the judgment as drawn up it was adjudged that the plaintiffs do recover £39 and costs against the defendant, Clara Anne Lane, such sum and costs to be payable out of her separate property, whether subject to any restraint against anticipation or not.

In March, 1903, Mrs. Lane and her husband separated, and a deed of separation was executed which contained a covenant by the husband to pay the wife a certain yearly sum by monthly instalments to her separate use without the power of anticipation.

The defendant, in order to protect her right to receive the monthly instalments from the operation of the judgment, took out a summons for the rectification of the judgment by striking out the words "whether subject to any restraint against anticipation or not."

The plaintiffs took out a summons for the appointment by way of equitable execution of a receiver of the monthly instalments.

The two summonses came on together before the judge at chambers.

Ridley, J., acting on the authority of *Axford* v. *Reid*, 37 W. R. 291, 22 Q. B. D. 548, refused to vary the form of the judgment, and made an order for the appointment of a receiver.

The defendant appealed.

Pritchett, for the defendant.—The learned judge was misled by the case of *Axford* v. *Reid*. That was

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

a decision on section 12 of the Married Women's Property Act, 1870, which enacted that any married woman's property belonging to her for her separate use should be liable to satisfy her ante-nuptial debts. The court there was asked to read in after the words "belonging to her for her separate use" the words "and not subject to any restraint on anticipation"; and they refused to do so. But the Married Women's Property Act, 1882, has now repealed the Act of 1870, and the effect of sections 13 and 19 of the present Act is to introduce the very words which the court refused to introduce into the earlier Act. The only case in which a restraint on anticipation is inoperative is where the married woman has made a settlement of her own property. The defendant's right to receive the sums payable under the separation deed is therefore protected, and the judgment ought to be rectified by striking out the words "whether subject to any restraint against anticipation or not." The judgment ought to be in the same form as in *Downe* v. *Fletcher*, 36 W. R. 694, 21 Q. B. D. 11. The order for a receiver ought also to be discharged.

Longstaffe, for the plaintiffs.—The plaintiffs are entitled to maintain their judgment as it is drawn up. Section 13 of the Married Women's Property Act, 1882, says that a married woman shall be liable in respect of her separate property for her ante-nuptial debts, and may be sued for them, and all sums recovered against her in respect thereof shall be payable out of her separate property. That is a clear enactment. Section 19 does not qualify this, but, while preserving the effect of restraints on anticipation so far as regards post-nuptial debts, provides that no restraint on anticipation shall have any validity so far as regards ante-nuptial debts. The plaintiffs might have taken judgment against the defendant in even wider terms—viz., a judgment against her personally: *Robinson, King & Co.* v. *Lynes*, 43 W. R. 62, [1894] 2 Q. B. 577.

MATHEW, L.J.—I am of opinion that the appeals must be allowed. The judgment which has been entered against this married woman has been drawn up without reference to the Married Women's Property Act, 1882. The Married Women's Property Act, 1870, under section 12 of which the case of *Axford* v. *Reid* was decided, has been repealed, and the question now depends on section 19 of the Act of 1882. That section enacts as follows: "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument." Then comes this important exception: "But no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage." Here the defendant incurred an ante-nuptial debt; she then married, and subsequently she separated from her husband under a deed by which he covenanted to pay her a yearly sum by monthly instalments for her separate use with a restraint against anticipation. It is now sought to make this money which she is restrained from anticipating liable for her ante-nuptial debts; and it is attempted to bring the case within the exception. But this money is not her "own property" settled by herself, it is property settled on her by her husband, so that the case clearly does not come within the exception. The first part of the section, therefore, applies, and the restraint against anticipation must be allowed to have effect.

COZENS-HARDY, L.J.—The case of *Axford* v. *Reid* is no longer an authority, as the Married Women's Property Act, 1870, under which it was decided, has been repealed by section 22 of the Married Women's Property Act, 1882. This case has to be decided under the Act of 1882. Section 13 of that statute provides that "a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted and all contracts entered into or wrongs committed by her before her marriage." If the enactment stopped there, the present judgment might be allowed to stand. But there follows section 19, the language of which is wide and unambiguous. I am of opinion that on the true construction of this section the judgment is clearly wrong, and the money payable under the separation deed can not be made available to answer the ante-nuptial debt. The case of *Robinson, King, & Co.* v. *Lynes* does not touch the point raised here. All that was decided there was that judgment should go against the married woman. Nothing was decided as to what property the judgment should go against.

Appeals allowed.

Solicitors for the plaintiffs, *Ward, Bowie, & Co.*, for *T. W. Walthall*, Birmingham.

Solicitors for the defendant, *Hulberts, Hussey, & Metcalfe*, for *Edwin Docker*, Birmingham

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From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Aug. 2; Nov. 19, 1902;
And K. B. Div. (Kennedy, J.) — Aug. 1, 3, 4, 1903.

ROWSON *v.* ATLANTIC TRANSPORT CO. (*a.*)

Ship—Bill of lading—Butter carried in refrigerating chambers — Negligence in working refrigerating machinery—"Faults in management of vessel"—Harter Act (U. S. Congress, 13th of February, 1893) incorporated in bills of lading—Meaning of "seaworthy."

By bills of lading incorporating an American Act of Congress the owners of The Minneapolis, *conveying butter in refrigerating chambers, were relieved from liability for damage caused by faults in management of the vessel, provided she were seaworthy at the commencement of the voyage. The refrigerating machinery was in good order and the chambers properly cooled at starting, but through negligence in working the said machinery the butter became damaged during the voyage.*

Held, by Kennedy, J., *that "seaworthy" meant, in the present case, "fit to carry the butter safely," that* The Minneapolis *was seaworthy in this sense, that the damage arose from faults in management of the vessel, and that her owners, therefore, were not liable.*

Held, on appeal, that inasmuch as the machinery was not intended for cooling the butter only, but other parts of the cargo and the ship as well, it was part of the ship, and that its mismanagement was a fault in the management of the vessel which relieved the owners by virtue of the Act.

This was an appeal by the plaintiff from a decision of Kennedy, J., sitting without a jury.

The facts were as follows:

The plaintiff was indorsee of certain bills of lading, dated the 29th of June, 1900, under which certain

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

parcels of butter were delivered in good condition to the defendants in New York by Messrs. Abraham Hodgson & Sons, for shipment in defendants' steamship *Minneapolis* and delivery in London to the order or assigns of the shippers in the like condition.

The bills of lading incorporated the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the United States approved on the 19th of February, 1893, and entitled, "An Act relating to Navigation of Vessels, &c.," commonly known as the "Harter Act."

The butter was carried in insulated chambers connected with the refrigerating machinery and apparatus of the vessel. This machinery and apparatus were in good order, and the chambers were at the time of shipment cooled down to the proper temperature for the safe conveyance of the butter; but by the negligence (which was not denied) of the crew in the management of the said machinery, the temperature of the chambers was allowed to rise unduly during the voyage with the result that the butter became deteriorated and was delivered to the plaintiff in a damaged condition.

The plaintiff thereupon claimed damages for breach of the contract contained in the bills of lading, but the defendants denied liability, relying on one of the incorporated clauses of the Harter Act, section 3 of which contained the following provision: "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy, and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." It was contended on behalf of the defendants that the negligence of the crew in the management of the refrigerating machinery was a fault or error in the management of the vessel within the meaning of that section.

J. A. Hamilton, K.C., and *Loehnis*, for the plaintiff.

Robson, K.C., and *D. Stephens*, for the defendants.

KENNEDY, J., in a reserved judgment, held on the the authority of *The Thames*, 61 Fed. Rep. 1014, and *Owners of Cargo on Ship Maori King* v. *Hughes*, 44 W. R. 2, [1895] 2 Q. B. 550, that the term "seaworthy" in the Harter Act must refer to fitness for carrying the particular cargo in question. His lordship found that in this sense *The Minneapolis* was seaworthy at the commencement of her voyage, and that as she ceased to be so through the negligence of the crew in the management of the refrigerating machinery, the logical conclusion must be that such negligence was, within the meaning of the Harter Act, negligence in the management of the ship of which that machinery was a part; and he gave judgment for the defendants.

The plaintiff appealed.

J. A. Hamilton, K.C., and *Loehnis* (*Ricardo* with them), for the appellant, cited *Dobell* v. *Steamship Rossmore Co.*, 44 W. R. 37, [1895] 2 Q. B. 408; *Owners of Cargo on Ship Maori King* v. *Hughes*, 44 W. R. 2, [1895] 2 Q. B. 550; *The Ferro*, [1893] P. 38, 41 W. R. Dig. 222; *The Glenochil*, [1896] P. 10, 44 W. R. Dig. 148; *The Rodney*, 48 W. R. 527, [1900] P. 112; *Botany Worsted Mills* v. *Knott*, 76 Fed. Rep. 582; *The Prussia*, 88 *Ibid.* 531, (on appeal) 93 *Ibid.* 837; *Steinman* v. *Angier Line* (*Limited*), 39 W. R. 392, [1891] 1 Q. B. 619; *Stanton* v. *Richardson*, L. R. 7 C. P. 421; *Kay* v. *Wheeler*, L. R. 2 C. P. 302; *Burton* v. *English*, 32 W. R. 655, 12 Q. B. D. 218; and *Calderon* v. *Atlas Steamship Co.*, 170 U. S. Rep. 272.

Robson, K.C., and *D. Stephens*, for the respondents, cited *Tattersall* v. *National Steamship Co.*, 32 W. R. 566, 12 Q. B. D. 297; *Queensland National Bank* v. *Peninsular and Oriental Steam Navigation Co.*, 46 W. R. 324, [1898] 1 Q. B. 567; *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 26 W. R. Dig. 216; *The Rodney*, 48 W. R. 527, [1900] P. 112; *The Mexican Prince*, 82 Fed. Rep. 484; and *The Strathdon*, 89 *Ibid.* 374.

J. A. Hamilton, K.C., replied.

VAUGHAN WILLIAMS, L.J.—This case seems to me to be rather on the border line; but the question which the court has to decide is really a question of fact, and not a question of the construction to be placed upon the clauses of the Harter Act which have been imported into the bills of lading. The decision (as I understand it) of the learned judge in the court below comes to this: He has found that the vessel, at the moment of starting on the voyage, carrying this cargo of butter, was in all respects seaworthy, properly manned and equipped. Having come to that conclusion he has also come to another conclusion of fact—namely, that the damage to the butter, by reason of its not being kept properly cool in the refrigerating chambers, was damage which arose in the management of the vessel. I do not think that anybody dealing with the clauses imported from the Harter Act, and deciding that those first two conclusions of fact were right, can doubt that the ultimate judgment of Kennedy, J., was right also. The moment that the court came to the conclusion that the vessel was in all respects seaworthy, properly manned and equipped, and if it was also true that the damage to the butter was damage resulting from the management of the vessel, it would be an irresistible conclusion that the shipowners were relieved from liability in respect of such damage. The court has to consider what the facts of the case are, and to see whether the facts and evidence are such as to justify the conclusion of Kennedy, J. [His lordship referred to the facts, and discussed the provisions of the Harter Act and the arguments based thereon, and continued:] What, for the purpose of clause 3 of the Harter Act, is the meaning of the phrase "faults or errors in . . . the management of said vessel"? In my opinion it means, in the management of the said vessel *qua* vessel. In these circumstances, if there had been some apparatus simply for the purpose of refrigerating the butter, I should have hesitated very much to say that such apparatus was part of the vessel, and should not be able to persuade myself to come to the conclusion that mismanagement of that special apparatus was mismanagement of the vessel. But it is not the fact that the apparatus was introduced into the vessel for a special purpose. It was not introduced any more for the butter than were the port-holes, the hatches, or other ventilating apparatus. I think that on the evidence it is clear that this refrigerating apparatus was put into the ship for the purpose of cooling the ship. It is true that when it was there, it could be used for the butter in the chambers or for meat there, or for the store-room of the ship, in which were placed the provisions for consumption during the voyage. It could be used for any or either of those purposes; and, in my judgment, the court ought not to say that Kennedy, J., was wrong in holding that this particular refrigerating apparatus was part of the vessel, and that the management of it was management of the vessel, and that therefore mismanagement of it was mismanagement of the vessel. That is the conclusion I have come to in the present case, and the moment I come to that conclusion I find it impossible to say that Kennedy, J., was wrong in deciding that the damage to the

butter resulted from the negligence in working part of the vessel.

ROMER and STIRLING, L.JJ., gave judgment to the like effect,

Appeal dismissed.

Solicitors, *Waltons, Johnson, Bubb, & Whatton; Holman, Birdwood, & Co.*

From K. B. Div. (Mathew and Cozens-Hardy, L.JJ.) } July 20, 1903.

HOARE & CO. *v.* MORSHEAD. (*a.*)

Practice—Leave to defend—Security to satisfaction of master—Decision of master as to sufficiency of security—Appeal—R. S. C., 1883, *ord.* 14, *r.* 6; *ord.* 54, *r.* 21.

Where an order has been made under ord. 14, *r.* 6, *granting the defendant leave to defend on giving security to the satisfaction of the master, there is no appeal from the decision of the master on the question of the sufficiency of the security tendered by the defendant*

Appeal from an order of Walton, J., at chambers.

The action was brought to recover a liquidated sum.

On an application by the plaintiffs for summary judgment under order 14 the master made an order granting the defendant leave to defend the action on giving security for the amount claimed to the satisfaction of the master.

On an appeal by the plaintiffs from that order, Phillimore, J., affirmed the order.

The defendant having tendered certain security, the parties attended before the master, and the question of the value of the proposed security and its sufficiency was argued. The master found that the proposed security was not sufficient, and made an order directing that the plaintiffs should be at liberty to sign final judgment.

On an appeal by the defendant from that order, Walton, J., was of opinion that he had no jurisdiction to review the finding of the master that satisfactory security had not been given, and he refused to make any order except to give the defendant leave to appeal to the Court of Appeal.

The defendant appealed accordingly.

Witt, K.C., and *Pollard,* for the defendant.—Walton, J., ought to have reviewed the decision of the master as to the sufficiency of the security. The order of Phillimore, J., did not make the master a *persona designata,* but referred the question of the sufficiency of the security to him in his capacity as master. The master, in dealing with that question, was acting as an officer of the court, and was exercising the jurisdiction conferred on him by ord. 54, r. 12. By rule 21 of the same order, "Any person affected by any order or decision of a master may appeal therefrom to a judge at chambers." *Owen* v. *London and North-Western Railway Co.,* 16 W. R. 125, L. R. 3 Q. B. 54, and *Sandback Charity Trustees* v. *North Staffordshire Railway Co.,* 26 W. R. 229, 3 Q. B. D. 1, have no bearing on this case. They were cases of a *persona designata* not exercising the functions of an officer of the court.

Lochnis, for the plaintiffs.—The order of Phillimore, J., designated the master as the person who was to exercise his judgment on the question whether the proposed security was sufficient. The learned judge clearly had power to do this under ord. 14, r. 6. The practice is that in such circumstances there is no appeal from the decision of the master; for the master in deciding such a question is not acting in virtue of any jurisdiction conferred on him by the rules as master. It would be very inconveient if that practice was disturbed.

MATHEW, L.J.—I think that this appeal must be dismissed. We must begin by looking at ord. 14, r. 6, which is as follows: "Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the judge may think fit." Under this rule, the judge, if he orders security to be given, may designate a person who is to ascertain the value of the security offered; for he has power to say on what terms he will grant leave to defend. Here Phillimore, J., directed that the question of the sufficiency of the security should be referred to the master. That was in accordance with the common form of order, and I do not think it was a direction to refer the question to the master as such. The parties went before the master and the question of the sufficiency of the security offered by the defendant was gone into by him, and he came to the conclusion that it was insufficient. It is now for the first time suggested that such a decision may be reconsidered on appeal. In my opinion the contention on the part of the defendant fails.

COZENS-HARDY, L.J.—I am of the same opinion. The defendant relies on ord. 54, r. 21. But that argument assumes that the master decided the question of the sufficiency of the security in the exercise of his jurisdiction as master, and not as a *persona designata.* I think that the order of Phillimore, J., which was made under ord. 14, r. 6, referred the question to the master as a *persona designata,* and that the defendant cannot be allowed to question the determination of the master that the security tendered by him was not sufficient.

Appeal dismissed.

Solicitors for the plaintiffs, *Tylee & Co.*

Solicitor for the defendant, *B. W. Kemp.*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) } May 1, 2, 20, 21; June 23, 1903.

In re BOLTON ESTATES ACT.
RUSSELL *v.* MEYRICK. (*a.*)

Statute—Private Act—Construction—Restraint on alienation—Exception in favour of jointures—Jointure appointed by will—Validity of exercise of power—Construction of earlier statute by law as existing at later time.

By a private Act (27 *Hen.* 8, *c. xvi.*) *certain estates were settled upon certain persons and the heirs of their bodies, and it was provided that none of the persons so entitled should "alyen, bargayn, give or selle any of the . . . premysses . . . nor any other thing do which should be to the hurt or disinheritance of the heires of any of them . . . but only for the joynter of wyfe or wyfes for the term of lyfe or lyves of any husband."*

Held, that, on the true construction of the Act, a power of jointuring was conferred which could be exercised by any instrument for the time being known to the law, and not only by fine or recovery, or since the Fines and

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Recoveries Act by disentailing assurance; and that, on the authority of Vernon's case, 4 *Co. Rep.* 1a, 4b, *it was well created by testamentary instrument, though at the time of the passing of the Act a will had no operation upon land, the statutes which enabled land to be devised by will being later in date.*

This was an appeal from a decision of Joyce, J.

By a private Act of Parliament (27 Hen. 8, c. xvi.), which gave parliamentary sanction and effect to an arrangement between two daughters and two granddaughters of Lord Brooke and their respective husbands, certain estates in Dorset, Devon, Cornwall, and Wilts were settled on Charles Lord Mountjoye and Anne his wife and the heirs of their bodies lawfully begotten as co-parceners, and then followed a proviso in the following terms: "That neyther the saide Charles Lord Mountjoye and the Lady Anne his wyfe John Paulet and Elizabeth his wyfe Francis Dartrey and Blanche his wyfe Foulke Gryvell and Elizabeth his wyfe nor any of them nor their heires nor the heires of any of them shall hereafter alyen bargayn give or selle any of the saide castelles manours menses landes tenements and other the premysses above specified nor any parte or parcell of theym nor any other thyng doo which shulde be to the hurte or disenherytanche of their heires or of the heires of any of them or to any of the saide remaynders but only for the joynter of wyfe or wyfes for terme of lyfe or lyves of any husband that hath or shall marry any of them or any heires that shall be inheritable to any of the same landes and tenements or for terme of lyfe of any other person or for years or at wyll after custome of the manour yeldyng the true and anncyent rent of the same landes or tenements so to him letten as aforesaid but that all and every acte or actes hereafter done or suffered contrary to the true intent of this present acte shall be voyde and of none effect in the law."

This proviso was recited in the Bolton Estates Act of 1863 (26 & 27 Vict. c. vi., private Act), which was passed mainly to enable the granting of building and mining leases and the partition and sale of the estates. Section 5 of the later Act referred to the powers of the earlier Act, and section 9 provided as follows: "From and after the passing of this Act the powers in the recited Act contained or implied of giving the said (hereditaments) for the jointure of a wife or wives . . . shall and may be exercisable either previously to and in contemplation of a marriage or after the completion or solemnization thereof . . ."

Section 10 of the same Act provided that after partition the powers of leasing, selling, and jointuring might be exercised as to each portion by the persons interested therein.

On the death of the late Duchess of Cleveland on the 18th of May, 1901, General A. W. H. Meyrick became entitled to one undivided third share of the said estates as tenant in tail. He died on the 26th of March, 1902, leaving a widow but no issue. By his will, dated the 30th of May, 1901, he bequeathed an annuity to his widow. By a codicil dated the following day, after revoking the gift of this annuity, he purported, in exercise of the powers contained in the two Acts, and of all other powers enabling him in that behalf, to appoint, bequeath, and give to his wife for the residue of her life by way of jointure the whole of his third or other share in the premises to the utmost extent of his power in as general and complete a manner as possible. The testator never executed any deed or disentailing assurance requiring enrolment appointing his said share to his wife by way of jointure.

A summons was issued on behalf of a sister and the children of other sisters of the testator as his heirs-at-law to have it determined whether, on the true construction of the Acts, he had power by will or codicil to appoint the income of his said share to any wife who might survive him.

Joyce, J., held that the power of jointuring conferred by the Act was not exercisable by will.

Mrs. Meyrick appealed.

Haldane, K.C., Younger, K.C., and *Cave,* for the appellant.—The question turns on the meaning of 27 Hen. 8, c. xvi. The Act creates a positive power by way of exception, and does not limit its execution to fine and recovery. Fine and recovery as a mode of alienation was first recognized by the courts in *Taltarum's case,* Year Books, 12 Ed. 4, 19. The respondents must show that by 1535 the practice had become so general that the Legislature recognized it as a regular means of alienation. The words creating the power are inapt for its exercise by fine and recovery. A fine would bar the issue only, while a recovery would destroy the rights of the issue altogether and put an end to the parliamentary estate. Though the power of alienating land by will did not exist in 1535, yet the later Acts of Parliament which authorized such alienation must be taken to apply to these estates and give by implication a power to jointure by will.

They referred to *Reade* v. *Nash,* 1 Leon. 147; *Duke of Bolton* v. *Grantham,* 3 Burr. 1259; *Earl of Darlington* v. *Pulteney,* 1 Cowp. 260; *Vernon's case,* 4 Co. Rep. 1a. 4a; *Wigson* v. *Garret,* Sir T. Raym. 239; *Mestaer* v. *Gillespie,* 11 Ves. 621; *Tollet* v. *Tollet,* 2 P. Wms. 489; Farwell on Powers (2nd ed.), p. 48; Cruise's Digest, vol. 4, chapters 13 and 14; Sugden on Powers (8th ed.), p. 563; and Williams on Real Property (19th ed.), p. 73.

Warmington, K.C., Hughes, K.C., and *Tomlin,* for the respondents.—By 1535 recoveries were a well-known method of conveying land. The word occurs in the statute of Henry VIII. itself. The recovery could not have its full legal effect by reason of the Act—that is to say, it could not defeat the rights of the issue, but it took effect so far as it was lawful by reason of the exception—that is, so as to give the wife a jointure. An exception out of a prohibition does not amount to an affirmative enactment, so as to enable a person to do something which he could not have done otherwise. At the time of the statute of Henry VIII. fines and recoveries were the proper mode of assurance for creating a jointure, and it cannot have been intended by the exception in that statute to confer upon the tenants in tail of these settled estates a power of alienation which they would not have had but for the exception.

They referred to *Attorney-General* v. *Duke of Marlborough,* 3 Madd. 498; *Martin* v. *Strachan,* Willes Rep. 444; *Lord Advocate for Scotland* v. *Hamilton,* 1 Macqueen 46; *West Derby Union* v. *Metropolitan Life Assurance Society,* 45 W. R. 388, [1897] 1 Ch. 335, [1897] A. C. 647, 46 W. R. Dig. 125; *Duke of Grafton* v. *London and Birmingham Railway,* 6 Scott 719; Blackstone's Commentaries, vol. 2, p. 270.

C. Ashworth James, for the executors.

Younger, K.C., replied.

Cur. adv. vult.

June 23.—The judgment of the court was read by

COZENS-HARDY, L.J.—This appeal raises a question as to the construction and effect of a private Act of Parliament, 27 Hen. 8, 1535, relating to the Bolton Estate. Mrs. Meyrick, the applicant, claims to be entitled under the codicil of the will of her late husband, who was tenant in tail in possession, to the

income of the estate by way of jointure. The respondents who are the present tenants in tail in possession contend that the testator had no power to create this jointure by testamentary instrument, and Joyce, J., has adopted this view. [His lordship read the proviso, and continued:] It was argued on behalf of the applicant that the successive takers were only tenants for life, but I am clearly of opinion that they were tenants in tail enjoying all such rights, powers, and privileges as were possessed by tenants in tail after the Statute De Donis, subject only to the proviso: *Attorney-General* v. *Duke of Marlborough*. That proviso prohibits alienation or any act done or suffered to the hurt of the heirs, but only (*inter alia*) "for the jointer of wyfe or wyfes." Now in point of form this is not an affirmative clause enabling a jointure to be created, but an exception from a prohibition, and it is contended that the result is that the tenant in tail is left, *quoad* the jointure, in the same position as if the prohibition had not been inserted in the Act, and that a tenant in tail never could dispose of or create any interest out of his estate tail by will, and that the only mode by which a jointure could be created was by fine or recovery and is now by a disentailing assurance. On the other hand it is contended that the Act confers a power which may be exercised by any instrument known to the law for the time being, including (since the Statute of Devises) a will. Upon the whole I have to come the conclusion that the former view cannot prevail. In the first place, assuming which may be doubted, that recoveries had in the short interval since *Taltarum's case* in 1472 come to be recognized in 1535 as common assurances and means of alienating estates tail, notwithstanding the language of the Statute De Donis, I am not satisfied that a jointure could have been created by means of a recovery which was said to have a "ransacking operation" except as part of a resettlement. In other words, the recovery must deal with and operate upon the whole fee simple, and not merely upon a smaller estate carved out of it. A resettlement would or might have involved the breaking of the parliamentary entail. In the second place, even if, which I doubt, a jointure might have been created by means of a fine, such jointure would only have been good against the issue of the tenant in tail and not against the remainders over. In the third place, it is almost inconceivable that customary leases for life or for years at the ancient rent should have required a fine or recovery in each case with all its delay and cost. In the fourth place, the words are sufficient to create a power if it is necessary to render the Act operative: *Reade* v. *Nash*. In the fifth place, there are *dicta* by Lord Mansfield with reference to this very Act in which the tenants in tail are said to have power to lease: *Roe d. Duke of Bolton* v. *Grantham* and *Earl of Warlington* v. *Pultenay*. In the sixth place, the usage of the Bolton Estate since the Act for a period of more than three centuries is only consistent with this view. There is no trace of leases having been granted otherwise than by ordinary deeds, and there is no trace of any jointure having been created by means of a fine or recovery, or, except in one instance in 1838, by means of a disentailing assurance. Lastly, the Bolton Estates Act, 1863, contains a recital that Katherine, Duchess of Bolton, who died in 1809, had a life estate under a settlement or deed of appointment made under the powers of jointuring contained in the Act. Section 4 speaks of a wife claiming any life estate under the powers of the Act, and similar language is used in section 9.

It remains to consider whether, although neither fine nor recovery nor disentailing assurance is necessary to the creation of a jointure, it can be created by will, and on this point it is important to observe that apart from custom a will had before 32 Hen. 8 no operation upon land, and it is impossible to suppose that in 1535 an exercise of the power by a testamentary instrument was contemplated. I have felt the weight of this argument, but on the authority of *Vernon's case* I think it must be held that the argument is unsound. The Statute of Uses, which was enacted in the same year as the Bolton Estate Act, 1535, contained provisions to the effect that a wife for whom a jointure should be provided should not also claim dower. It was held in *Vernon's case*, 1572, that a devise of land to a wife is a jointure within the Statute of Uses. "Although land was not devisable until 32 Hen. 8, yet it is frequent in our books that an Act made of late time shall be taken within the equity of an Act made long time before." This seems to justify the conclusion that a jointure under the power conferred by the Bolton Estate Act upon tenants in tail may be well created by testamentary instrument.

The result is that in my opinion the order of Joyce, J., must be discharged, and it must be declared that the testator had power by will or codicil to appoint the income of the entailed estate for the jointure of the appellant, and that such power was well exercised in her favour.

Solicitors, *Ford, Lloyd, & Co.; Williams & James.*

High Court of Justice.

Chan. Div. Buckley, J. — Oct. 29, 30, 31.

In re STEPHENS.
KILBY *v.* BETTS. (*a.*)

Will—Construction—Gift to class of children—Period for ascertaining class—Prior trust for accumulation of income—Remoteness—Provision for raising portions—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98), *s.* 2.

The rule that, where there is a gift to a class of children, the class shall be incapable of being increased, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, does not apply where there is a direction to accumulate for a period extending beyond the time fixed for distribution.

A testator directed that out of the income of his estate there should be accumulated a yearly sum of £24 while there should be a child of S. B. for the time being under twenty-one, and that the accumulated fund should be in trust for the children of S. B. who should attain twenty-one in equal shares, the shares of such children to be vested in and payable to them at twenty-one. Subject thereto he gave the income of his estate to S. B. for life.

Held, (1) *that the period directed for accumulation was so long as there should be any child of S. B. for the time being under twenty-one, irrespective of the date when such child was born;* (2) *following* Beech *v.* Lord St. Vincent, 3 *De G. & Sm.* 678, *that the direction to accumulate was a provision for raising portions within section* 2 *of the Thellusson Act, and that, consequently, it was not rendered void by that Act;* (3) *that the class of children could not be ascertained until the termination of the period directed for accumulation, and, consequently, that until that date the accumulated fund did not become divisible.*

Watson *v.* Young, 33 *W. R.* 637, 28 *Ch. D.* 436, *followed.*

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

In re Wenmoth's Estate, 36 *W. R.* 409, 37 *Ch. D.* 266, *discussed.*

This was an originating summons raising questions on the construction of the will of Christopher Stephens.

By his will, dated the 11th of February, 1886, the testator gave all his real and personal estate to trustees upon trust for sale and investment, and out of the income to set apart the sum of £24 while and so long as there should be a child of his daughter Sarah Betts, the wife of Henry Betts, for the time being under the age of twenty-one years, subject as thereinafter mentioned, And he directed his trustees to invest and accumulate the said sum of £24 during the infancy of such children of his said daughter, or so long as his trustees were by his said will directed to continue to set apart the said sum of £24 a year. And he declared that his trustees should stand possessed of the accumulated fund in trust for such of the child or children of his said daughter who, being a son or sons, should live to attain the age of twenty-one years, or, being a daughter or daughters, should marry, and if more than one in equal shares, and the share and shares of such child and children to be vested interests in him, her, or them, and to be paid and payable to them, in the case of a son or sons, when and as they respectively attained twenty-one years of age; and in the case of a daughter or daughters when and as she or they should attain twenty-one years of age or marry, and if there should be but one such child, then the whole for such one child only. Subject thereto, he gave the income of the trust property to Sarah Betts during her life, and after her death to Henry Betts during his life, if he should survive her. And he provided that if Sarah Betts should survive Henry Betts, the trustees should pay to her during the remainder of her life the whole of the future income of the trust property, and should not set set apart for any then longer period the said sums of £24 a year therefrom, but without prejudice to the sums of £24 a year which should then have been accumulated, but subject to the obligation of maintaining such of her children as were under twenty-one, or in the case of daughters unmarried. And after the death of the survivor of Sarah Betts and Henry Betts, he directed the trustees to stand possessed of the trust property in trust for all such of the children of Sarah Betts as should be living at her death, and the child and children then living of any child or children of Sarah Betts who should have died in her lifetime, and being male should attain the age of twenty-one years, or being female should attain that age or marry under that age, if more than one in equal shares *per stirpes.*

The testator died on the 4th of March, 1888.

There were six children of Mr. and Mrs. Betts—namely, Ethel, who died in infancy in 1881; Frederick, born on the 19th of June, 1882; Beatrice, born in 1885; Reginald, born in 1888; Dorothy, born in 1891; and Marjorie, born in 1896.

The questions to be determined on the summons, which was taken out by the trustees of the will, were: (1) Whether the direction to accumulate the sum of £24 year was void to any and what extent, and, if so, who was entitled to the money already accumulated and to the annuity for the remainder of the period during which the accumulation was directed; and (2) whether it was the duty of the trustees to continue to set apart the annuity while there was a child under twenty-one, having regard to the declaration that the shares of the children were vested and payable at twenty-one being a son, or being a daughter upon attaining that age or marriage, and whether such trust for accumulation ceased on the eldest child of Sarah Betts attaining twenty-one being a son, or marrying under that age being a daughter.

Kenyon Parker, for the trustees and for Mr. and Mrs. Betts, did not, having regard to *Beech* v. *Lord St. Vincent*, 3 De G. & Sm. 678, contest the point that the direction to accumulate was valid. On the question of the ascertainment of the class of children to take, he referred to Theobald on Wills (5th ed.), 279, 280.

T. Douglas, for Frederick, Beatrice, and Reginald Betts.—The period of accumulation is to continue until the youngest child for the time being attains twenty-one. The rule in *Andrews* v. *Partington*, 3 Bro. C. C. 401—that, where a time of payment is pointed out, as where a legacy is given to all the children of A. when they shall attain twenty-one, the class is fixed on the first interest vesting—is applicable to the present case. Only the five children, therefore, who were *in esse* at the time when Frederick attained twenty-one are entitled to share in the accumulation, and, at present, they are entitled in fifths. Frederick is henceforth entitled to receive during each year his one-fifth share in the income of the accumulated fund.

He referred to *Mogg* v. *Mogg*, 1 Mer. 654; *In re Wenmoth's Estate*, 36 W. R. 409, 37 Ch. D. 266; and *In re Knapp's Settlement*, 43 W. R. 279, [1895] 1 Ch. 91.

Duke, for Dorothy and Marjorie Betts.—The rule in *Andrews* v. *Partington*, being a rule of convenience, does not apply to a case where (as here) there is a period of accumulation directed which may last beyond the time when the first interest is vested: *Watson* v. *Young*, 33 W. R. 637, 28 Ch. D., at p. 445; *In re Knapp's Settlement*, [1895] 1 Ch., at pp. 96, 97; *In re Emmet's Estate*, 28 W. R. 401, 13 Ch. D. 484, 490. Consequently the class does not close until the period of accumulation comes to an end. The direction to accumulate is a provision for raising portions for children of a person taking an interest under the will. As such, it comes within the exceptions contained in section 2 of the Thellusson Act, and is not void. Portions are sums of money secured to children out of property springing from or settled upon their parents: *Jones* v. *Maggs*, 9 Ha. 665, 667. A similar gift was held to be a portion in *Beech* v. *Lord St. Vincent*: see also the note to *Griffiths* v. *Vere*, Tudor's Real Property Cases (3rd ed.), p. 515.

Cur. adv. vult.

BUCKLEY, J., after reading the material portions of the will, continued: The first question to be determined is, what is the period during which the testator directs the aggregation and accumulation of these sums of £24? It appears to me that he expresses it perfectly plainly, it is to be so long as there shall be a child of Sarah Betts for the time being under the age of twenty-one years. It does not matter whether that child be born before its eldest brother or sister attains twenty-one. If it be a child of Sarah Betts, and that child be under twenty-one, then the time thus specified for the aggregation and accummulation has not expired. Just to give the dates in the case, to show how that applies. The testator died on the 4th of March, 1888. There had been a child of Sarah Betts who had died in 1881, and who may be disregarded. At the death of the testator there were living three children—namely, Frederick, Beatrice, and Reginald, who were born in 1882, 1885, and 1888 respectively. Frederick attained the age of twenty-one years on the 19th of

June, 1903. In the interval, in 1891 and 1896, were born other two children, Dorothy and Marjorie. The period of twenty-one years from the birth of Marjorie will not expire till 1917. In my opinion, the testator has directed the aggregation and accumulation of these sums till 1917, and if there shall be hereafter another child of Sarah Betts, the period may be a longer one. The period may also be cut down by the other event named in the will—namely, the death of the husband in Sarah's lifetime. If so, the period is cut down to that date. But the period for aggregation and accumulation is, in my opinion, in the events which have happened, 1917, or such later date as an afterborn child of Sarah shall attain twenty-one, but subject to discontinuing the aggregation and accummulation at the date at which Henry dies in Sarah's lifetime.

The next question is whether that direction is in breach of the Thellusson Act. It is quite obvious that the period I have described is not within any of the periods allowed by section 1. The question here, therefore, is whether the gift is protected by section 2. It is protected if it is a provision for raising portions for children of any person taking an interest under the will. Now, Sarah takes an interest under the will. Therefore these are children of a person taking an interest under a will. It remains to say whether this benefit is properly described by the word "portion." Now, I apprehend that the word "portion," as generally understood, conveys the meaning of a sum of money secured to a child out of property either coming from, or settled upon, its parents. The benefit is none the less a portion, I think, because it is given not only to younger children, but to all the children, including the eldest. If that be a correct statement of the meaning of the word, this gift is within that. Now, there is authority upon the point in *Beech* v. *Lord St. Vincent*. I see no difference in principle between the two cases, except that the children who were in *Beech* v. *Lord St. Vincent* to be entitled, excluded an eldest son; but I do not see that there is any difference in the fact that all the children, and not only the younger children, are to take. I think, therefore, that this gift is protected by section 2 of the Thellusson Act.

The next question is whether the class of children who can take under this gift closed on the 19th of June, 1903, the day on which the eldest child attained twenty-one. Now, the rule which was laid down in *Andrews* v. *Partington* has been repeatedly stated to be merely a rule of convenience. In cases in which it has been adopted, the solution arrived at is in an endeavour by the court to reconcile two inconsistent directions, the one that the whole class of children shall take, and the other that the fund shall be divided at a moment when the whole class cannot be ascertained. The court has cut that knot by saying, we will close the class at that date, and then you can ascertain. You have got to choose between two alternatives.

But, again, as I shall show from the cases, the rule is never applied unless it is necessary. Where it is not necessary to resort to it, you give effect to the disposition as it is, and directly you find, as you do find in this case, that there is a direction to accumulate after the date at which the eldest child attains twenty-one—that is to say, where the fund to be divided is a fund to be aggregated and accumulated after that date, so that the fund to be divided is not known at that date, you are driven to the conclusion that the child who attains twenty-one cannot have that which is given to him at that date, because the sum to be divided is not known. Therefore, where you find a direction to accumulate to a later date, the rule in *Andrews* v. *Partington* does not apply. The same thing may be stated in a different way. The direction to accumulate until 1917 is inconsistent with the division in 1903. If you give effect to the direction to accumulate until 1917, you cannot divide in 1903. When you come, therefore, to the direction here to pay at twenty-one, you must read it as meaning that the payment is to be at the expiration of the period of aggregation and accumulation, or at twenty-one, if the beneficiary is, at that date, still an infant; in other words, that it means that you are to pay not before twenty-one—not that you are to pay at twenty one, although the aggregation and accumulation has not expired.

There are several cases bearing on the point. The first is that of *In re Emmet's Estate*, where the rule was applied. It was an ordinary case; there was no direction for accumulation and aggregation till a later date. The children were to be paid at twenty-one, and the decision was simply that the rule in *Andrews* v. *Partington* was to be applied, because you could not pay at twenty-one a share of an ascertained sum unless you knew among how many people you were to divide it. Therefore, it was held, you must close the class and determine the number of people among whom it was to be divided.

The next case is that of *Watson* v. *Young*, which is, I was going to say, exactly, or as exactly as any case can be, the present case. The gift there was to one for life, and after his death to his children who should attain twenty-one, and the issue of children who should die under twenty-one, leaving issue who should attain twenty-one, "provided always that the rents of the trust premises should, during the term of twenty-one years from the day next before the day of the testator's death be accumulated by way of compound interest, and the accumulated fund should be held in trust for the child, if only one, or all the children equally, if more than one, of R. who should attain twenty-one." What was held was that all the children of R. who were born during the period of accumulation, and who attained twenty-one, were entitled to take. Pearson, J., who decided the case, said: "But in the present case, where there is an accumulation directed, and no one can, therefore, enter into the the actual enjoyment of his share until the period of accumulation has come to an end, I do not see that there is any consideration of convenience, or of lesser inconvenience, which obliges me to shut up the class until the period of accumulation comes to an end."

In re Wenmoth's Estate, decided by Chitty, J., is reported as a decision that the rule as to closing the class does not apply to gifts of income. I cannot think that that case is satisfactorily reported. To understand my difficulties I must state a few dates. The testator died in 1871, and the eldest child attained twenty-one in 1883. The directions of the will were that the shares of the grandchildren were to be invested by the trustees during the minority of the grandchildren and form part of the trust, so that from 1871 to 1883 the shares of the income were to be invested, and in 1883 there was an aggregate sum resulting from so doing. At that moment there were seven children; four years later, in February, 1887, there was born an eighth child. The direction was "to apply the income unto and equally between the grandchildren on their attaining twenty-one." It is quite obvious that in 1883, when the first attained twenty-one, the question arose, Was he entitled to one-seventh of the income which had accumulated during this period, and thenceforward to one-seventh of the income, or was he not? And, further, when another child was born in 1887—four years later—was he still entitled to a seventh of the income, or

was his share of the income cut down to an eighth? Chitty, J., held that the eighth child took. If so, did he take a share in the income which was there in 1883, and which accrued to 1887, or did he not? Did you divide in sevenths until he was born, in 1887, and then did you divide in eighths, or what did you do? It was obviously a question of difficulty which required a decision. Chitty, J., is reported as saying: "Where, however, as in this will, the distribution is of income and not of *corpus*, there is nothing which requires the application of the rule, and the difficulty does not arise." I confess I do not understand that. It seems to me that it does arise, and that the difficulty can only be got over by a subsequent sentence which I find in the learned judge's judgment, which makes it plain if I understand it rightly. He says just below: "Each member of the class, as soon as he becomes entitled, takes his share of the income, and there is no reason why the rule should be applied beyond each periodical payment." If you read the two sentences together, and understand the learned judge to mean that as each periodical payment falls due, you are to divide it upon the then existing state of things, that is to say, in sevenths, and when another periodical payment falls due, after another child has been born, you are to divide it in eighths, I understand it. But the order, as drawn up, is a declaration that the income is divisible in eighths—not that the income after the birth of the eighth was divisible in eighths, but that all the income was divisible in eighths. If that is so, it seems to me that the difficulty does arise as to what is to happen, and I can only suppose that the decision of the learned judge must have been asked only on the question of income which accrued after the birth of the eighth. If so, the matter becomes plain; if not, I confess I have great difficulty in understanding the decision.

The last case referred to is *In re Knapp's Settlement*, where it was held that the class closed. In that case there was no direction for accumulation. North, J., referring to *Watson* v. *Young*, a case which appears to me to govern the present, distinguishes it from the case he was then deciding, and points out the ground of the decision. I adopt his view, as it seems to me to be the true one. He says: "Although (in *Watson* v. *Young*) the tenancy for life had expired, a further term had to elapse during which the rents had to be accumulated, and till that period came to an end there could be no distribution, and therefore in that case the period for distribution and fixing the class was not the death of the tenant for life, but the expiration of the further period that had to run to make up the twenty-one years." Directly you have, as here, a direction to aggregate and accumulate for a further term, in my judgment, the rule in *Andrews* v. *Partington* does not apply.

I hold, therefore, that the aggregation and accumulation is to be continued for the period named by the testator, and that the fund does not become divisible until that period of accumulation has expired.

Solicitors, *A. H. Arnould & Son*, for *Kilby & Collinge*, Banbury.

Chan. Div. } Oct. 28.
Buckley, J. }

In re HAY.
KERR *v.* STINNEAR. (*a.*)

Will—Codicil confirming will—Unattested alteration made before execution of codicil—Construction—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 21.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

Where unattested alterations have been made in a will after the execution thereof, and the testator has afterwards executed a codicil confirming the will, it is in all cases a question of the construction of the codicil whether he has confirmed the will as originally executed or as subsequently altered. A "will" means an instrument executed in conformity with the requirements of the Wills Act; consequently, where the codicil purports to confirm the "will," no effect is to be given to the subsequent alterations.

A testatrix gave legacies to A., B., C. Afterwards, by her directions, the legacies were crossed out. The obliteration was not executed in the manner required by the Wills Act for the execution of the will. Subsequently she executed a codicil to her "will" revoking the legacy to B., and in other respects confirming her said will.

Held, that the legacies to A. and C. were valid, and payable to them.

Adjourned summons.

This case raised the question as to the effect of the confirmation by a codicil of a will in which there were unattested alterations made subsequently to the execution of the will.

By her will dated the 1st of February, 1901, Marianne Louisa Hay, after appointing executors and trustees, and referring to a power of appointment which she did not exercise, bequeathed her real and personal property to her trustees, upon trust for conversion, and to stand possessed of the proceeds of such conversion and of her ready money upon trust to pay certain legacies—amongst others "[to Miss Christina Stewart, of Orich, Nither Lochaber, £200]," "[to Miss Elizabeth McKenzie, daughter of Colonel John McKenzie, who at one time held] a command at Tynemouth Castle, £500," "to [Mrs. Stinnear, of Oxford-terrace, Christchurch, New Zealand, £3,000]," and to stand possessed of her residuary estate upon divers charitable trusts.

On the 24th of May and the 23rd of July, 1901, she made two codicils, neither of which is material to the present purpose.

From the affidavit of Emily Miles, the housemaid of the testatrix, which was incorporated in and forms part of the probate of the will and codicils, it appeared that on the 19th of October, 1901, the testatrix directed her to cross out the legacies to Miss Stewart, Miss McKenzie, and Mrs. Stinnear, and that she accordingly drew a pen through the words which are, in the will as above set out, enclosed between square brackets.

The obliterations were not signed by the testatrix or attested.

By a third codicil to her will, dated the 21st of October, 1901, she said: "This is a third codicil to the last will and testament of me, Mrs. Marianne Louisa Hay, which will bears date the 1st of February, 1901," and two codicils . . . "I revoke the legacy of £500 which I have given to Miss Elizabeth McKenzie, daughter of Colonel John McKenzie, who at one time held a command at Tynemouth Castle." And after bequeathing divers legacies she concluded, "In all other respects I ratify and confirm my said will and two codicils."

The testatrix died on the 28th of December, 1901. Probate was granted of the will in facsimile.

The above-mentioned facts were stated by his lordship in his judgment. It also appeared that on the 20th of October, 1901, she instructed her solicitor to draw the third codicil, and told him that she wished to revoke the legacy to Miss McKenzie, but did not refer to the others. He did not know of the obliteration, having drawn the codicil from a draft copy of the will. Some time prior to, or at the time of the execution of the third codicil, as the result of a con-

versation which the testatrix had with one of the executors on the subject of the legacy to Mrs. Stinnear, she said to him, "Let it stand."

The present summons was taken out by the trustees to determine the question whether the legacies in favour of the persons originally named in the will, but whose names were obliterated therefrom, were now payable.

Section 21 of the Wills Act provides that, "No obliteration or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will."

Birrell, K.C., and *J. B. Howard*, for the trustees.

Astbury, K.C., and *T. T. Blyth*, for Mrs. Stinnear.—The codicil confirms the will as originally executed—that is to say, without the unattested obliterations. *In the Goods of Hall*, 19 W. R. 897, 2 P. & D. 256, shows that strong evidence is required to establish the fact that unattested obliterations are intended to be final. Such evidence was forthcoming in *In the Goods of Heath*, [1892] P. 253, 40 W. R. Dig. 204, and in that case they were held to have been incorporated in the will and confirmed by the codicil. In the present case the circumstances are in our favour.

Finlay, for Miss Christina Stewart.

R. J. Parker, for the Attorney-General.—*Tyler* v. *Merchant Taylors' Co.*, 15 P. D. 216, is an authority for the proposition that where there is an unattested alteration in a will, and a subsequent codicil confirming the will, effect is given to the alteration. It is only in cases where the alteration is shown by the evidence to be deliberative and not final that the rule laid down in *In the Goods of Hall* can apply. Here the circumstances show that the obliteration was meant to be final. Confirmation of the will means confirmation of the whole of the document purporting to be the will, not merely of so much of the document as is her will according to the strict construction of the Wills Act.

BUCKLEY, J., after referring to section 21 of the Wills Act, stated the facts, and continued: Now it is plain, having regard to section 21 of the Wills Act, that an alteration of a testamentary gift, made after the execution of the will, cannot be effective, unless the alteration be executed in like manner as is required for the execution of the will. The first step is to see whether, in the third codicil, she has by that instrument altered a previously duly executed instrument so as to give effect to an alteration which the statute says shall be of no effect unless executed as a will. That is a question of construction. You have to read the third codicil and say what it is that she thereby confirms. That which she confirms may be either unattested or duly attested. The third codicil, being a duly attested instrument, whatever it is that she confirms by it will become part of her will. I cannot doubt what was the instrument which she intended to confirm. The first question, then, is one of construction. What did she mean when she spoke of her will? She begins by referring to her "will which bears date the 1st of February, 1901." It is the will without the alterations which she confirms.

It is not necessary that I should base my decision on that circumstance alone. There is a clause of revocation in the third codicil, a revocation of the legacy of £500 to Miss Elizabeth McKenzie. She therefore treats the will on the footing that the three legacies are subsisting and then revokes one of them.

It is unnecessary to consider the cases which have been referred to, and which are said to to have been decided differently according as the alterations were regarded as deliberative or final. All the cases appear to be reconcileable. The true view seems to me to be that in all cases it is a question of construction as to what is the instrument which the testator by his codicil intends to confirm. In the present case what is intended to be confirmed is the original will—the instrument of the 1st of February, 1901, as unaltered. I think, therefore, that no effect ought to be given to the alterations, and that under the will the three legacies were good. One of them was taken away by the codicil, but the others remain, and I hold that they are now payable.

Solicitors, *Field, Roscoe, & Co.*, for *Bubb & Co.*, Cheltenham; *Blyth, Dutton, Hartley, & Blyth; Markby, Stewart, & Co.; Solicitor to the Treasury.*

Chan. Div.
Swinfen Eady, J. } July 8, 9, 18, 1903.

In re DENTON'S ESTATE.

LICENSES INSURANCE CORPORATION AND GUARANTEE FUND (LIMITED) *v.* DENTON. (*a.*)

Insurance—Insurance of mortgage debt—Surety for part of debt—Liability—Co-sureties.

In a mortgage deed the mortgagor and D. jointly covenanted to pay the principal and interest, D.'s liability not to exceed £1,000. In the same deed the mortgagor covenanted to insure the mortgage debt against loss in the name of the mortgagees with plaintiffs. The mortgagor had, previous to the date of the mortgage, made a proposal that the plaintiffs should insure the said mortgage debt. In reply to this proposal, on a date subsequent to the completion of the mortgage deed plaintiffs issued a policy of insurance to the mortgagees. It was by this instrument agreed that upon the payment by the plaintiffs of the amount which might become due under the policy the mortgagees should transfer to the plaintiffs the mortgage debt and interest and all securities. On default by the mortgagor, and the subsequent sale of the mortgaged property, there was a loss to the mortgagees of £984 12s. 6d., which was made good by the plaintiffs. The plaintiffs claimed to recover the whole deficiency from D.

Held, that the mortgage and the insurance were one transaction in two parts, that the plaintiffs and D. were in the position of persons subject to a common liability which had been discharged by one of them, and that accordingly they must contribute in proportion to their liability.

This was a summons taken out by the Licenses Insurance Corporation and Guarantee Fund (Limited) asking for a declaration that the estate of George Denton, deceased, was indebted to the said plaintiff corporation in the sum of £984 12s. 6d.

On the 2nd of November, 1899, Maude Hannay mortgaged the "Lord Palmerston" public-house at Highgate to mortgagees (a bank) to secure the repayment of £4,000 and interest. The mortgage contained a joint and several covenant of the mortgagor and of one George Denton, as surety, with the mortgagees for the repayment of £4,000 with interest thereon, and also of all such further sums as should for the time being be due from the mortgagor to the mortgagees for moneys advanced on her behalf for rents, rates, taxes, repairs, licences, &c. The liability of the said George Denton under the above covenant was not to exceed £1,000. There was also a further proviso that

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

the mortgagor should insure the said debt against loss in the name of the mortgagees with the plaintiff corporation.

Maude Hannay had, in accordance with the last proviso, made a proposal to the plaintiff corporation on the 28th of October, 1899, for the insurance of the said mortgage debt, and in this proposal it was stated that George Denton would join in the mortgage for the purpose of guaranteeing the repayment of £1,000 of the principal money.

On the 7th of March, 1900, the plaintiff corporation issued a policy of insurance to the mortgagees in which it was agreed that the said proposal should be the basis of the contract of insurance thereby intended. This document was headed "Mortgage Insurance Policy." It was witnessed by this policy that the plaintiff corporation agreed with the mortgagees (subject to certain indorsed conditions) that if the mortgagees should become entitled under their power of sale to sell the mortgaged property, and should give notice thereof in writing to the plaintiff corporation, the plaintiffs would, after the expiration of six months from the receipt by them of a claim in writing by the mortgagees requiring payment, pay the principal money for the time being due under the said mortgage, with interest thereon. It was further agreed by clause 9 that upon the payment of the amount which might become payable under the above policy, the mortgagees should transfer to the plaintiffs the mortgage debt and interest, and all securities held by the mortgagees for the same.

The mortgagor made default in the payment of the principal and interest, and eventually the mortgagees, in virtue of their power of sale, sold the property for the sum of £4,044 4s. 9d.

At the time of the sale the sum of £5,028 17s. 3d. was due to the mortgagees, including interest, sums paid for repairs, and law costs, so that after the sale there still remained due the sum of £984 12s. 6d. The latter sum was paid to the mortgagees by the plaintiff corporation in pursuance of the said policy of insurance, and on the 23rd of July, 1902, all the estate and interest of the mortgagees in the property, including the benefit of the covenants, was transferred by them to the plaintiffs.

The surety, George Denton, died on the 15th of November, 1899, and the defendant was his executrix.

Everett, K.C., and *Owen Thompson*, for plaintiffs.—The plaintiffs were not sureties. They were in the position of underwriters: *Dane* v. *The Mortgage Insurance Corporation*, 42 W. R. 227, [1894] 1 Q. B. 54; *Finlay* v. *The Mexican Investment Corporation*, [1897] 1 Q. B. 517, 45 W. R. Dig. 76. In any case they were not co-sureties with the defendant: *Craythorne* v. *Swinburne*, 14 Ves. 160.

Eve, K.C., and *J. Henderson*, for the defendants, argued that plaintiffs and defendants were co-sureties, and were liable to contribute in proportion to the amount of their respective liabilities.

SWINFEN EADY, J., stated the facts and proceeded: It will be observed that the issue of the policy by the corporation and the joinder of George Denton as surety in the mortgage were not separate and distinct transactions, but the same transaction divided into different parts. Each of them—the corporation and Denton—acted with the privity of the other. In the proposal in writing referred to in the policy as the basis of the contract, it is stated that Mr. G. Denton will join in the mortgage for the purpose of guaranteeing the repayment of £1,000 of the principal money. In the mortgage to which Denton is a party the mortgagor covenanted to insure and keep insured the principal moneys and interest against loss in the name of the bank (the mortgagees) with the corporation. The corporation and Denton were also bound for the same principal on the same engagement, although Denton's liability was restricted to £1,000 and interest. At one time it was contended on behalf of the corporation that their engagement was different from Denton's, as the corporation were only liable for the principal moneys originally advanced on the mortgage (£4,000) with interest, while Denton was liable for further advances and for moneys paid by the mortgagees on behalf of the mortgagor for rent, rates, taxes, repairs, licences, and insurances; but the liability of the corporation under the policy is to pay "the principal money for the time being due under the said mortgage," and is not limited to so much of the original principal sum of £4,000 as remains unpaid. In order to ascertain the amount of "the principal money for the time being due under the said mortgage," reference must be had to the deed which determines what sums the mortgagee is entitled to claim as principal. By clause 9 of the conditions, upon payment of the amount which may become payable under the policy the insured is to transfer to the corporation the mortgage debt and interest and all securities; this means the whole of the mortgage debt, and not merely so much thereof as may represent principal money originally advanced with interest thereon. Indeed, if the contention of the corporation had been well founded in this respect, and they were only bound to pay, and thereupon entitled to have transferred to them so much of the original mortgage debt with interest as remained unpaid, their claim to prove against Denton's estate would immediately have failed except as regards £18 2s. 8d., as this latter sum is the only amount they have actually paid for either principal or interest in respect of the original advance of £4,000, the mortgaged premises having realized by sale the full sum of £4,000. I treat the corporation, therefore, as bound by the same engagement as Denton, and I treat the sums properly paid by the corporation for rent, costs, repairs, and otherwise as covered by their policy. If these had been paid by the bank, the bank could first have deducted these sums from the £4,000 proceeds of sale, and thus left a corresponding deficiency of the principal moneys, which the corporation would have been liable to pay. These various sums appear, in fact, to have been paid by the corporation direct, and not by the bank in the first instance and then repaid by the corporation; but this is mere form, as the payments were certainly made by the corporation by reason of their liability under the policy, and to assist in realizing the property to the best advantage so as to diminish as far as possible the ultimate loss.

Under these circumstances the question is, What are the respective rights of the parties? The corporation claim that they are not in the position of sureties or co-sureties, but are entitled as transferees of the bank to throw the whole of the loss upon Denton's estate as it does not exceed £1,000 and interest, the limit of his liability. In my opinion this claim cannot be sustained. Denton was surety only, and could, with equal and perhaps greater force, have claimed that upon payment of the deficiency he would have become by operation of law entitled to enforce all the rights of the bank, including the right to proceed against the corporation under the policy for the full extent of deficiency. In the absence of any express contract as between the corporation and Denton with regard to the incidence of any loss, I am of opinion that their position is that of persons subject to a common burden or liability which has been discharged by one of them. That one is entitled in equity to enforce contribution from the

other, upon the principle established and expounded in *Dering* v. *Earl of Winchelsea*, 1 Cox 318. It was contended that the corporation were not in the position of sureties strictly and properly so called. I am not satisfied that this contention is well founded. The policy contains a recital of a proposal for guaranteeing the said mortgage debt and interest, and then it provides that if the insured shall become entitled to sell the mortgaged property—that is, if the mortgagor shall make default in the payment on demand of the principal money and interest—the corporation will, after six months' notice, pay the principal money and interest. In other words, if the principal does not pay, the corporation will pay. It was argued by the corporation that they were merely in the position of persons insuring against a loss, but this argument is founded on their instrument being headed "Mortgage Insurance Policy," and without regard to the terms of the instrument itself. It is not merely an insurance against loss. The corporation is liable, after the expiration of six months, to pay the full principal and interest if the mortgagor does not, and even although there may not ultimately be any loss whatever on the mortgage. After transfer the corporation may ultimately realize from the security the full amount of principal, interest, and costs, and instead of there being any loss there may ultimately be a surplus for the mortgagor. The corporation may, under condition 7, require the insured to realize the securities, but they may not be capable of immediate realization. The corporation is liable to pay the full amount, irrespective of the securities not being realized. The policy is in a different form from that considered in *Dane* v. *Mortgage Insurance Corporation*, [1894] 1 Q. B. 55; but whether the contract of the corporation is a contract of insurance or a contract of suretyship does not seem to me to be material. The corporation and Denton were subject to a common burden or liability to which they must respectively contribute. The question then remains, In what proportions are they to do this? They will contribute in the proportion which the whole liability under the policy bears to £1,000. There must be a reference to chambers to settle the amount, as the figures are not agreed upon.

Solicitors for plaintiffs, *Jennings, Son, & Allen*.

Solicitors for defendants, *Loxley, Elam, & Gardner*.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) } May 25, 1903.

SALT (*Appellant*) v. SCOTT-HALL (*Respondent*). (a.)

Local government—Bye-law as to new buildings—No exempting power reserved therein—Bye-law not unreasonable—Summary Jurisdiction Act, 1879 (42 & 43 *Vict.* c. 49) s. 16.

By a bye-law with respect to new buildings made by a rural sanitary authority it was provided that "Every person who shall erect a new building shall cause such building to be enclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together (a) *with good mortar compounded of good lime and clean sharp sand or other suitable material, or* (b) *with good cement, or* (c) *good cement mixed with sharp sand."*

Held, that the bye-law was not unreasonable and ultra vires, *because it did not reserve to the rural authority any discretion to permit the erection of any new building in exceptional circumstances other than in accordance with the requirements of the bye-law. On proceedings being taken under the Summary Jurisdiction Act*, 1879, *in respect of an offence against the above bye-law, the justices have discretion under section* 16, *though the charge is proved, to dismiss the summons if they think the offence is of a trifling nature and that punishment would be inexpedient.*

This was a case stated by the justices for the county of Anglesey.

On the 8th of October, 1902, an information was laid by John Salt, the appellant, an inspector of nuisances for the Valley Rural District Council, the sanitary authority for the parish of Llanfaelog, against the Rev. W. E. Scott-Hall, the respondent, for that he on the 1st of October, 1902, unlawfully did break a certain bye-law made by the guardians of the Holyhead Union in accordance with section 23 (3) of the Public Health (Amendment) Act, 1890, with respect to new streets and buildings in that he did unlawfully cause to be erected a bungalow without causing such building to be enclosed with walls of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together contrary to the said bye-laws.

The said bye-law was as follows: "Every person who shall erect a new building shall cause such building to be enclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together (*a*) with good mortar, compounded of good lime and clean sharp sand or other suitable material, or (*b*) with good cement, or (*c*) with good cement mixed with sharp sand."

By bye-law 98 it was enacted that every person who shall offend against the foregoing bye-laws shall be liable for every such offence to a penalty of £5, and in the case of a continuing offence to a further penalty of ten shillings for each day after written notice of the offence from the sanitary authority.

On the hearing of the information the following facts were either proved or admitted:

The structure in question was erected by and was the property of the respondent, and was intended to be used in the summer months as a dwelling-house or bungalow.

The foundation was of stone, the chimney and breastings of brick, and the rest of the building of wood, except the roof, which was of slate.

All the rooms of the bungalow were on the ground-floor, and the windows were French-windows.

The parish of Llanfaelog, where the building was situated, is a rural parish adjoining the sea.

The bungalow was an isolated building in the country, the two nearest houses thereto being respectively 450 and 200 yards distant therefrom.

Bungalows of similar character were frequently built and there were five bungalows erected in the appellants' district.

The cost of building a bungalow was less than the cost of building a stone or brick house of similar accommodation.

A bungalow made of wood similar to the one erected by the respondent was as healthy as it would have been if erected of bricks or stone or other hard and incombustible materials.

The bye-laws adopted by the appellants were in the form of a set of model bye-laws prepared by the Local Government Board for urban districts.

Since the adoption of such bye-laws the Local Government Board had prepared a set of model bye-laws for rural districts, but they had not been adopted by the appellants.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The above bye-law was properly made and confirmed by the Local Government Board in accordance with the Public Health Acts.

The appellant contended that on the above facts an offence against the bye-law had been proved and that the respondent should be convicted.

For the respondent it was contended that the bye-law was unreasonable in a thinly populated parish like Llanfaelog or in a thinly populated rural district like that of the appellants, inasmuch as it absolutely prohibited the erection of bungalows under any circumstances whatever, and however isolated, and did not reserve any discretion to the appellants to permit the erection of such bungalows under any circumstances.

The justices were unable to agree, and the information was in consequence dismissed.

The question for the determination of the court was whether on the facts of the case the justices were right in dismissing the information for the reason that the bye-law was unreasonable and *ultra vires*, or whether they ought to have convicted the respondent.

It was admitted, before the Divisional Court, that for the purposes of this case the rural sanitary authority had the powers of an urban sanitary authority under the Public Health Act, 1875.

H. C. Davenport (*Ellis Griffiths* with him), for the appellant.

J. Bryn Roberts, for the respondent.

Lord ALVERSTONE, L.C.J.—No doubt it would be more satisfactory if there was a power in the bye-laws enabling the local authority to exercise their discretion under exceptional circumstances. We are asked to say that this bye-law is unreasonable and wholly void, because there is here no such provision. I think we cannot go as far as that. In the first place, this bye-law is in identically the same terms as the bye-law which has been treated as reasonable in the case of *Batley* v. *Cuckfield Rural District Council*, 59 J. P. 584. It was stated—I do not know exactly upon what authority—that they are the model bye-laws which have been adopted in urban districts with the sanction of the Local Government Board, and of course there must be many places in which such a bye-law as the one we are dealing with would be most salutary and prudent, therefore when I say it would no doubt be more satisfactory if there was such a dispensing power, I mean to say that such a provision under many circumstances might be most useful and salutary and most reasonable; but I hesitate to hold that this bye-law is unreasonable. It seems to me that the consequence of such a decision would be very serious, not only as practically overruling the case of *Batley* v. *Cuckfield Rural District Council*, but as having a very far-reaching application with regard to a great many other bye-laws in the country.

We are asked by the magistrates whether they were right in dismissing this action against the respondent for the reason that the bye-law was unreasonable and *ultra vires*. I think that they were wrong in dismissing this summons on these grounds.

It has been conceded, and, I think, rightly, on behalf of the respondent that this rural authority had the powers of an urban authority, therefore the question of its being made under section 23 of the Public Health Act of 1890 disappears. Of course we have already indicated in the course of the argument that we do not think there was the power to make these bye-laws under that section. Taking section 157 and the other sections of the Public Health Act, we think the bye-laws are not *ultra vires*, nor can we say that they are unreasonable.

The only other matter I have to deal with is whether the justices were bound to convict the respondent of the offence with which he was charged. It is true that these bye-laws apparently contain no exempting power, but the proceedings are taken under the Summary Jurisdiction Act, 1879, and the magistrates have power under section 16 of that Act, if they think fit, to dismiss the summons. I think this case must go back to the magistrates with a direction that the bye-law is not unreasonable or *ultra vires*, and that they should deal with the case having regard to their powers under section 16 of the Summary Jurisdiction Act, 1879. They certainly should exercise their discretion and deal with the matter as they think fit on the merits of the case.

WILLS, J.—I agree.

CHANNELL, J.—I agree. I should just like to add a few words to explain the view I take of the matter.

It seems to me that all bye-laws relating to the construction of buildings ought to contain something in the nature of a dispensing power, enabling the local authority or surveyor to say that a particular building is of an exceptional character, and that the hard-and-fast rules laid down by the bye-laws as to the mode of construction ought not to apply to that particular building. But if we were to hold that every set of bye-laws that did not contain some such power was bad, it would follow that we should have to hold that these bye-laws could not be enforced. Having regard to the principle upon which bye-laws are now dealt with—namely, that the court does not interfere to set aside bye-laws which a local authority has deliberately adopted, because it is held that they ought to be the best judges of whether a particular bye-law is required in their own district or not, it seems to me it would be mischievous to hold that every set of bye-laws which purported to lay down a hard-and-fast rule for all buildings was necessarily bad because no dispensing power was contained therein. I think the proper way to treat such bye-laws is to say that they must not be set aside entirely as unreasonable, because the magistrates must be trusted to exercise the powers which they have in fact got of dealing with exceptional cases, when such cases do arise, in an exceptional way, and either inflict a perfectly nominal penalty, or, if they think fit, say that the particular offence is of too trifling a nature to require any punishment or any penalty to be inflicted. It is because magistrates have those powers that it is unnecessary to say that bye-laws which unfortunately omit to provide specially on their face for exceptional circumstances must necessarily be set aside, because exceptional cases may arise. I think that is the best way of dealing with such an objection to the bye-law.

Appeal allowed.

Solicitor for appellant, *T. D. Jones*, for *T. R. Evans*, Holyhead.

Solicitors for respondent, *Horne & Birkett*, for *Gold, Edwards, & Co.*, Denbigh.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Nov. 12.

DOWDEN & POOK (LIMITED) v. POOK. (a.)

Restraint of trade—Covenant—Validity—Reasonableness—Province of judge—Province of jury.

The old rule that the question of the reasonableness of a covenant in restraint of trade is for the judge and not for the jury has not been altered by recent decisions.

A contract whereby the plaintiffs agreed to employ the defendant as the manager of their cider business contained a covenant by the defendant not to carry on the business of a cider merchant for the term of five years after leaving the plaintiffs' service. The capital invested in the plaintiffs' business was not more than £9,000. Most of their customers resided in the South of England, though there were also some in Scotland and Ireland. The plaintiffs intended to extend their business, and had opened agencies in various places. In an action to enforce the covenant,

Held, that, having regard to the nature and condition of the plaintiffs' business, the covenant, being unlimited as to space, was unreasonable, and therefore void as being in restraint of trade.

Application by the defendant for judgment or a new trial in an action tried before Grantham, J., and a jury.

The action was brought for damages for breach of a covenant on the part of the defendant not to carry on a certain business, and for an injunction to restrain the defendant from committing further breaches of the covenant.

The defence was that the covenant was void as being in restraint of trade.

The plaintiff company was formed in 1902 for the purpose of acquiring the business of a cider merchant which had been carried on before 1895 by the defendant and subsequently by another company in and about Newton Abbot, in the county of Devon, and the business of a manufacturing chemist and cordial compounder which had been carried on by one Dowden in London.

By an agreement in writing, dated the 14th of June, 1902, between the plaintiff company and the defendant, it was agreed that the defendant should be the manager of the Newton Abbot department of the plaintiff company's business at a salary of £104, and that he should also receive a one-fifth share of the profits of the department. The agreement contained the following covenant: "The said Robert Gidley Pook shall not either solely or jointly with or as manager or agent for any other person or persons or company, directly or indirectly carry on or be engaged or concerned or interested in the business of a cider merchant, manufacturing chemist, or cordial compounder, nor permit or suffer his name to be used or employed in carrying on or in connection with the said business for the term of five years after leaving the service of the company, and in case the said Robert Gidley Pook shall commit any breach of the foregoing stipulations he shall pay to the company immediately on every such breach the sum of £100 as liquidated damages in respect thereof."

In September, 1902, the defendant was dismissed from the service of the plaintiff company.

The plaintiffs complained that the defendant had since his dismissal committed breaches of the above covenant by carrying on business as a cider merchant.

The evidence given at the trial as to the nature and condition of the plaintiff company's business was that it had a total capital of not more than £9,000, that the plaintiffs intended to extend the cider business and make it a wholesale business, that they had opened agencies in various places, that their cider was drunk in all parts of England, that most of their customers resided in the South of England, though there were also some in Scotland and Ireland, and that they were also doing a certain amount of export trade.

Grantham, J., left to the jury the question whether the covenant, being unlimited as to area, was wider than was necessary to protect the plaintiffs in their business.

The jury answered that the covenant was wider than was necessary.

The learned judge, notwithstanding this finding of the jury, gave judgment for the plaintiffs, granting the injunction which was asked for.

The defendant by way of appeal applied for judgment.

Clavell Salter, for the defendant.—The proper way of dealing with a covenant in restraint of trade is, first, to interpret the covenant itself, and then to consider whether the covenant so interpreted goes so far in restraint of trade as to be unreasonable. Further, the court will not sever the covenant for the purpose of upholding so much of it as may be reasonable unless it finds in the covenant itself some ground for making the severance: *per* Chitty, J., *Mills* v. *Dunham*, reported in Court of Appeal only, 39 W. R. 289, [1891] 1 Ch. 576. This covenant has no limitation as to space. None is expressed, and there is no warrant for reading any such limitation into it. The natural meaning of it is that the defendant is to be prevented from carrying on any such business as that of the plaintiffs anywhere for five years. Such a covenant must be held to be unreasonable: *Allsopp* v. *Wheatcroft*, 21 W. R. 102, L. R. 15 Eq. 59. The old rule that a covenant in restraint of trade, unlimited as to space, is void as being contrary to public policy is still law, though the tendency of recent decisions has been more and more to make reasonableness the chief test: *per* Vaughan Williams, L.J., *Underwood* v. *Barker*, 47 W. R. 347, [1899] 1 Ch. 300. The reasons which induced the House of Lords in *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, to hold an unlimited covenant to be not unreasonable have no application to this case. This covenant is clearly unreasonable as being wider than could by any possibility be reasonably required for the protection of the plaintiffs' business: *Ward* v. *Byrne*, 5 M. & W. 548; *Hitchcock* v. *Coker*, 6 A. & E. 438. This covenant is not such as to enable the court to separate what is unreasonable in it from what is reasonable as in the case of *Mallan* v. *May*, 11 M. & W. 631. The decision of the learned judge, therefore, is erroneous. Secondly, the finding of the jury is conclusive in the defendant's favour. Reasonableness, which recent decisions make the chief test (see *Roussillon* v. *Roussillon*, 28 W. R. 623, 14 Ch. D. 357), is the same thing as necessity. The question whether the covenant was wider than was necessary for the protection of the plaintiffs' business was a question of fact, and was rightly left to the jury. The point has not arisen recently, as actions of this kind are now usually brought in the Chancery Division. But where there is a jury the question whether the covenant is wider than necessary ought, like any other question of fact, to be answered by them.

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

J. A. Foote, K.C., and *Simey*, for the plaintiffs.—The onus is on a defendant who objects to a covenant in restraint of trade to satisfy the court that the covenant is more than could under any circumstances be necessary for the protection of the plaintiff's business. The learned judge was rightly of opinion that this onus had not been discharged by the defendant. The only test to be applied in this class of case is that of reasonableness: *Roussillon* v. *Roussillon; Haynes* v. *Doman*, [1899] 2 Ch. 13, 47 W. R. Dig. 174. Assuming that the area of restriction extends to the whole world, there is nothing unreasonable in this covenant, having regard to the nature of the business which is to be protected: *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.; Mitchel* v. *Reynolds*, 1 Smith's Leading Cases (10th ed.), 391. The business was acquired by the plaintiffs with the intention of extending it and converting it into a wholesale business. They are opening agencies in all parts of England, they have customers in Scotland and Ireland, and they also do some business outside the United Kingdom. The possibilities of the business, and not merely its actual present condition, ought to be taken into consideration. The finding of the jury may be disregarded. There have been many common law cases as to restrictive covenants, such as *Mallan* v. *May* and *Tallis* v. *Tallis*, 1 E. & B. 391; but the question whether such a covenant was enforceable has never been left to a jury. All the cases show that, whether that question is to be considered a question of law or a mixed question of law and fact, it is in either case for the judge and not for the jury. Where a contract is proved, and a breach is proved, but the defendant craves in aid the doctrine of public policy, the question arises whether the contract is so much at variance with the interests of the King's subjects that the court will not enforce it; and that must be a question for the court itself and not for the jury. The province of the jury in such cases is the same as in cases of malicious prosecution, where questions of fact as to reasonable and probable cause may be left to the jury, but it is for the judge to say whether the facts found amount to reasonable and probable cause. At any rate, no question ought to be left to the jury unless there is some evidence of unreasonableness; and here there is no evidence of unreasonableness.

COLLINS, M.R.—This is an action on a covenant contained in an agreement between the plaintiffs and the defendant, by which the plaintiffs undertook to employ the defendant as the manager of the Newton Abbot department of their business. The covenant sued on is as follows: [His lordship read it.] The defendant was dismissed from his employment, and the plaintiffs proved that after his dismissal he carried on business as a cider merchant not far from their place of business. The defendant took the point that the covenant was void as being in restraint of trade. The view put forward on his behalf was that the covenant was wider than was reasonably necessary for the protection of the plaintiffs' business. The jury took that view, finding that, being unlimited as to area, it was wider than could possibly be required for the purpose of carrying on the plaintiffs' business. The learned judge, however, came to the conclusion, first, that the case did not really raise any question for the jury at all; secondly, that on the true construction of the covenant it was not more than was reasonably necessary for the protection of the plaintiffs' business. He accordingly granted an injunction restraining the defendant from further breaches of the covenant.

Now, is the question whether a particular restrictive covenant is reasonable or unreasonable a question for the jury or a question for the court alone? It seems to me, on going back to the old authorities, that it has never been doubted that this is a question of law and is one for the court and not for the jury. No doubt facts may have to be ascertained in order to enable the court to decide on the reasonableness of the covenant, and questions as to such facts may properly be left to the jury, but it is outside their province to decide the question whether the covenant is reasonable or unreasonable. In *Mitchel* v. *Reynolds*, 1 Smith's Leading Cases (10th ed.), 391, Lord Macclesfield laid down the law thus: "In all restraints of trade, where nothing more appears, the law presumes them bad; but, if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances, and determine accordingly." The expression "the court" in that passage must mean the judge in contradistinction to the jury. Again, in *Mallan* v. *May* it was expressly decided that the reasonableness of a restriction was a matter of law, and could not be left to the jury. This was followed in *Tallis* v. *Tallis*. It is suggested that the current of recent authorities is to the contrary of this view, and that the law on the subject has been changed. In my opinion there is no ground for this suggestion. There have been numerous recent cases as to the validity of covenants in restraint of trade, and I think that some change in the law has taken place by which the area of possible validity has been enlarged. But these cases do not throw any light on the question as to the respective provinces of judge and jury. In olden times the idea was entertained that a restriction which was universal and unlimited was void. One view was that an unlimited restriction created only a vehement presumption of unreasonableness; another view was that it created an irrebuttable presumption. It seems to me that the modern view that a restriction, though unlimited, may under particular circumstances be reasonable, has not altered the law as to the question of reasonableness being for the judge and not for the jury. The authorities on that point are still authorities, and therefore the question whether this covenant was reasonable was for the judge.

Then does this court agree with the learned judge in the conclusion to which he has come? In my opinion the evidence as to the nature and condition of the business was all relevant and was rightly admitted. If that evidence had raised any controversy, there would have been a question for the jury. But there was no controversy in this case, as the books of the plaintiffs' business spoke for themselves. Quite apart from the finding of the jury it is clear to my mind that the business is not a large business, and that the great majority of the customers reside in the south of England, though there are a few elsewhere. Can a restrictive covenant, having an area of restriction extending over the whole world, be necessary for the protection of such a business? In my opinion, under all the circumstances of the case, the restriction is so wide as to be unreasonable and to invalidate the covenant. I cannot arrive at the same conclusion as Grantham, J., came to on this question, and I think his decision should be reversed, and that judgment should be entered for the defendant.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Judgment for the defendant.

Solicitors for the plaintiffs, *Mann & Crimp*, for *Hacker, Michelmore, & Bewes*, Newton Abbot.

Solicitors for the defendant, *Dunn, Baker, & Baker*, for *Dunn & Baker*, Exeter.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) May 12, 1903.

BOUCAS v. COOKE AND ANOTHER. (a.)

Copyright—Photograph—Made "for or on behalf of" another—"Good or valuable consideration"—Photograph taken at request of sitter—Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *s.* 1.

Where a photographer takes a photograph of a person at the latter's request in circumstances which raises an implied promise on the part of the sitter to pay for the photograph, the negative of the photograph is "made or executed for or on behalf of" the sitter "for a good or valuable consideration" within the meaning of section 1 *of the Fine Arts Copyright Act*, 1862, *and the copyright in the photograph belongs to the sitter, though he may not have bought the negative from the photographer.*

Pollard *v.* Photographic Co., 37 *W. R.* 266, 40 *Ch. D.* 345, *approved.*

Melville *v.* Mirror of Life Co., [1895] 2 *Ch.* 531, 44 *W. R. Dig.* 45, *commented on.*

Application by the defendants for judgment or a new trial in an action tried before Ridley, J., and a common jury.

The plaintiff was a photographer, and the defendant Cooke was a mission hall preacher, seventeen years of age, known as the "boy preacher." The action was brought to recover damages for infringement of copyright in a photograph, and for an injunction and penalties.

It appeared that in January, 1902, the defendant Cooke went to the plaintiff's studio, accompanied by a friend as a guarantee of his responsibility, Cooke being under age. Cooke asked the plaintiff to take a silver print photograph of him, saying that he wanted to advertise his meetings and to distribute the photographs there. The plaintiff accordingly took the photograph, and, according to the plaintiff's evidence, Cooke said that if the negative was good he might buy it. According to Cooke's evidence he said that he would buy the negative if it was good. The negative remained in the possession of the plaintiff, who supplied Cooke at his request with eighteen copies of the photograph. Cooke approved of the photograph, but they were unable to agree upon a price at which the plaintiff should supply Cooke with several thousand copies, and the plaintiff refused to accept a proposal by Cooke to pay for the eighteen copies supplied. Cooke then sent a copy of the photograph to the defendant Reynolds for reproduction, and several thousand copies were printed and sold. On the 30th of January, 1902, plaintiff registered the copyright in the negative in his name, and Reynolds also registered the copyright in his print.

Ridley, J., asked the jury whether upon the evidence the negative was to be Cooke's in any event, or only in the event of his paying for it. The jury found that the negative was the property of the plaintiff, and assessed the damages at £20 and the penalties at £5. The learned judge gave judgment for the plaintiff accordingly, and granted an injunction restraining the defendants from further publishing the photograph.

Sir Arthur Collins, K.C., and *Trickett*, for the defendant Cooke.

Herbert Reed, K.C., and *Turrell*, for the defendant Reynolds.

Scrutton, K.C., and *Colam*, for the plaintiff.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

COLLINS, M.R.—This is an action brought by a photographer to restrain a breach of alleged copyright in a photograph taken by him, and for damages and penalties. At the trial the verdict passed for the plaintiff. The questions are whether there was misdirection by the learned judge which resulted in the verdict being wrong; whether the verdict was against the weight of the evidence; and lastly, whether there was any reasonable evidence to support the verdict. The defendant Cooke, who is known as the "boy preacher," came to the plaintiff's place of business for the purpose of having his photograph taken. He was accompanied by a friend. It was the ordinary case of a customer having his photograph taken at his own request. There was *primâ facie* a contract made for a good or valuable consideration, and the onus was on the photographer to show that there was not. The plaintiff said that he was not paid for taking the photograph. According to the plaintiffs' evidence Cooke said that if the negative was a good one he might buy it; according to Cooke's evidence he said that if it was good he would buy it. That being the evidence, the learned judge summed up the case with reference to section 1 of the Fine Arts Copyright Act, 1862. That section provides that "The author, being a British subject, or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided that, when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing signed at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless at or before the time of such sale or disposition an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorized, shall have been made to that effect."

The question turns upon the words at the beginning of the proviso. It is said on behalf of the plaintiff that the only matter dealt with, there is a sale or disposition of the negative, and that is the view which Ridley, J., took, and in accordance with which he directed the jury, telling them in effect that the test of the right of the party to the copyright in the photograph was whether he had bought the negative; and that if the sitter had not bought the negative, the author of the photograph had the copyright in it. It is said that in this case the negative was not bought, and that, therefore, the copyright in the photograph remained in the photographer, and that the plaintiff, who took the photograph, can sue any person for reproducing or

multiplying copies thereof. It seems to me that that view of the law cannot be supported. It is contrary to the express words of this section. It ignores the second of the two alternatives which *primâ facie* takes the copyright out of the photographer, thus ignoring the distinction between the purchaser of the negative and the person for or on whose behalf for a good or valuable consideration the photograph is taken. The Act regards this latter person as a different person from the vendee or assignee, because, having placed the copyright in these various persons, the Act proceeds to deal with the vendee and assignee as distinguished from the other, and imposes conditions upon them which are not imposed upon him. The Act thus draws a clear distinction between them. That being my view of the construction of the section, I turn to Scrutton on Copyright, where this result of the decisions is compendiously stated. He says (4th ed., pp. 193, 194): "In the ordinary case of photographs taken for a paying customer the photographer will be restrained from multiplication of copies both on the ground of copyright, if the sitter is registered as proprietor, the photograph being taken on his behalf for a valuable consideration, and even if he is not registered, on the ground of implied contract or confidence. Where the photographer asks for the sitting, and the sitter pays nothing for it, or for copies of the photograph, the copyright will clearly be the photographer's, if he is the author, as explained above. . . . The question in each case is: 'Was the negative taken for or on behalf of the sitter for a valuable consideration?' If so, the copyright is the sitter's; if not, it is the author's. And it would seem that if the photograph is taken at the request of the photographer, even though the sitter afterwards pays for copies, it is taken on behalf of the photographer, and the copyright is his." That seems to me to be a perfectly fair summary of the law. The question is, not whether the negative was bought or sold, but whether it was taken for or on behalf of the sitter for a good or valuable consideration. The evidence on that point seems to be all one way. A person came to the plaintiff's shop and asked to have his photograph taken, which was done. That raised an implied promise to pay for it, upon which the photographer could sue the sitter. There was a good and valuable consideration. The defendant Cooke said that if he was pleased with the negative he would or might like to buy it. That is all. That is the point upon which the learned judge was misled. He treated the contract mentioned in the section as a contract for good or valuable consideration to buy the negative, and that if there was no such contract the copyright was in the photographer. He treated that as the test. In so treating the case he was dealing with it under the first branch of the proviso only. The evidence shows that the plaintiff always intended to charge for the photograph, and the defendant Cooke said that he understood he would have to pay for it. Ridley, J., in his summing up, followed some observations of Kekewich, J., in *Melville* v. *Mirror of Life Co.*, [1895] 2 Ch. 531, 44 W. R. Dig. 45, and made the test to be whether the sitter had arranged with the photographer to buy the negative of the photograph. He directed the jury in effect that unless there was a consummated bargain for the purchase of the negative by the sitter the plaintiff was entitled to succeed. That was the standard or test which he put to the jury, and the jury returned their verdict upon that direction. The decision itself of Kekewich J., was, no doubt, right; but this court is bound to consider whether those observations are sound in law. I think that they are not. They ignore the distinction between the person buying the negative and the person for or on whose behalf the photograph is taken for good or valuable consideration. There was therefore clearly a misdirection; and the only remaining question is whether we should send this case for a new trial or whether we should enter judgment for the defendants upon the ground that there was no reasonable evidence upon which a jury could find that the contract was other than the ordinary contract which arises when a customer employs a photographer to take his photograph. Frequently a photographer solicits attendance of some well-known person to sit for his or her photograph without making any charge with the view of multiplying copies and selling them for his own profit. That is not the present case. Here the defendant Cooke went in the ordinary way to have his photograph taken, and I can see no reasonable evidence that there was other than a bargain for valuable consideration to take the defendant's photograph. We must therefore enter judgment for the defendants.

STIRLING, L.J.—I am of the same opinion, and I agree with what has been said by the Master of the Rolls. In my opinion the law is correctly laid down by North. J., in *Pollard* v. *Photographic Co.*, 37 W. R. 266, 40 Ch. D. 345. He held that where a photographer in the ordinary way takes a photograph at the request of the sitter upon the terms that the sitter is to pay the photographer for the photograph, the copyright in the photograph is in the sitter, even though the property in the glass negative is in the photographer, and further, that it is part of the bargain that the photographer shall not be at liberty to sell copies of the photograph or make use of the negative for any purpose without the authority of the sitter. The case is different when a person's photograph is taken at the photographer's request for the photographer's own use, and without any bargain being made with the sitter. All the cases such as *Ogden* v. *Ellis*, 11 Times L. R. 50, and *Ellis* v. *Marshall*, 11 Times L. R. 522, are consistent with this view. The only authority which conflicts with it is *Melville* v. *Mirror of Life Co.*, before Kekewich, J. It is to be observed that there the photograph was taken at the request of the photographer and no charge was made for it. The decision itself was right in those circumstances, but certain observations were made by the learned judge which, if taken literally, would support the view contended for by the plaintiff here. The learned judge said: "It seems to me that a man cannot be said to make a photograph for or on behalf of another when that other is not entitled to have the negative of the photograph when made." If that observation is to be taken apart from the particular circumstances of the case and treated as an absolute statement of the law, I am unable to agree with it. At the same time, I think that the decision itself is correct. In the present case I think that the learned judge attached too much weight to the fact that the title to the negative remained in the photographer, and omitted to give sufficient weight to the fact that the photograph was taken at the request of the defendant Cooke, and that the latter would in the ordinary course have the right of control over the use of the negative by the photograper. I have felt some doubt whether we ought not to send the case for a new trial, but I do not differ upon this point from my brethren.

MATHEW, L.J.—I am of the same opinion. I think that judgment should be entered for the defendant, and that there is no need of submitting the case, which seems to me to be perfectly clear, to another jury who can only find one way. Ridley, J., in summing up the case to the jury followed the statement of the law in the judgment of Kekewich,

J., in *Melville* v. *Mirror of Life Co.*, and the learned judge gathered from that judgment what he conceived to be the true test in these cases—namely, the purchase of the negative, and as the defendant Cooke had not bought the negative, the copyright was in the photographer. The true test seems to me to be plainly stated in the section—namely, the sale or disposal of the negative, or the photograph being taken for or on behalf of the sitter for good or valuable consideration. The defendant Cooke came to the plaintiff's shop to have his photograph taken. It was the usual and ordinary transaction between a photographer and a sitter. To take the photograph it was necessary that a negative should be taken, and it was taken for good or valuable consideration. A photographer invites persons to come to his shop and have their photogrhphs taken, and he makes a living by it. The photographer is as much entitled to payment as a bootmaker from whom a pair of boots is ordered. The defendant Cooke, who was somewhat of a celebrity, asked for a silver print photograph of himself to be taken from the negative for the purpose of circulating copies at his meetings. The photographer clearly foresaw that copies would be produced from that print. The plaintiff, having produced the negative for good and valuable consideration within the meaning of the section, can be prevented from making use of it except with the consent of the defendant. The appeal must therefore be allowed.

Appeal allowed.

Solicitors for the plaintiff, *C. V. Young & Son.*

Solicitors for the defendants, *Beckinsale, Greenwood, Tucker, & Cross.*

High Court of Justice.

Chan. Div. }
Kekewich, J. } July 28, 1903.

In re SOMERVILLE AND TURNER'S CONTRACT. (*a.*)

Vendor and purchaser—Title—Equitable estate in copyholds—Sale by administratrix—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 1.

The equitable estate in copyholds vests, under the Land Transfer Act, 1897, *in the personal representative, and not in the customary heir.*

Adjourned summons.

On the 17th of March, 1901, S. T. Chatt, who was the owner of the equitable estate in a copyhold cottage, 29, Rosedale-street, Sunderland—the legal estate being outstanding—died intestate.

Letters of administration were granted to his widow, Ada Blanche Chatt.

On the 12th of November, 1901, Mrs. Chatt, as administratrix, conveyed the said copyhold cottage to James Edward Somerville to hold unto the use of the purchaser according to the custom of the manor and subject to a ground-rent and certain conditions. And it was agreed and declared that the person or persons in whom the legal estate of inheritance in the said premises was then vested, his, her, or their heirs, sequels in right, and assigns should stand seised thereof according to the custom of the manor, subject as aforesaid, in trust for the purchaser, his heirs and assigns.

On the 10th of October, 1902, J. E. Somerville entered into an agreement with George Turner for sale to him of the equitable interest in the said copyhold cottage.

The purchaser delivered a requisition objecting that Mrs. Chatt had no power to sell or convey this property as personal representative of her husband, because the property did not vest in her.

The vendor replied that under the Land Transfer Act, 1897, the estate vested in her, thus giving her a right to sell and convey.

The purchaser took out this summons under the Vendor and Purchaser Act, 1874, for the determination of this question.

Section 1 (1) of the Land Transfer Act, 1897, provides that "where real estate is vested in any person without a right in any other person to take by survivorship, it shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him."

Section 1 (4): "The expression 'real estate' in this part of this Act shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

Section 2 of the Land Transfer Act, 1875, provides that "land shall not be registered under this Act unless it is of freehold tenure or is leasehold held under a lease which is either immediately or mediately derived out of land of freehold tenure; but for the purposes of this Act customary freehold, in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchase from a customary tenant, shall not be deemed to be land of freehold tenure.

Gatey, for the purchaser.—Section 1 (1) of the Land Transfer Act, 1897, does not apply to copyhold land at all. The expression "land of copyhold tenure" in section 1 (4) includes copyhold land whether held by legal or equitable title, and therefore all copyhold land is excluded from the "real estate" which is dealt with by section 1 (1). The words following "customary freehold" must be held to refer to customary freehold and not to "land of copyhold tenure" in analogy to the canon of construction laid down in *Wolverton* v. *Attorney-General*, [1898] A. C., at pp. 554 and 555. In the Land Transfer Act, 1875, s. 2, similar words refer to customary freehold only. In some Acts, such as the Fines and Recoveries Act, s. 50, and the Trustee Act, 1893, s. 12, sub-section 3, where a distinction has been drawn between the legal and equitable estates in copyhold land, it has been done with great accuracy. In the Land Transfer Act, 1897, no distinction has been drawn, and the presumption is that the equitable estate was intended to devolve according to the same rules as the legal estate, which clearly would not devolve upon the personal representative.

Methold, for the vendor.—The words "land of copyhold tenure" in sub-section 4 refer only to legal estates in copyholds. The words following "customary freehold" in the sub-section apply both to "land of copyhold tenure" and to "customary freehold." In the Fines and Recoveries Act and the Trustee Act a distinction was drawn between the legal and equitable estates in copyholds for the reason that in dealing with the legal estate in copyholds the rights of the lord would be interfered with, but in dealing with the equitable estate no act of the lord is necessary, therefore there is no reason why the equitable estate should not devolve upon the personal representative. To hold otherwise would be to cut down the obvious intention of the Legislature.

(*a.*) Reported by ALFRED C. THOMAS, Esq., Barrister-at-Law.

KEKEWICH, J.—The question for decision arises in this way: the vendor accepted a conveyance from a personal representative of a deceased person of land of copyhold tenure, not of the legal estate but only of the equitable estate. If the present vendor, having purchased from the personal representative of a deceased owner, obtained a bad title he cannot force that title on the purchaser. On that there arise two questions, both undecided, upon the construction of Part I. of the Land Transfer Act, 1897. The object of Part I. of that Act was to establish a real representative. As a matter of history it was deemed inconvenient that freehold estates in land should vest in the heir, whereas leaseholds vested in the legal personal representative of a deceased, and it was deemed desirable that both should be placed upon the same footing. Accordingly it was provided by the Land Transfer Act, 1897, s. 1, sub-section 1, that "where real estate is vested in any person, it shall on his death become vested in his personal representatives as if it were a chattel real vesting in them." There was no new real representative established, though it is said that the Act is for the establishment of a real representative, but the personal representatives are constituted real representatives, and the Act expresses the intention in clear language that as regards vesting in personal representatives real estate is to follow chattels real; in other words, the law respecting leaseholds.

The first question that arises is, Does this apply equally to legal and equitable estates? I see no reason why it should not apply to equitable estates as well as to legal estates, and to hold that it did not apply to equitable estate as well as to legal estates would, in my opinion, be to cut down the value of the section and deprive it of its proper meaning. It is common knowledge that a very large proporsion of estates, including freeholds, are held by equitable titles, some outstanding estate in a mortgage has been sometimes forgotten, and where the legal estate is outstanding, all the other estates are necessarily equitable. It may be vested in the trustee of an old settlement or will, and never have been conveyed, and sometimes difficult questions arise in consequence as to the devolution of real estate. But the court is accustomed in considering questions affecting the title to property to deal with them in precisely the same manner whether the estate is legal or equitable. And, further, the devolution of an equitable estate is governed by the same rules as the legal estate. It is impossible to conceive that when the Legislature provided for real estates being vested in the personal representative, it was intended that equitable estates should not be affected. Personal representatives take chattels real whether legal or equitable, an equity of redemption as much as an original lease. Therefore, in answer to the first question, section 1, sub-section 1, applies both to the legal and the equitable estate in property which under that section vests in the personal representative.

In the present case the vendor purchased an equitable estate from an administratrix, and this equitable estate would clearly have vested in her if it had been an equitable interest in freeholds, but it was an equitable interest in copyholds. It is said that by section 1, sub-section 4, of the Land Transfer Act, 1897, the equitable estate in copyholds is taken out of the operation of Part I. of the Act. It is said that all land of copyhold tenure is excepted from the expression "real estate" in section 1, sub-section 4, but that depends upon how sub-section 4 is read. It was urged that the words of the sub-section following "customary freeholds" must be held to apply to "customary freeholds" only, and not to "land of copyhold tenure." It is possible to read the sub-section in this way if it were necessary in order to give it a rational meaning, but in my opinion it is not necessary. "Real estate" is "not [to] be deemed to include land of copyhold tenure or customary freehold in any case"; grammatically that means either "land of copyhold tenure or customary freehold in any case"; and unless the words that follow show on the face of them that they are inapplicable to both they must be held to extend to both. I see no reason why the words should not apply to both. The words "customary tenant" would seem to refer to customary freeholds, but a tenant of copyhold land is tenant according to the custom of the manor, and the words are therefore quite applicable to both; moreover, the phrase "in any case" seems to me to apply both to customary freeholds and to lands of copyhold tenure. There seems to me good reason for the exception contained in sub-section 4, for when the land descends to the heir according to the custom of the manor it is not convenient to interfere with the relations which exist between the lord of the manor and the tenant. There is a peculiar relation between them, and to introduce the personal representative in that case would be to introduce a novelty which would cause difficulty. But that does not arise in the case of an equitable interest, therefore one gets a very good explanation of the restricted meaning of the exception. It is said that the other interpretation must be sound because this is an Act passed to amend the Land Transfer Act, 1875, in section 2 of which we find that the same words only qualify "customary freeholds," but land of copyhold tenure is not mentioned; that is not the alternative which we have in sub-section 4. But when the alternative "land of copyhold tenure or customary freehold" is used, the Act of 1875 ceases to have application to a large extent. That being so, and this not being a case in which the act of the lord is necessary, because the equitable interest may be conveyed without the lord's intervention, I think that the equitable estate in this copyhold passed to the personal representative from whom the present vendor bought, and his title is therefore good.

Solicitors, *S. Gissing Skelton*, for *W. Murray Humphrey*, Sunderland; *J. & R. Gole*, for *T. Thorburn Nesbitt*, Sunderland.

Chan. Div. }
Kekewich, J. } July 23, 1903.

In re O'CONNELL.

MAWLE *v.* JAGOE, A. S. C. LEMPRIERE, AND OTHERS. (*a.*)

Marriage settlement—Covenant to settle after-acquired property—Property bequeathed to wife with general power of appointment, subject thereto to herself absolutely.

Where property is given subject to a general power of appointment, and subject thereto to the donee absolutely, then it will be caught by a covenant previously entered into by the donee to settle after-acquired property.

Steward *v.* Poppleton, *W. N.* (1877) 29, *followed.*

Adjourned summons.

By a settlement, dated the 14th of December, 1881, made on the marriage of G. B. Lempriere and A. S. C. Lempriere it was agreed that if the defendant A. S. C. Lempriere then was, or if during the said intended coverture she or the defendant G. B.

(*a.*) Reported by ALFRED C. THOMAS, Esq., Barrister-at-Law.

Lempriere in her right should at one and the same time and from the same source (whether under or by virtue of the trusts or provisions of the hereinbefore-mentioned articles for a settlement, dated the 8th of March, 1842, or any appointment made or to be made or executed under any power or provision therein contained, or from any other source) become seised or possessed of or entitled to any real or personal property of the value of £200 or upwards for any estate or interest whatsoever in possession, reversion, remainder, or expectancy (except jewels and certain other articles therein mentioned), then and in every such case the defendant G. B. Lempriere and the defendant A. S. C. Lempriere and all other necessary parties should assign and assure the said real or personal property to or otherwise cause the same to be vested in the trustees of the settlement upon the trusts thereby declared.

Frances E. O'Connell, the mother of A. S. C. Lempriere, by a settlement made on her marriage in 1842, covenanted to assure to the trustees of the settlement two-thirds of certain real and personal estate on the trusts therein mentioned, and after her death the trustees were to stand possessed of the said two-thirds of the trust estate in trust for all and every the child or children issue of the said marriage in such shares and proportions as the said F. E. O'Connell should by her last will and testament in writing or any codicil thereto direct or appoint, and as to the remaining one equal third part of the trust premises the trustees should stand possessed upon trust for such persons and for such trusts as the said F. E. O'Connell should by any deed or instrument in writing appoint.

There was issue of the said marriage several children, of whom the defendant Anne Sophia Campbell Lempriere was one.

By her will, dated the 7th of May, 1888, the said F. E. O'Connell, after reciting the effect of the said indenture of settlement of the 8th of March, 1842, directed that the trustees of the said indenture should stand possessed of such parts of the said trust premises over which she had a power of appointment, and she devised and bequeathed the same in trust as to a moiety of the residue to the defendant A. S. C. Lempriere, her executors, &c., and she further gave to the executors named therein all income which might be owing to her at her death, and all other (if any) of the real and personal property belonging to her at her death which she might have power to dispose of (except the property comprised in the appointment hereinbefore mentioned) unto the executors therein named upon trust for such persons and purposes and in such sums and manner in every respect as her daughter, the defendant A. S. C. Lempriere, should, notwithstanding coverture, in writing appoint, and in default of and subject to any such appointment in trust for the defendant A. S. C. Lempriere for her sole and separate use, it being the expressed intention of the testatrix that the defendant A. S. C. Lempriere might be able, by exercising her power of appointment, to defeat the operation of the agreement and declaration contained in her ante-nuptial settlement for the settlement of her after-acquired property of the value of £200 or upward.

By a codicil to the above will, dated the 26th of August, 1898, the testatrix directed that the trustees of her marriage settlement should stand possessed of one-fourth of the sum of £2,000 and the investments representing the same upon trust for such persons and purposes and in such sums and manner in every respect as her said daughter, the defendant A. S. C. Lempriere, should, notwithstanding coverture, in writing appoint, and in default of and subject to any such appointment in trust for the defendant A. S. C. Lempriere for her sole and separate use, it being the expressed intention of the testatrix that she (the defendant A. S. C. Lempriere) might be able, by exercising her power of appointment, to defeat the operation of the agreement and declaration contained in her said ante-nuptial settlement for the settlement of her after-acquired property of the value of £200 and upwards.

By four deeds-poll A. S. C. Lempriere purported to exercise the powers of appointment given her respecting the residue and her fourth share in the £2,000 by appointing in favour of herself absolutely two sums of £199, part of the residue, and two sums of like amount, part of her fourth share in the £2,000.

Under these circumstances the plaintiffs, trustees of the settlement of the 8th of March, 1842, desired to have the decision of the court as to whether they ought to pay the two appointed sums (part of the said legacy of £500) to the defendant A. S. C. Lempriere for her own benefit, or whether they should pay the whole of the said legacy of £500 to the trustees of the marriage settlement of A. S. C. Lempriere. And the executor of the will and codicil of the said F. E. O'Connell asked for a similar decision in respect of the two appointed sums part of the residue of the estate of F. E. O'Connell.

E. D. Robertson, for the trustees of the wills, stated the case to the court.

Christopher James, for the trustees of the marriage settlement.—Both funds are caught; both funds, if they are not appointed by Mrs. Lempriere, then Mrs. Lempriere takes them absolutely. General principles show that they are caught by the covenant, as Mrs. Lempriere cannot derogate from her own grant: *Attorney-General* v. *Selborne*, 50 W. R. 210, [1902] 1 K. B. 388; *Stewart* v. *Poppleton*, W. N. (1877) 29; *Lord Gerrard's case*, 58 L. T. 800; *Ewart* v. *Ewart*, 11 Hare 276; *Bower* v. *Smith*, 19 W. R. 399. The interest she takes in each case is hers absolutely. By the settlement for value she contracted to settle after-acquired property. No distinction as to the source whence the property comes exists. She has contracted to assign it to trustees on her mother's death. She cannot be allowed to defeat the equitable interest of the trustees by an exercise of the power.

Adams, for Mrs. Lempriere.—It is a question of contract; the matter rests in contract. Mrs. Lempriere is bound to give effect to her contract and no more. The only thing she contracts to settle is a defeasible interest, and if it is defeated by the exercise of the power in favour of others or of herself, then the covenant as to after-acquired property does not affect it. In the case of *Stewart* v. *Poppleton* neither *Ewart* v. *Ewart* nor *Townshend* v. *Harrowby*, 27 L. J. Ch. 553, is alluded to. This latter case is clear authority that where a power of appointment is given, the donee should not be prevented from exercising it as he or she thinks fit.

KEKEWICH, J.—Mrs. O'Connell had some property which was her own and which she could dispose of as she pleased, and some which was not her own but over which she had a power of appointment under her marriage settlement. She died, and by her will and codicil purported to exercise her power of appointment in favour of her daughter Mrs. Lempriere in a manner which is familiar to conveyancers. She wanted to give her daughter a power of appointment over the property and also the property itself. She could have done that in three ways: (1) given it to trustees on trust as daughter should appoint, and in default of appoint-

ment to her daughter absolutely; (2) given it straight to daughter; (3) to the daughter absolutely or as she should by deed or will appoint.

These are some of the methods by which she might have given the property that I have mentioned, although she has not followed the exact phraseology of one of them. But she has followed them in substance, and there is no distinction in principle, if the intention is clear that the daughter is to have a power of appointment and subject to that, is to take absolutely. Now this power of appointment was put in for some purpose. Why was it put in here? It was put in because Mrs. O'Connell knew that her daughter Mrs. Lempriere was bound by her marriage settlement to settle after-acquired property, and she desired to enable her daughter to evade that obligation —that is, in the proper sense of that term; she says so herself in so many words. It is a fact that Mrs. Lempriere had bound herself to settle all her after-acquired property and there is a particular reference in her covenant to property which might come to her under her mother's marriage settlement, but I put that aside. The point is that Mrs. Lempriere has covenanted to settle all after-acquired property to which she may become absolutely entitled, and the only question is whether or not this property is caught by that covenant, Mrs. Lempriere having been given a power of appointment over it practically before it is given to her absolutely.

I think there is no advantage in distinguishing between the different portions of property which Mrs. Lempriere gets. Substantially it is the same whether she gets her shares under Mrs. O'Connell's will and codicil by virtue of the exercise by Mrs. O'Connell of her power of appointment or directly. All are disposed of in the same way and are governed by the same considerations.

Curiously enough it is said that there are no direct authorities on the point, although the industry of counsel has succeeded in discovering some that are of assistance; and it is truly said that there is a conflict of authority. In the case of *Bower* v. *Smith* a lady by her marriage settlement covenanted to settle after-acquired property, and money was subsequently bequeathed to her upon such trusts as she should appoint, and Lord Romilly held that the money was not caught by the covenant. But there was a gift over in default of appointment, not to the lady herself, but to a stranger, so that it was impossible to say that the lady by exercising the power could defeat a gift over to herself which would be caught. That case was originally imperfectly reported and was subsequently corrected by Sir G. Jessel in *Steward* v. *Poppleton*, which is, I think, a direct decision on the point. It is unfortunately, however, only reported in the Weekly Notes. If it had been more fully reported we might have known exactly what were Sir G. Jessel's reasons for his decision that the share was bound by the covenant. There the case was like what we have here, a devise and bequest and then a power of appointment, an absolute gift for the lady's separate use, and then as she should appoint; and the question was whether she could, by the exercise of her power, take the property out of her covenant to settle after-acquired property, and the Master of the Rolls held that she could not, and his decision acquires strength because he distinguished the case then before him from that of *Bower* v. *Smith* on the ground that the gift over in *Steward* v. *Poppleton* was to the same person to whom the power was given, whereas in *Bower* v. *Smith* it was to a stranger.

The next case is that of *In re Lord Gerard*. Now, I cannot say that North, J., did not understand that case, but I certainly cannot understand him, which, no doubt, is my fault. He seems to have thought that *Bower* v. *Smith* conflicted with *Steward* v. *Poppleton*, but I do not think it does. In the former case there was a gift over to a stranger, in the latter there was not.

There is one other authority I must refer to in the case of *Townshend* v. *Harrowby*. The head-note in the Law Journal is not explicit, although the report is. There property was given to a lady with a power of appointment and in default of appointment to her for her life, and subject to that to her absolutely. Kindersley, V.C., broke up the gift into three parts—the power, the life estate, and the absolute interest—he thus found distinct gifts and held that what was true of the last was not true of the first two gifts—that is, that although the ultimate interest was affected by the covenant, the power was not; and there was no coalescing or merger. The lady was free to exercise her power of appointment so as properly to evade her covenant to settle after-acquired property. Now it seems to me that if *Steward* v. *Poppleton* is sound, then *Townshend* v. *Harrowby* is wrong, for I cannot see how the intervention of a life estate makes any difference, if by exercising her power she defeats the destination of the ultimate gift. I do not go so far as to say that Kindersley, V.C.'s, elaborate and skilful judgment was wrong, but, nevertheless, he breaks the gift up there into three separate parts and bases his decision on that, and doesn't proceed on the simple lines of *Steward* v. *Poppleton*. I think, therefore, that *Steward* v. *Poppleton* is a distinct decision which I ought to follow. *Townshend* v. *Harrowby* is not precisely in point, and is therefore distinguishable. I think, therefore, following *Steward* v. *Poppleton*, that I must declare that this property is all bound by the covenant to settle after-acquired property.

Solicitors, *G. Slade; Bell, Brodrick, & Gray.*

Chan. Div. }
Farwell, J. } Nov. 21, 25.

In re SMITH.
EASTWICK *v.* SMITH. (*a.*)

Will—Construction—Trustee—Power—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 10 (3), 22, 37.

A power given to trustees, which enables them to deal with trust property, is primâ facie *given them* ex officio *as an incident of their office, and passes with the office to the holders or holder thereof for the time being. The mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the* primâ facie *presumption. The testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language.*

Originating summons.

This was an originating summons by two of the present trustees of the will of Job Smith.

The testator, by his will, dated the 15th of December, 1894, appointed his wife, Mary A. Smith, his brother Charles, and his friend Robert Bell executors and trustees.

He devised and bequeathed "unto my said trustees all the real and personal estate of whatever kind or nature to which I shall be entitled or possessed of at the time of my decease upon trust . . . to permit and allow my said wife to receive and enjoy the

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

rents and income arising therefrom, she keeping my dwelling-houses in repair, and with my furniture and effects insured against loss or damage by fire; and with full power for my said trustees to sell the whole or any part of my said real and personal estate as they in their absolute discretion may think fit and apply the proceeds arising therefrom for the sole and absolute use and benefit of my said wife for and during the term of her natural life."

The testator died in January, 1895.

The executors Charles Smith and Robert Bell were both dead, and the widow, M. A. Smith, had appointed new trustees.

The question to be determined was whether the defendant M. A. Smith, as the survivor of the three trustees named in the will, or the plaintiffs (the two new trustees) and M. A. Smith together could now sell the real and personal estate, and whether on any such sale the defendant M. A. Smith and the plaintiffs together could apply the proceeds of sale for the benefit of M. A. Smith during her life.

The Trustee Act, 1893, provides: Section 10.—(3) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Section 22.—(1) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

Section 37.—Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

J. G. Woods, for the plaintiffs.

Upjohn, K.C., for the defendant Mrs. Smith, referred to *Byam* v. *Byam*, 3 W. R. 95, 19 Beav. 58; *Crawford* v. *Forshaw*, 39 W. R. 484, [1891] 2 Ch. 261; *Brassey* v. *Chalmers*, 4 D. M. & G. 528; *Cole* v. *Wade*, 16 Ves. 27; *Gude* v. *Worthington*, 3 De G. & Sm. 389; Hargrave's note, 113 A., note 2, Co. Lit.; and the Trustee Act, s. 22.

Jenkins, K.C., and *Humphrey*, for the defendant Mrs. Halls.

FARWELL, J., in giving judgment, said: This is a question of construction to be determined on the words of this will, but I must of course be guided by general principles of law and the reasoning in other decided cases on similar lines. The testator begins by appointing his wife Mary, his brother Charles, and his friend Robert Bell executors and trustees, and devises and bequeaths all his real and personal estate to "my said trustees" on trust to pay the income to the widow for life. [His lordship referred to the will.] The brother Charles and the friend Robert Bell are both dead, and the widow has appointed new trustees, and the question now arises whether the present trustees can exercise the power above quoted of applying capital for the benefit of the widow, and this depends on the question whether the power is given to the individuals or annexed to the office.

Now the provision is undoubtedly one requiring the exercise of great discretion, involving as it does the transference of capital from the beneficiaries named by the testator to the widow, and it is no doubt worthy of observation that the donees of the powers include the widow, who will profit, and one of the beneficiaries, who will suffer, by its exercise, and that all are described by the relation in which they stood to the testator—my wife, brother, and friend. On the other hand, the devise is to "my said trustees," and it is clear that this would take effect, although one or two of the trustees predeceased the testator, and the power follows immediately after the devise, and is expressed in the same terms. Unless, then, I am justified in inferring from the nature of the power that "my said trustees" in the power means something different from "my said trustees" in the devise, I must hold that the power is annexed to the office and estate of the trustees, and can be exercised by the survivors or survivor or other the trustees or trustee for the time being: and after considerable hesitation I have come to the conclusion that that is the true view, and that there is not enough to justify me in holding that the power is given to the three individuals; and that, if I were to take the latter view, I should really be guessing at what I might suppose that the testator may have intended, rather than construing the words that he has actually used.

My hesitation has been mainly caused by a statement in the judgment of the Master of the Rolls in *Cole* v. *Wade*, 16 Ves. 27. He says (p. 44), "I conceive that whenever a power is of a kind that indicates a personal confidence, it must *primâ facie* be intended to be confined to the individuals to whom it is given, and will not except by express words pass to others, to whom by legal transmission the same character may happen to belong." The decision in that case turned on the words of the will, which was long and not very lucid. But the Master of the Rolls states a general principle, which would be applicable to the present case, if it had been adopted by later cases. The principle, however, is open to the criticism that it is expressed in loose and general terms. All, or nearly all, powers necessitate the personal confidence of the testator in the donees thereof, and it is very difficult to draw a line—*e.g.*, powers of leasing, selling, and investing, powers of maintenance and advancement of children, all require the exercise of discretion, but the principle could hardly be applied to them. I find it impossible to formulate any rule by which the court can say that certain powers are and others are not of such a nature that they must necessarily be given only to individuals known to the testator. There is no standard of measurement, but the more or the less become a mere matter of conjecture affording no basis for judicial determination.

Further, the Court of Appeal in *Crawford* v. *Forshaw*, [1891] 2 Ch. 261 (where *Cole* v. *Wade* was cited), declined by necessary implication, although not in express terms, to adopt the principle. There the testator who conferred the power in that case obviously showed great personal confidence in his executors therein named, for he allowed them to select the charities which were to be the objects of his bounty; but the Court of Appeal nevertheless held the power was annexed to the office; and the passage in Bowen, L.J.'s, judgment at p. 368 is inconsistent with the *dictum* of the Master of the Rolls in *Cole* v. *Wade*: "Even if you find in a will a power given to executors in their official capacity there may be such an indication of reliance on the just judgment of the individuals as would make it impossible if one or more renounced for the others to act, but I think such reliance must be expressed in clear and apt language." In other words, the personal confidence in the individuals must be expressed and cannot be inferred from the mere nature of the power.

To the same effect is the case of *Byam* v. *Byam*, 19 Beav. 58, where the power involved the exercise of a very delicate discretion permitting the withdrawal of the trust funds settled by marriage articles and the payment thereof to the wife herself; and this was held to be annexed to the office. It is true that the court there was dealing with an executory document and (as pointed out by Wood, V.C., in *Peover* v. *Hassel*, 1 J. & H. 341) there is a great distinction in the mode of construing executory and executed instruments, but Lord Romilly, although he refers to the fact, does not rest his judgment upon it, and in that case the words "trustees . . ." and in *Crawford* v. *Forshaw* the words "my executors herein named" lent much more value to the argument in favour of a personal confidence than the words in this will. The result of the authorities and of sections 22, 10 (3), and 37 of the Trustees Act is, in my opinion, this: Every power given to trustees which enables them to deal with or affect the trust property is *primâ facie* given them *ex officio* as an incident of their office and passes with the office to the holders or holder thereof for the time being; whether a power is so given *ex officio* or not depends in each case on the construction of the document giving it; but the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the *primâ facie* presumption, and little regard is now paid to such minute differences as those between "my trustees," "my trustees A. and B.," and "A. and B., my trustees." The testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language. I therefore hold that the power in this will can now be exercised by the present trustees.

Solicitors, *Helder Roberts; Gribble, Oddie, Sinclair, & Johnson*, for *Danby, Palmer, & Danby*, Great Yarmouth.

Chan. Div. }
Buckley, J. } Nov. 4, 5, 18.

In re THE CHURCH PATRONAGE TRUST.
LAURIE *v.* ATTORNEY-GENERAL. (*a.*)

Advowson—Charity—Will—Trust to present fit and pious person.

The devise of an advowson on trust to present "such fit and pious person of godly life and conversation, being in holy orders, capable of accepting and holding the same, as the trustees" shall think fit, does not constitute a charitable trust, the trust being only to do that which every owner of an advowson is in all events bound to do.

Adjourned summons.

This was an application under section 8 of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), made by the trustees of the Church Patronage Trust, that the court might sanction their retaining the advowson of the vicarage of the church of Battesford, otherwise Battisford, in the county of Suffolk, coming to them under the codicil to the will of Louisa Woodcock, and a subsequent deed of appointment; the application was made on the assumption that the advowson had been thereby assured "to or for the benefit of a charitable use" within the meaning of section 5 of that Act.

By the codicil, dated the 18th of April, 1902, to her will, the testatrix devised the advowson to such uses as her three sisters or the survivor of them should "within twenty-one years from the date of the testatrix's decease appoint, for the purpose of carrying out the express wish of my late husband that the said advowson should be made over to and vested in the Church Patronage Trust Society by all lawful means, but if the said society decline to accept the said patronage, the said advowson and perpetual presentation shall belong to my said three sisters as joint tenants in fee simple."

The testatrix died on the 14th of May, 1902, and by the deed of appointment which was dated the 14th of February, 1903, the advowson was appointed and confirmed unto and to the use of the trustees of the Church Patronage Trust, their heirs and assigns. And it was thereby agreed that the trustees and the persons deriving title under them should stand possessed of the advowson upon the trusts and subject to the powers, so far as applicable, comprised in and forming the ninth schedule to an indenture of the 21st of December, 1871.

The last-named indenture was the trust deed of the Church Patronage Trust.

The trusts contained in the 9th schedule were, so far as they are material, as follows: 1. "Upon trust that from time to time, as often as the said vicarage and parish church of —— shall become vacant by the death, resignation, deprivation, or cession of the incumbent or otherwise, the trustees for the time being of these presents do and shall nominate, appoint, and present to the same vicarage and parish church such fit and pious person of godly life and conversation, being in holy orders, capable of accepting and holding the same, as the trustees for the time being of these presents, or the major part in number of them shall determine upon. . . ."

4. "That only such persons shall be eligible to the office of trustees as shall be, or shall be well known or reputed to be, of godly life and conversation and shall profess themselves members of the Established Church of England, and shall be known to be zealously attached to the great principles of the Reformed faith contained in the Liturgy and Articles of the said Established Church."

The summons was taken out within a year from the death of the testatrix. When it was first heard the year had expired.

It was apprehended that, assuming the devise and appointment to have been charitable, the advowson had then, by the operation of section 6 of the Mortmain and Charitable Uses Act, vested in the Official Trustee of Charity Lands.

At his lordship's suggestion the hearing was adjourned to enable the official trustee to be made a party.

Montague Barlow, for the trustees of the Church Patronage Trust.—There was a good charitable trust. The trust of an advowson is charitable not only when it is for a particular parish, but also when it is for the purpose of appointing fit and proper persons: *In re St. Stephen, Coleman-street*, 36 W. R. 837, 39 Ch. D. 492; *Attorney-General* v. *Bishop of Lichfield*, 5 Ves. 825. In the 9th schedule there is a trust for securing a fit and proper person as the incumbent of such parish of which the advowson is held. If a private patron presents an improper person, the only protection for the parishioners is the possible refusal of the bishop to institute. In the case of patronage held on trusts such as these there is a double remedy; for proceedings may also be taken against the trustees in respect of any improper appointment.

R. J. Parker, for the Attorney-General.—In general it is the duty of the Attorney-General to

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

contend that there is a charity. But he is bound to submit the effect of the authorities to the court. An advowson may be the subject of a charitable trust, (1) if the trust be in respect of the advowson of a particular parish (*In re St. Stephen, Coleman-street*); and (2) if the trust be to present persons of a definite persuasion: *In re Hunter*, 45 W. R. 610, [1897] 2 Ch. 105, where the decision of Romer, J., 45 W. R. 344, [1897] 1 Ch. 518, to the contrary effect, was reversed. This point was not affected by the decision of the House of Lords in *Hunter* v. *Attorney-General*, 47 W. R. 673, [1899] A. C. 309, by which the judgment of Romer, J., was restored. The present case, however, which is merely that of a trust to present fit and proper persons, comes within neither of these categories. A trust merely to do that which the trustee is by law already bound to do cannot be charitable.

Vaughan Hawkins, for the Official Trustee of Charity Lands, submitted to the directions of the court.

Montague Barlow replied.

BUCKLEY, J., after referring to the codicil and the indenture of the 14th of February, 1903, read paragraph 1 of the 9th schedule to the trust deed, and continued: I am unable to find here any direction to do anything further or other than the owner of an advowson is bound to do. He ought to present a fit and pious person of godly life, being in holy orders, capable of accepting and holding. There is no trust expressed other than such as is involved in the duty of an owner of an advowson. If I turn on to paragraph 4 of this 9th schedule, which is also included, having regard to the contents of the deed, I find there a definition or indication of the class of persons who are to be trustees. [His lordship read paragraph 4, and continued:] Assuming, as I do not think to be the case, that I could evolve from the description of the character of the trustees that they were bound to appoint a person of the particular religious persuasion which is pointed to by that clause, I do not find that any class of thought in the Established Church of England is there defined or pointed to. The trustees are simply to be persons of godly life, members of the Established Church of England, and attached to the principles of the reformed faith contained in the liturgy and articles of the Established Church. In other words, the trustees by this definition must be people of such religious convictions as the person to be appointed to the advowson is to be. He must be a member of the Church of England, and the trustees must be members of the Church of England. There is no occasion that the trustees should be of any particular class of thought in the Church of England. Therefore, I cannot get out of that clause, even if I could under any circumstances do so, any indication that the persons to be appointed to the advowson must be of any particular type of religious conviction included within the pale of the Church of England. Under these circumstances, is there any charitable trust? I think not. There may be a charitable trust of an advowson; there is no question about that after the decision of the House of Lords in *Hunter* v. *Attorney-General*. Thus, for instance, an advowson may be held upon a charitable trust if it be held for the inhabitants of a particular parish, as was decided by Kay, J., in *In re St. Stephen, Coleman-street*. Again, the advowson will be the subject of a charitable trust, if it is held upon trust to present from time a person who holds a particular type of religious thought in the Church of England. I say that for this reason, that Romer, J., in *In re Hunter* was of opinion that that was not so, but in the Court of Appeal I think they took a different view, and thought that if there had been a trust to present a person of a particular type of thought that might have been a good charitable trust. And Lord Davey, in the House of Lords, without deciding the point, assumed that that would be so. He says (at p. 321): "I assume, for the purposes of this case, that if applicable to the first purpose there would be a good charitable trust. The first is that only such churches or chapels shall be subscribed or contributed to wherein the service shall, in the opinion of the special trustees, be conducted in the particular manner prescribed." If, therefore, I could find here that the trustees were always to present a person of a particular type of religious thought, the case would be different; but I am unable to find any such trust. The trusts indicated are only that the persons who are the owners of the advowson shall do that which every owner of an advowson ought to do—namely, present a fit and proper person ordained in holy orders in the Church of England competent to hold preferment in that church. That is no indication of any charitable trust, and I hold that there is no charitable trust. I arrive at this conclusion with more confidence because, at my instance, the Official Trustee of Charity Lands has been brought here, and appears by Mr. Vaughan Hawkins. It would be his duty to argue that this was a charitable trust if he could do so; but, although he is willing to assist the court to the utmost of his ability, he is unable to refer me to any case in which such a gift as this has been held to constitute a charitable trust. I think, therefore, that the summons fails. The case does not come within the Act.

Solicitors, *Bridges, Sawtell, & Co.; Solicitor to the Treasury.*

K. B. Div.
(Lord Alverstone, L.C.J., and Channell, J.) — May 28, 1903.

EMARY (*Appellant*) v. NOLLOTH (*Respondent*). (a.)

Criminal law—Sale of intoxicating liquor to child under fourteen—Delivery in vessel not corked and sealed—Sale by servant without master's knowledge and in disobedience to his orders—"Knowingly allows any person to sell"—Intoxicating Liquors (Sale to Children) Act, 1901 (1 *Ed.* 7, *c.* 27), *s.* 2.

Section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, *provides that "every holder of a licence who knowingly sells or delivers, or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only," shall be liable to certain penalties.*

B., acting within the general scope of his employment as a barman to a person licensed to sell intoxicating liquors, in breach of his master's express orders and without his knowledge, knowingly sold to a child under fourteen years of age a pint of porter in a bottle neither corked nor sealed. The licence-holder had not delegated the charge or control of his licensed premises to B.

Held, that the licence-holder could not be convicted under the above section of "knowingly allowing" the sale.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

This was a case stated by G. Paul Taylor, Esq., metropolitan police magistrate sitting at Southwark police-court.

On the 17th of July, 1902, an information was laid by John Nolloth, the respondent, against Alfred Emary, the appellant, under section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, charging that he, being a person licensed for the retail sale of intoxicating liquor within the meaning of the Licensing Acts, 1872 and 1874, did unlawfully and knowingly allow a certain person, to wit, James Barnes, to sell intoxicating liquor for consumption off the premises to Alice Bastard, a person under the age of fourteen years, in a vessel which was not corked and sealed and which contained not less than one reputed pint.

Upon the hearing the following facts were proved:

At half-past one o'clock in the afternoon of Sunday, the 13th of July, 1902, Alice Bastard, a child aged nine years, entered the appellant's premises and placed upon the counter in the bar an empty bottle and one penny and a half-penny to pay for a pint of porter. The bar was crowded with customers at the time. The appellant, who was then himself in charge of the premises, was present in another part of the bar, but did not see the said child and had no knowledge of any intoxicating liquor being sold to her.

James Barnes, a barman employed by the appellant, filled the bottle with porter and returned it to the counter, from whence it was taken away by Alice Bastard. The bottle was neither corked nor sealed.

The bottle in which the porter was supplied had the appearance of having been sealed on a previous occasion, and it was proved that on all previous occasions upon which the child had been served with intoxicating liquor at the said tavern she had been so served in bottles corked and sealed.

The appellant kept posted up in a conspicuous place in the bar a notice in the following terms:

"Notice to employees.—Every servant employed at this establishment is expressly forbidden to supply any intoxicating liquors either for consumption on or off the premises to any child who is in his or her opinion under fourteen years of age except in sealed and corked bottles containing not less than one pint."

Prior to the sale complained of the appellant had given express instructions to James Barnes similar to the directions contained in the above notice and had required him to observe and obey the same.

The learned magistrate found that James Barnes in serving Alice Bastard was acting within the general scope of his employment as the appellant's barman, and he further found as a fact that James Barnes, in breach of the appellant's express orders and without his knowledge, had knowingly sold the said pint of porter for consumption off the premises to a person under the age of fourteen years in a vessel neither corked nor sealed, and which contained not less than a reputed pint; and he was also satisfied that the appellant had not connived at the sale.

On behalf of the appellant it was contended that he had adopted all reasonable means to prevent sales taking place upon his premises in contravention of the Intoxicating Liquors (Sale to Children) Act, 1901, and that the sale complained of had been effected while the appellant himself was in charge of the house without his knowledge and in disobedience to his express orders and directions by an employee to whom the appellant had not delegated the charge of superintendence of the licensed premises, and that accordingly he could not be convicted of the offence with which he was charged.

The learned magistrate was of opinion that this contention was not well founded in law, and that the appellant was liable under the statute under which he was charged for any act done in contravention thereof upon his licensed premises by his servant, provided such act was within the general scope of his employment, and that the circumstance that such servant acted without the appellant's knowledge and in disobedience to his orders afforded no ground of defence.

The question for the opinion of the court was whether the learned magistrate was right in law in so holding.

The Intoxicating Liquors (Sale to Children) Act, 1901 (1 Ed. 7, c. 27), provides as follows: Section 2. "Every holder of a licence who knowingly sells or delivers or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantity not less than one reputed pint for consumption off the premises only, shall be liable to a penalty not exceeding forty shillings for the first offence, and not exceeding five pounds for any subsequent offence; and every person who knowingly sends any person under the age of fourteen years to any place where any intoxicating liquors are sold or delivered, or distributed, for the purpose of obtaining any description of intoxicating liquor, excepting as aforesaid, for consumption by any person on or off the premises, shall be liable to like penalties."

Danckwerts, K.C. (*Bruce Williamson* with him), for the appellant.—The conviction was wrong. Before the appellant can be rightly convicted of "unlawfully and knowingly allowing" the barman to sell in contravention of the section it must be found as a fact that he "knowingly" allowed the barman so to sell. The learned magistrate, however, has found as a fact that the sale was effected without the appellant's knowledge. Knowledge on the part of the licence-holder is a necessary ingredient of the offence. *Brooks* v. *Mason*, 51 W. R. 224, [1902] 2 K. B. 743, is not in conflict with this proposition. In that case the charge was for actually delivering the bottle not corked and sealed as required by the Act, although believed to be so, not merely of permitting the delivery. The word "knowingly" applies to the offence itself. The cases decided under section 13 of the Licensing Act, 1872, are in point. That section enacts that if any licensed person permits drunkenness or sells liquor to a drunken person he shall be liable to a penalty. In *Cundy* v. *Le Cocq*, 32 W. R. 769, 13 Q. B. D. 207, it was held that the prohibition was absolute, and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence. The case of *The Commissioners of Police* v. *Cartman*, 44 W. R. 637, [1896] 1 Q. B. 655, is to the same effect. There the charge was for selling intoxicating liquor to a drunken person. The licence-holder gave orders to his servants that no drunken persons were to be served. During his absence one of his servants sold intoxicating liquor to a drunken person, and it was held that the licence-holder was guilty, the act of the servant being within the scope of his employment. In *Somerset* v. *Wade*, 42 W. R. 399, [1894] 1 Q. B. 574, which followed *Somerset* v. *Hart*, 32 W. R. 594, 12 Q. B. D. 360, it was held that a licensed person cannot be convicted under section 13 of the Licensing Act, 1892, of permitting drunkenness to take place on his premises, where the evidence shows that a person who was on the premises was in fact drunk, but the licensed person did not know that such person was

drunk. Knowledge, therefore, is not necessary under that section as to the "selling," but it is necessary as to the permitting. Where a licensed person, who has not delegated his authority to a servant, is charged with permitting or allowing an offence, knowledge on his part is essential to a conviction. A person cannot permit that which he has no knowledge of. In *Worth* v. *Brown*, 40 SOLICITORS' JOURNAL 515, it was held that the servant was not merely the licensee's agent for certain purposes only, but was his agent in the further sense of being his *alter ego*. The knowledge of the servant, however, is only the knowledge of the master where the servant has had delegated to him the master's authority.

Macmorran, K.C. (*Arthur Gill* with him), for the respondent.—The conviction was right. The case finds that the barman had knowingly sold the liquor. That knowledge on the part of the barman is sufficient to support the conviction of the appellant. No doubt the appellant was in charge of his premises, but the facts of the case show that he had delegated the charge of that portion of them where the sale took place to his servant The servant was acting within the scope of his employment. In *Bond* v. *Evans*, 36 W. R. 767, 21 Q. B. D. 249, where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person, who was in charge of the premises but without any knowledge or connivance on the part of the licensed person, it was held that the licensed person had suffered gaming to be carried on on the premises within the meaning of section 17 of the Licensing Act, 1872. In *Bosley* v. *Davies*, 24 W. R. 140, 1 Q. B. D. 84, it was held that constructive knowledge was sufficient to support a conviction for suffering gaming. In that case Cockburn, C.J., said, at p. 87, "a man may be said to 'suffer' a thing to be done if it is done through his negligence."

Danckwerts, K.C., replied.

Lord ALVERSTONE, L.C.J.—I am of opinion that this appeal must be allowed. No doubt the scope and object of this Act was to prevent the sale of intoxicating liquor to small children unless with certain precautions.

Now if this is a criminal statute for this purpose, it probably was and is a *casus omissus*, that the Legislature have not included within its scope the case of the sale by any person on licensed premises, but have only provided for the case of a sale by the holder of a licence. In all probability, if the Act is to have the effect that is desired, some amendment in order to include a sale on licensed premises by a person other than the holder of the licence should be made in it. We have to consider whether, under the circumstances of this case, the holder of the licence, who did not know of, and did not connive at the sale, and has not delegated his authority, can be convicted. Now, this case has proceeded on the basis that the offence imports knowledge. The words of section 2 are practically these: "Knowingly sells or delivers, or either unlawfully or knowingly allows any person to sell or deliver"—that word "allows" importing knowledge. The whole point is whether or not for this particular offence the knowledge of the person who in fact sells, and who is the agent of the licence-holder, is sufficient in order to convict the licence-holder. It is unnecessary to go through all the cases that have been cited, and I do not think I should serve a useful purpose by attempting to do so; but there seems to be derived from them three principles. If the Act is prohibitive in itself the knowledge is immaterial, as, for instance, in the case *Brooks* v *Mason*, where the bottle of beer was not in fact sufficiently corked and sealed, but was believed to be so. In that case it was attempted to be argued that that knowledge was material to the offence, but it was held that it was not; and in the other instance of the same kind, where there was a prohibition against selling, we held that knowledge was immaterial. Then there is the class of case in which the licence-holder is charged with knowingly allowing, permitting, or suffering an offence to have been committed. There knowledge has been held to be essential, but it has been held, and I should say rightly held, and this is the second principle to be derived from the cases—that where a licence-holder delegates his own authority, and puts somebody else in charge, and, if I may adopt what my brother Channell said, "has delegated his own power to prevent," and the person put in charge commits the offence, the licence-holder is responsible for permitting or suffering it. That seems to me to be a reasonable and logical conclusion so as to prevent the Acts of Parliament being defeated. Now, the third matter we have to consider is what is to be the result where, under such circumstances as appear in this case, there has been no delegation of authority, and the licence-holder is himself at the time controlling the business, and has given direct instructions to the people employed there and to himself—to use the expression—by a public notice that he himself is not going to allow any infraction of the Act. Of course, if there has been a delegation of authority, then the private prohibition, as has been pointed out in the two cases of *The Commissioners of Police* v. *Cartman* and *Bond* v. *Evans* may become immaterial. I think, having regard to the particular facts of the case before us, of the licence-holder in charge keeping control and not delegating his authority, the fact of one of his servants disobeying his orders does not make any offence in the licence-holder. In order to cure that particular blot, the Act, if desirable, could be amended by making a person who knowingly sells on licensed premises contrary to this section, though he is not the licence-holder, subject to the provisions of the Act. I am of opinion that the appeal should be allowed and the conviction quashed.

CHANNELL, J.—I am of the same opinion, and for the same reasons.

Appeal allowed, with costs; conviction quashed.

Solicitors for the appellant, *Maitlands, Peckham, & Co.*

Solicitors for the respondent, *Wontner & Sons.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) — May 20, 1903.

REX *v.* WESTMINSTER HIGH BAILIFF. (*a.*)

Land Clauses Act—Acquisition of land—Compensation—Offer of a certain sum by undertakers—Acceptance after part hearing before jury—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *ss.* 38, 51—*London County Council (Improvements) Act*, 1899 (62 & 63 *Vict. c. cclxvi.*), *s.* 20.

The offer which the promoters are required, by section 38 *of the Lands Clauses Consolidation Act*, 1845, *to*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

make in a notice of their intention to summon a jury to decide the purchase-money of land taken by them, need not be accepted within the ten days mentioned in the section. It is therefore open for any landowner, after he has carried in his claim before a jury, to accept the offer at any period of the trial before verdict.

Rule *nisi* for a *mandamus*.

On the 4th of March, 1902, the London County Council under powers conferred on them by the London County Council (Improvements) Act, 1899, served notice on the claimants to treat in respect of certain premises required for the new street from Holborn to the Strand, and in that notice claimed under section 28 that the premises were in an insanitary condition.

On the 27th of March, 1902, the claimants delivered to the council a notice of claim.

On the 5th of November, 1902, the council delivered to the claimants a sealed offer of £1,600 for the premises under section 38 of the Lands Clauses Consolidation Act, 1845 (which Act was incorporated by the Act of 1899), and on the 18th of November, 1902, the offer was refused by letter.

On the 22nd of November the London County Council issued a warrant to the High Bailiff of Westminster to summon a jury to settle the question whether the premises were insanitary and the amount of compensation.

At the hearing the jury first of all found that the premises were insanitary, and the claimants thereupon stated they were prepared to accept the amount of the sealed offer. This was objected to on behalf of the council on the ground that the case was in the hands of the jury, and, therefore, their verdict must decide the amount of compensation.

The deputy high bailiff held that the claimants were entitled to accept the offer, and withdrew the case from the jury and discharged them. No judgment was recorded.

A rule was then obtained on the motion of the London County Council calling upon the high bailiff of Westminster to show cause why a writ of *mandamus* should not issue to him commanding him to summon a jury to determine the amount of the compensation.

Danckwerts, K.C., and *R. C. Glen*, for the claimants, showed cause against the rule.—The question is, after what stage of the proceedings is it not open to the claimants to accept a sealed offer, made under section 38 of the Lands Clauses Act, 1845. There has been a regular practice to treat such an offer as a standing offer down to the time of the verdict of the jury: *Reg.* v. *Manley Smith, In re Church and London School Board*, 40 W. R. 333. There is no provision requiring its acceptance within a definite time; nor can it be withdrawn. The deputy bailiff ought to have directed the jury to find an amount, but his not doing so at the utmost can but be regarded as an irregularity, and therefore a *mandamus* ought not to go: *Reg.* v. *Smith, In re Westfield and Metropolitan Railway Co.*, 12 Q. B. D. 481.

Dickens, K.C., and *Corrie Grant*, in support of the rule.—The claimants can only accept the offer within the ten days prescribed by section 38 of the Lands Clauses Consolidation Act, 1845. The whole procedure depends upon this statute and section 51 clearly contemplates the acceptance within that period. The object of the notice is to give the claimants an opportunity of considering whether they will accept the offer or embark in litigation. The ten days gives the claimant reasonable time: see *per* Cockburn, C.J., in *Hayward* v. *Metropolitan Railway Co.*, 4 B. & S. 787. The section gives no intimation that the sealed offer is to remain open after the case has gone to the jury. If the offer can be accepted up to verdict, the promoters in many cases will be put to the cost of getting up their case before the jury, all of which must necessarily be thrown away, and thus the parties put to needless expense.

Lord ALVERSTONE, L.C.J.—This is a point of considerable interest, and my wish is to dismiss from my mind, as far as possible, my recollections of past experience; in the first place, because they are never altogether trustworthy, and in the second, because the incidents they recall may have been exceptional. All I have to say, therefore, is that if the view propounded by counsel for the London County Council be the right one, a very large number of cases have in practice been decided upon an entirely different view; and if the sealed offer does not bind the purchasing authority, but can be withdrawn so as to allow of their taking a verdict of a jury which may be less in amount than the sum contained in the sealed offer, it would give rise to such a remarkable state of things that it is singular that the question should not have formed the subject of, or been referred to in, the decisions already given. By section 38 of the Lands Clauses Consolidation Act, 1845, it is, in order to avoid summoning a jury, provided that the promoters of the undertaking are, before summoning a jury, to give not less than ten days' notice to the other party, and that they shall in such notice state what sum of money they are willing to give for the land. But that is an offer which is not open for ten days only. Mr. Dickens has pressed upon us the argument that the offer must be accepted within ten days because if it were not accepted within that time the promoters would incur costs in getting up their case which would be thrown away if the claimant were to change his mind when before the jury and accept the sum named in the sealed offer. But the necessities of this argument force him to overlook the position of the claimant, the vendor of the property, who was never intended to be placed in a worse position with regard to expenses and costs than the promoters. The vendor claiming compensation is in precisely the same difficulty; he knows quite well that if he goes to trial and incurs the expense of it, and fails to obtain from the jury a verdict which exceeds the sealed offer, but on the contrary gets a verdict for a less amount, he will not only have to bear his own costs, but will have to pay over to the promoters some portion of what may be called the joint costs of the trial. Section 51 is clear as to this. It provides that "on every such inquiry before a jury, where the verdict of a jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking, but if the verdict of the jury be given for the same, or a less sum than the sum previously offered by the promoters of the undertaking . . . one half of the costs of summoning, impannelling, and returning the jury and of taking the inquiry and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry." So it is not only a question of promoters' costs; but the claimant must also be considered, for by going up to trial he takes up or renders himself liable to a burden which the argument of Mr. Dickens has overlooked. I agree with what Lord Coleridge, L.C.J., said in *Reg.* v. *Smith*, 12 Q. B. D. 481, at p. 487: "The promoters are taking a person's property adversely to his benefit, and

it does not seem an unreasonable thing that before they are allowed to take from him that which he does not desire to part with they should make him an offer by which they are bound to abide, and upon which he can take the advice of his surveyor and come to a conclusion whether or not he will accept it or embark upon costly litigation with the promoters." I am therefore of opinion that under the Lands Clauses Consolidation Act, 1845, the sealed offer was intended to exist as an offer down to the time when the verdict of the jury is given. There is, therefore, in the present case, under the statute an offer binding on the promoters up to the time the jury gave their verdict, and the claimant is entitled to say that he will accept that offer subject to this: That he cannot be in a better position as to costs than if the jury had given a verdict for a sum amounting exactly to the sum named in the sealed offer.

The only remaining question is whether section 20 of the London County Councils (Improvements) Act, 1899, makes any difference. I agree that it is difficult to see how the question is to be worked out. Apparently there is to be a sort of first issue to be decided as to whether the property falls within a particular class. Section 20 sets up two standards of compensation. In this case the promoters had, by the terms of their notice to treat, alleged the existence of a state of things that would entitle the claimants to receive compensation upon the lower scale only. But it is impossible to suggest that the promoters have a greater right to withdraw an offer under section 20 of the Act of 1899 than under the Lands Clauses Consolidation Act of 1845, which is incorporated in the later Act. Mr. Dickens said that practically it would be a hardship if this view were adopted, because in the offers there was a considerable margin allowed. It seems to me that the argument applies just as strongly to the Land Clauses Acts as to the Act of 1899. For the purposes of section 51 of the Land Clauses Act, 1845, there would have to be a margin allowed, whether the property was taken under one Act or the other. The claimants are therefore entitled to accept the sealed offer notwithstanding the circumstances of the summoning of the jury and the partial hearing of the case. The only thing they render themselves liable for by adopting this course is the payment of their own costs and half the costs of summoning the jury, and so on.

WILLS and CHANNELL, JJ., concurred.

Rule discharged.

Solicitors for the claimants, *Lewis & Lewis.*

Solicitor for the county council, *Blaxland.*

House of Lords.

From C. A. (England). July 7, 1903.

IGOE *v.* SHANN AND OTHERS. (*a.*)

Licensing law—Renewal of licence—Value of house—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 45.

Section 45 *of the Licensing Act,* 1872, *which requires premises to be of a certain annual value as a qualification for being licensed for consumption of intoxicating liquor thereon, does not apply to a house which was licensed at the time of the passing of the Act, and also at the time when the renewal was applied for, even in the case of there having been a break in the continuity of the licence.*

Decision of the Court of Appeal (51 *W. R.* 38, [1902] 2 *K. B.* 740) *reversed.*

Freer *v.* Murray, [1894] *A. C.* 576, *distinguished.*

This was an appeal from an order of the Court of Appeal (Collins, M.R., and Mathew, L.J., Cozens-Hardy, L.J., dissenting) (reported 51 W. R. 38, [1902] 2 K. B. 467), reversing a judgment of the Divisional Court (Lord Alverstone, L.C.J., and Lawrance, J.) (49 W. R. 559, [1901] 2 K. B. 740). The appellant was the tenant and occupier of the Council Inn, and was licensed in respect thereof for the sale of beer by retail to be consumed on or off the premises. On due notice of objection the respondents, who were the licensing justices for the city and county of Manchester, in September, 1900, refused to renew the appellant's licence on the ground that the premises were not of the necessary annual value. The Council Inn was originally licensed in 1868, and, with the exception of a break of two days, was continuously licensed until September, 1900, and it was found in the case stated that the annual value of the house exceeded £15, but was less than £30 The Court of Appeal held that as there had been a break in the continuity of the licence by the renewal having been refused since the Licensing Act, 1872, the requirement as to annual value (for Manchester £30 per annum) imposed by section 45 applied, and therefore upheld the refusal.

Rufus Isaacs, K.C., Avory, K.C., and *Randolph,* for the appellant.

C. H. Russell, K.C., and *T. F. Byrne,* for respondents.

Freer v. *Murray,* [1894] A. C. 576, was referred to.

Earl of HALSBURY, L.C.—I think it unnecessary to discuss *Freer* v. *Murray,* which was decided in this House, because it appears to me that the question which we have to determine is one entirely apart and distinct from the question which then arose. I am myself disposed to follow almost literally the decision of Cozens-Hardy, L.J. The question here, and the only question, has relation to the capacity of the house to receive a licence. The capacity of a house to receive a licence is settled by the Act of 1840. The question which arises here is whether that capacity to receive a licence has been altered by the Act of 1872. I have to look at both statutes, and unless I am able to fix an incapacity by statute upon this house it is obvious that the capacity to receive a licence remains where it was. I agree with Cozens-Hardy, L.J., that there are no words which render this house incapable of receiving a licence except words from which this House is in terms excluded. The result, therefore, must be that the capacity to receive a licence remains. Apart from the questions—somewhat puzzling and difficult questions that arise under the other heads which have been brought by way of analogy before your lordships, it appears to me that upon the most ordinary principles of construction we are bound to construe these words as we find them; and, as the learned counsel very justly said, there is no justification here, where the language is clear and unambiguous, for introducing any other words into the statute than those which we find there. As a matter of general principles of construction I very much deprecate going outside the language of the statute to find some meaning for the words other than that which the words themselves in their

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

ordinary and natural construction suggest. At the time of the passing of the Act, for some reasons (whether good or bad reasons is immaterial) the Legislature thought it right to draw a distinction between two different sets of houses, not as regards the jurisdiction of the magistrates in judging in respect of the goodness or badness of the tenant, or his fitness or unfitness, or of there being a want in the neighbourhood of licensed houses, but a distinction in respect of the material construction of the houses themselves. The Legislature determined that there should be two classes of houses, one of which should be capable of receiving a licence if the magistrates thought fit, and the other not. The simple question before us in this appeal is, Within which of those classes does this house come? It appears to me to be almost impossible to argue that, without introducing a considerable number of qualifying words into the language of the statute, you can say that this house is disqualified from receiving a licence if the magistrates so think fit. Under these circumstances, and for the reasons which I have given, I agree with Lord Alverstone, L.C.J., and Lawrance, J., and Cozens-Hardy, L.J., and disagree with the learned judges who have taken the opposite view. The only objection which I entertain to the language of the Lord Chief Justice in giving his judgment is this: The Lord Chief Justice seems, in some way or other, to try to get over the interval of two days by saying that it was a substantial continuance. Now, if it was necessary to have a continuity of the licence there was no such continuity; it cannot be denied that there was a complete break. But the view which I entertain of this case is that, notwithstanding the complete break, the language of section 45 of the Act of 1872 is too clear to admit of doubt that this house was qualified within the meaning of that section. I move your Lordships that the judgment of the Court of Appeal be reversed, and the judgment of the King's Bench Division restored.

Lord MACNAGHTEN.—I am of the same opinion. The construction adopted by Collins, M.R., and Mathew, L.J., may produce a more reasonable result, and one more in harmony with the course of legislation on this subject, but the language of the Act seems to me too clear to admit of that construction. The second clause of section 45 of the Act of 1872 appears to divide houses in regard to which an application for a licence may be made into two classes. First, those in regard to which a licence was current at the time of the passing of the Act of 1872; and, secondly, those in regard to which no such licence was then current. As regards the second class, the standard of value was to be raised, while the houses in the former class were left as they were, and to have the benefit of the old standard. I do not think that the decision of this House in *Freer* v. *Murray* compels your lordships to depart from the literal meaning of the words in the second clause of section 45, or to introduce words which are not there.

Lord SHAND.—I am of the same opinion. I only desire to say that I construe the statutes as your lordships have done, and I therefore come to the same result.

Lord ROBERTSON.—I entirely agree. The section seems to me to be perfectly plain in its terms, and to fix the date without reference to the continuance of the licence down to a certain time. It may be expedient or not to fix a date which may now have come to be pretty remote for the determining of the conditions under which a house shall be disqualified; but the conclusion is not a very formidable one, for the discretion of the magistrates remains, and all that is done is to leave this class of houses qualified to receive the consideration of the magistrates as under the Act of 1840. The argument of the respondents really rested upon two grounds: First, it was argued that, a licence being personal, it was necessary to consider the continuance of a licence in order to give effect to the statute, but the Act, in several of its sections other than that which we are now considering, expressly speaks of houses as being qualified as well as of individuals being qualified, and of houses being disqualified as well as of individuals being disqualified. The other, and the main, ground upon which the respondents' argument was rested was the judgment of this House under another section of a different Act. I understand the theory upon which that decision was pronounced, and I have only to say that the phraseology, upon which everything turns, which was used in that case does not occur in the present instance, and accordingly your lordships are entirely free to give effect to the plain terms of the Act now before you.

Lord LINDLEY.—I am entirely of the same opinion. When the Act of 1872 is looked at, and when the language of that Act and the language of the Act of 1869 are compared, it appears to me that the *Freer* v. *Murray* cannot be safely said to be case of applicable at all. The language of section 45 of the Act of 1872 runs thus—it is awkwardly expressed: "Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorising such sale unless" certain "conditions are satisfied." Now, unless it can be said that this house was at the time of the passing of the Act an unlicensed house, that provision cannot possibly apply. I agree with counsel for the respondents that, in construing section 45, you must also look at the definition of a "house." But what we have got here is a house which was licensed in 1872 and was licensed at the time when the renewal was applied for. Construing section 45 and the definition clause together, it appears to me impossible to say that this house is one of those in which the condition as to extra value has to be complied with. Then we come back to this question: Does that break which unquestionably occurred in 1886 render this house an unlicensed house ever since? I cannot so regard it. There may have been some irregularity, there may have been some oversight, there may have been even a technical want of jurisdiction; but a house which was licensed in 1868, and, with the exception of two days in 1886, has been licensed ever since, cannot, to my mind, be treated as an unlicensed house in 1872. The problem which we have to solve now did not rise in *Freer* v. *Murray*. In that case the house had not a licence when the renewal was applied for. The effect of a break, followed, as in this case, by a succession of new licences or renewals, was not before the House on that occasion, and had not to be considered. The case was a simple one of a new licence. Here there was a licence both when the Act passed and when application was made for a renewal: the difference, to my mind, is manifest.

Judgment appealed from reversed. Judgment of the King's Bench Division restored.

Solicitors for the appellant, *R. B. Wheatley, Son, & Daniel*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

Solicitors for the respondents, *Crowders, Vizard, & Oldham*, for *Hockin, Raby, & Beckton*, Manchester.

Privy Council.

(*From the Court of Appeal for Ontario.*)

July 28, 1903.

GRAVES & CO. *v.* GORRIE. (*a.*)

Copyright — Fine arts — Pictures — United Kingdom — Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68).

The Fine Arts Copyright Act, 1862, *confers on British subjects and persons resident in the British dominions copyright in pictures, drawings, and photographs in the United Kingdom, but not beyond that area. Nor is this altered by the Canada Copyright Act,* 1875.

Printing such copyright pictures in Canada is, therefore, in no way prohibited by the Fine Arts Copyright Act; to obtain protection the pictures must be registered under the Canadian laws.

Appeal by special leave from the Court of Appeal for Ontario.

The facts are given in their lordships' judgment.

Haldane, K.C., Scrutton, K.C., and *Beven,* for the appellants.

Denton, for the respondent.

The judgment of their lordships (Lords MACNAGHTEN, SHAND, ROBERTSON, LINDLEY, and Sir ARTHUR WILSON) was delivered by

Lord LINDLEY.—The appellants and plaintiffs in this case are the registered owners of the copyright of a picture called "What we have we'll hold." They acquired this copyright under the statute 25 & 26 Vict. c. 68, commonly called the Fine Arts Copyright Act, 1862. They have not complied with the Canadian Copyright Act, and have acquired no copyright in Canada apart from the copyright to which the statutes of the United Kingdom entitle them. The defendant is a printer and publisher in Toronto, and he has printed, published, and sold in Canada copies of the plaintiffs' picture without obtaining any licence from them. The plaintiffs complained of this as an infringement of their copyright, and they instituted legal proceedings in Canada against the defendant for an injunction and damages. The case was heard in the High Court of Ontario, and the plaintiffs' application for an injunction was dismissed with costs. An appeal to the Divisional Court was unsuccessful. A further appeal to the Court of Appeal met with no better fate. The courts in Canada decided that the plaintiffs had no copyright in Canada. The present appeal has been brought in order that this decision may be reconsidered and finally reviewed.

The question depends entirely on the true construction and effect of the Act of 1862 before referred to. Other statutes were called in aid by the appellants' counsel and will be noticed presently, but they do not extend the rights conferred by the Act of 1862.

The Act of 1862 begins by reciting (as their lordships believe, quite accurately) that the authors of paintings, drawings, and photographs had, as the law then stood, no copyright in such works, and that it was expedient to amend the law in that respect. Then follows section 1, which confers copyright in such works on their authors, being British subjects or resident within the dominions of the Crown. Copyrights in such works and assignments of such copyrights have to be registered in Stationers' Hall; and no one is entitled to the benefit of the Act until registration (section 4); penalties are imposed on persons who infringe such copyright (see sections 6, 7, and 8); facilities are given for obtaining injunctions (section 9); importations into the United Kingdom are prohibited (section 10); the remedy by action for damages is preserved (section 11); and the then International Copyright Act (7 & 8 Vict. c. 12) is incorporated.

The Act of 1862 confers on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs. Such copyright extends to the whole of the United Kingdom. But there is not a word in the Act to indicate any intention on the part of the Legislature to extend the limits within which the copyright is to be enjoyed to any part of the British dominions outside the United Kingdom. There are clauses, especially section 4, relating to registration, and section 10, prohibiting importation, which negative any such such intention. In the absence of language clearly showing an intention to confer copyright in such dominions, their lordships are of opinion that the plaintiffs' contention cannot be supported.

This view of the Act is by no means new. It was adopted in *Tuck & Sons* v. *Priester,* L. R. 19 Q. B. D. 629, in which the effect of non-registration and of the penal clauses had to be considered. The appellants' counsel, however, called in aid some other statutes, and notably the Canada Copyright Act, 1875 (38 & 39 Vict. c. 53), s. 3, and the International Copyright Acts.

The Canada Copyright Act, 1875, does not by section 3 make the Canadian Act set out in the schedule an Imperial Act applicable to Canada. The section simply removes a difficulty which had arisen in Canada by reason of section 91 of the British North America Act and some Orders in Council. Copyright is placed by that Act under the Dominion Legislature; and, having regard to some Orders in Council, it was doubtful by whom the Act in the schedule should be assented to. The effect of the Act was considered by the Court of Appeal for Ontario in *Smiles* v. *Belford,* 1 Ont. App. Rep. 436, and it is plain from that case, and indeed from the Act itself, that it in no way assists the plaintiffs.

The International Copyright Acts, and especially the Act of 1886 (49 & 50 Vict. c. 33), were relied upon with the view of showing that, unless the Act of 1862 were held to confer copyright not only in the United Kingdom, but also in the British dominions, unforeseen anomalies would arise, and those Acts would not have the effects intended under the Berne Convention. It is unfortunately true that the International Copyrights Acts and the Berne Convention give rise to many serious difficulties when they have to be applied to particular cases. But their lordships are unable to discover any language in those Acts which, without more, extends the area of the copyright conferred by the Act of 1862 on British subjects and persons resident in British dominions, to any country beyond the limits of the United Kingdom.

The short result is that those who want copyright in Canada for paintings, drawings, and photographs must obtain such copyright by complying with the laws of that country. There is no difficulty or expense worth mentioning in doing this.

Their lordships will therefore humbly advise his Majesty to dismiss this appeal, and the appellants must pay the costs.

Solicitors, *Eardley Holt & Hulbert; Blake & Redden.*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) } May 6; July 26, 1903.

BOYCE *v.* MAYOR, ALDERMEN, AND COUNCILLORS OF THE METROPOLITAN BOROUGH COUNCIL OF PADDINGTON AND ANOTHER. (*a.*)

Local government—Open space—Hoarding—Adjoining landowner—Access of light—Building—Right to sue without joining Attorney-General—Metropolitan Open Spaces Acts, 1877 (40 & 41 *Vict. c.* 35). *s.* 1; 1881 (44 & 45 *Vict. c.* 34), *s.* 5; 1887 (50 & 51 *Vict. c.* 32), *s.* 4—*Disused Burial Grounds Act,* 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

A local authority has, under the Metropolitan Open Spaces Acts, 1877, 1881, *and* 1887, *and the Disused Burial Grounds Act,* 1884, *control over open spaces for limited purposes only. It cannot, for example, use its interest in a disused burial ground either for the purpose of compelling an adjoining owner to give the public a right of way elsewhere or to prevent the acquisition by an adjoining owner of any rights in respect of any new building he may erect.*

B., an adjoining landowner, erected flats overlooking an open space. The local authority threatened to erect a hoarding in the open space which would interfere with B.'s lights. B. thereupon brought an action for an injunction to restrain the council from erecting any such screen as would interfere or cause damage to himself and the tenants of his flats.

Held, that B. was entitled to an injunction.

Judgment of Buckley, J. (51 *W. R.* 109), *reversed.*

Appeal from the decision of Buckley, J. (reported 51 W. R. 109).

The facts, which are set forth fully in the report of the case in the court below, briefly were as follows:

The churchyard of St. Mary's, Paddington, had become a disused burial ground within the meaning of the Metropolitan Open Spaces Acts of 1877, 1881, and 1887, and of the Disused Burial Grounds Act, 1884; and by virtue of those Acts, and of an indenture of April, 1892, made between the vicar of the parish (who was one of the defendants) and the Vestry of Paddington (who were the predecessors in title of the defendant borough council), and of a faculty granted by the Bishop of London in December, 1892, the defendant borough council had the control and management of the churchyard.

The plaintiff was the owner of land in the parish of Paddington, and he had lately erected blocks of flats adjoining the churchyard and containing numerous windows which overlooked the churchyard.

In January, 1901, the defendant borough council proposed to erect a hoarding or screen in the churchyard in front of the windows of the plaintiff's flats, which would have had the effect of darkening them.

The plaintiff thereupon brought this action, claiming an injunction to restrain the defendants from erecting any screen, wall, or building in the churchyard so as to occasion nuisance, annoyance, or damage to the plaintiff and the tenants of the flats.

Buckley, J., dismissed the action. He held that the proposed hoarding was not a "building" such as the borough council were precluded from erecting within the meaning of the said Acts, and that the said Acts did not create any easement of light for the benefit of adjoining owners.

(*a.*) Reported by R. R. CAMPBELL, Esq., Barrister-at-Law.

The plaintiff appealed.

The appeal came on for hearing on the 6th of May, 1903, when the court ordered the matter to stand over, partly in order that the Attorney-General might be consulted, but chiefly in the hope that the parties might come to a settlement.

A settlement not having been arrived at, the matter again came before the court on the 26th of July, 1903; the Attorney-General being then joined as a co-plaintiff.

Astbury, K.C., and *Mark Romer* for the plaintiffs.—There is an express provision in the statutes that the vestry shall hold for the purpose of public enjoyment and for that purpose alone. They cannot hold it for the purpose of exacting an involuntary contribution from the owner of an adjoining building. (They referred to the Acts in question.)

H. Terrell, K.C., and *T. A. Nash,* for the borough council.—The local authority, under section 4 of the Metropolitan Open Spaces Act, 1881, is bound to hold this churchyard so that it is accessible to the public as an open space. If the council have no power to prevent builders erecting huge blocks of buildings round this open space, then this open space as an open space is seriously injured. The Council's duty is to provide for access of air and access of light. The interests of the public are not interfered with by the erection of a screen, nor is such a screen a "building" within the terms of the Act.

C. A. Montague Barlow, for the Vicar of Paddington, when asked by the court whether he wished to disclaim any connection with the action, refused to disclaim, but urged that the injunction should not be directed against him.

VAUGHAN WILLIAMS, L.J.—I will deal in the first instance with the case made against the Vicar of St. Mary's, Paddington. Now we know that he took no part as vicar in the threat to erect this hoarding. We think that as against him there is no cause of action, and therefore against him the action is dismissed. And we think that under the circumstances, we ought not to interfere with the order for costs made below as far as the vicar is concerned. That only refers to the proceedings below. As to the proceedings in the Court of Appeal we do not think that the vicar, having regard to what had happened here, ought to have any costs of the appeal, so that in respect of the appeal as between the plaintiff and the vicar there will be no costs on one side or the other.

I now propose to deal with the case as against the Borough Council of Paddington. We have got their defence and they tell us in the fourth paragraph that "the action of the defendants in threatening to erect the said screen has been taken solely in performance of their public duty as trustees by virtue of the said Acts, and the sole purpose of erection was to prevent the plaintiff, as the owner or occupier of land adjoining the said churchyard from acquiring any right of light or air which would diminish or injuriously affect the enjoyment by the public of the said churchyard as an open space."

Now, when that matter came on for trial, it was attempted to be set up on behalf of the plaintiff that the proposed erection by the borough council of this screen was an act which was not covered by their authority in the Acts which determine their duties as trustees, and also, it was suggested, that the erection of a screen of this sort would actually affect the enjoyment by the public of the churchyard as an open space. When that objection was made by the plaintiff it was said: "It does not lie in your mouth as a private individual to set up that case. It may be

that what we are doing is beyond our power, having regard to the Acts of Parliament, and it may be that that which we are doing tends to interfere with and diminish the enjoyment by the public of this open space, but that is a complaint which a private citizen cannot make, and the Attorney-General is not a party to this action." When the matter came before us we were of opinion that this question of whether public rights had been interfered with or whether the borough council had exceeded their statutory duties, was an important question to be determined before we could decide this matter. After first making a vain attempt to get the matter settled as between the borough council and the plaintiff so as to avoid any further litigation, we thought it our duty to say that the Attorney-General ought to be approached in order that he might judge whether this was a case in which he thought he ought to be added as a plaintiff. And upon the Attorney-General being so approached, he was of opinion that he ought to be added, and he was accordingly added. Therefore we are now in a position to determine the question really as between the Attorney-General as representing the public and the borough council.

In our judgment, what the borough council are now threatening to do is inconsistent with their duties having regard to the statutes governing those duties. I will now deal with those statutes in so far as it is necessary in this case. I do not think I need touch upon the Act of 1877, except to call attention to the words of the 1st section, where the local authorities are "to hold" these open spaces "in trust for the perpetual use thereof by the public for exercise and recreation." Then one comes to the Act of 1881 with its definition of an open space, and the sections dealing with the acquisition of land for the purpose of these metropolitan open spaces. Section 5 is the really important section, containing, as it does, the powers of the managers of these open spaces.

I think that in erecting these buildings the borough council are holding and administering this open space for a purpose other than the enjoyment of it by the public in an open condition. And, speaking for myself, I think that that which they are proposing to do would in all probability really interfere with the enjoyment by the public of this open space. I wish to add that I am not disposed myself to adopt the view which Buckley, J., did, and read the word "buildings" in the limited way in which he read it in his judgment. One has some sort of light thrown upon the limitation of the authority of these trustees when one comes to the words as to enclosure. The administrators of the open space are entitled to enclose the open space with proper railings and gates, and in my judgment they have no right to enclose it wholly or partly with a screen of this sort.

Under these circumstances, in my opinion, the plaintiff succeeds in this action, and ought to have the costs of this appeal and the costs below.

ROMER, L.J.—I agree.

COZENS-HARDY, L.J.—I agree. I only wish to add this: That I do not desire to base my judgment upon any view as to whether this screen or hoarding is or is not a building within the meaning of this section. It seems to me that this matter may be dealt with on much broader grounds than that. The district council or the borough council, as it is now, have control over this space for strictly limited purposes. It is to be held and administered by the council in trust to allow it for the use and enjoyment of the public in an open condition free from buildings and under proper control and regulations and for no other purposes, and the subsequent words which authorize the enclosure, draining, levelling, and so on, and the doing of all such other works and things, is further limited by the words at the end—"such as may be requisite for the purposes aforesaid." Under those words it would be, I apprehend, competent for the board to erect a tool-house for the gardeners or for anything which was requisite for the purpose of the enjoyment by the public of such open space, but it seems to me that it is not competent under the powers conferred by this section to use their interest in the disused burial ground either for the purpose of compelling the adjoining owner to give the public a right of way elsewhere or to prevent the acquisition by an adjoining owner of any rights in respect of any new building he may erect. It would not be proper on my part that I should go over the ground which has been covered by Vaughan Williams, L.J., but I may just say as to the form of order, we think that the injunction should go in this form: That the defendants should be restrained from holding, administering, or using the disused burial ground in question for any purposes other than the purposes pointed out in that behalf by section 5"—then putting this in—"and in particular from using the said ground for the purpose of erecting thereon any building or screen to prevent the access of light coming over the said ground to the plaintiff's windows, provided that nothing in this injunction is to prevent the defendants," from enclosing, and so on, following the subsequent words in the section.

Appeal allowed.

Solicitors, *Cheston & Sons; J. H. Hortin.*

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) | June 30; July 1, 1903.

ISLINGTON CORPORATION v. LONDON SCHOOL BOARD. (a.)

Local government—Lands taken compulsorily—Assessment for poor rate—Liability for deficiency in general rate—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 133—*London Government Act,* 1899 (62 & 63 *Vict. c.* 14), *s.* 10 (2).

Section 10 *of the London Government Act,* 1899, *under which the general rate and poor rate are to be made and levied as one rate as if it were a poor rate, does not increase the liability imposed by section* 133 *of the Lands Clauses Consolidation Act,* 1845, *on promoters of undertakings to make good the deficiency in the poor rate caused by their taking lands for the purposes of their undertaking, and they are only liable to make good the deficiency in that proportion of the general rate which represents the poor rate.*

Decision of Wright, J. (51 *W. R.* 255), *affirmed.*

This was an appeal from a decision of Wright, J. (reported, 51 W. R. 255, [1902] 2 Ch. 701).

The facts are fully stated in the report of the case in the court below, and it is enough to say here that the question was whether section 10 of the London Government Act, 1899, which enacted that the general rate and the poor rate are to be made and levied as one rate as if it were a poor rate, imposed any fresh liability upon the defendants as promoters of undertakings under the Lands Clauses Act, 1845, so as to make them liable to make good the deficiency, in the general rate as a

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

whole, caused by their taking lands for the purposes of their undertaking, and not merely the deficiency in such proportion of the general rate which represented the poor rate as they were bound to make good under section 133 of the Lands Clauses Act, 1845.

Wright, J., held that section 10 of the London Government Act, 1899, did not impose any fresh liability, and that the defendants were only liable to make good the deficiency in that proportion of the general rate which represented the poor rate.

The plaintiffs appealed.

Danckwerts, K.C., and *Ryde*, for the appellants.

Avory, K.C., and *Layman*, for the defendants.

VAUGHAN WILLIAMS, L.J.—In my opinion the judgment of Wright, J., ought to be supported. I propose to say very little about the matter, as I adopt not only his judgment, but the reasons that he has given for it. Counsel for the appellants have both referred to *Farmer* v. *London and North-Western Railway*, 36 W. R. 590, 20 Q. B. D. 788, as a strong authority applying to this case. To my mind it only applies to this case in this sense—that it is a guide to us as to what we must look for in order to make section 133 of the Lands Clauses Consolidation Act, 1845, apply in the present case. The question that Field, J., and Wills, J., put to themselves in that case was with respect to the borough rate and the county rate. They asked themselves whether there was anything in the Acts of Parliament regulating these two rates which brought them respectively within the operation of the words of the Lands Clauses Act, and they found that which was sufficient to make section 133 apply to those rates. What they found was that when you looked at the Act of Parliament those rates were really poor rate—that is to say, were either poor rate or were charged as poor rate. It is a similar question which we have to ask ourselves here, and when I look at this section—though I do not mean to say that there are not arguments which might be and were properly addressed to us, inviting us to put such a construction on this section as that the whole of the general rate, irrespective of the purposes for which it was to be raised, ought to be considered poor rate for the purposes of section 133—still, in my opinion, there is not sufficient to extend the liability under the section of the Lands Clauses Act beyond the poor rate. It would have been very easy to have made this section perfectly clear, but that has not been done. If Parliament had said that the general rate was to be deemed the poor rate, no question could have arisen like that which has arisen in this case. When I pressed counsel for the appellants with that observation, his answer was that the modern practice of legislation is to wrap up a Bill which is wanted to be passed in such a way as to make it less likely that there will be obstruction. He meant that the words should be wrapped up in such a way that Parliament should not recognise what was being done. I deny that there is any such practice in Parliament at all as so to wrap up legislation that the members of Parliament and others cannot know what is being passed. It remains therefore that what might have been expressed in clear language has, if the argument of counsel is right, been expressed in such a way that it can only be inferred from a minute inspection of the words of the clauses.

I entirely agree with Wright, J., that "the form of sections 10 and 11 would be a strange form to adopt if the intention were to impose a novel burden of this kind, especially when it is remembered that section 133 of the Act of 1845 is not concerned with rating at all; for while sections 10 and 11 of the Act of 1899 are entirely concerned with rating, section 133 of the Lands Clauses Act, 1845, is concerned merely with the making up of the deficiency in the rate." I entirely agree with that proposition. I cannot believe that if the Legislature had intended to impose a novel burden on promoters of undertakings, and to alter their liability in this very strong manner, they would not have expressed it in clear terms.

ROMER, L.J.—I have come to the same conclusion. Certainly the Act of 1899 did not, nor has the Islington scheme, expressly cast upon the defendants such an additional burden as is contended, nor ought it to be inferred that such an additional burden is cast upon them unless the inference is necessary, having regard to the scheme. To my mind such an inference is not necessary. After the elaborate criticism of Wright, J., with which I agree in substance, I do not think it necessary to go through the provisions of these Acts. I can only say that I agree with the concluding part of Wright, J.'s, judgment, where he says: "The true meaning of the enactments when read together is that the School Board must make up the deficiency of that part of the general rate which represents the poor rate, or represents anything chargeable on that rate."

STIRLING, L.J.—I am of the same opinion. By the Lands Clauses Consolidation Act, 1845, s. 133, the Legislature thought fit to impose on the promoters of an undertaking the liability to make good the deficiency in the poor rate. At the time of the passing of that Act other rates were known besides the poor rate. It may be said that that rate was a universal rate, while the other rates were local. Nevertheless, the existence of such rates was well known. The Legislature did not see fit to impose liability in respect of rates other than the poor rate. Prior to 1899 four rates were collected in the metropolis—namely, the sewers rate—the lighting rate, the general rate, and the poor rate, and by the London Government Act, 1899, provisions were made for effecting alterations in that respect; and in sub-section 1 of section 10 there is an express direction that a separate sewers and a separate lighting rate are to be discontinued, and sub-section 2 provides that the general rate and the poor rate shall be assessed and made and levied together as one rate. The language there is different. There is no provision for the discontinuance of either the general rate or the poor rate. All that is provided is that they are to be assessed, made, and levied as one rate. Then it is said that it is to be called the general rate. That is a mere name. Then it is said that it is to be collected as if it were poor rate. That does not make it a poor rate. Then comes this clause: "All enactments applying or referring to the poor rate shall, subject to the provisions of this Act as to audit, be construed as applying and referring also to the general rate." The question on that is whether, on the fair construction of that clause, the effect is to impose on promoters of undertakings a liability to make up a deficiency in the general rate as opposed to the poor rate. In my opinion that is not a fair construction. If it were impossible to give effect to the language of the section in any other way, it might be necessary for the court so to hold; but it is obvious that the language in itself has a wide application quite apart from the construction contended for, and I do not think that it was intended to have the effect of enlarging the meaning of the words poor rate in section 133 of the Lands Clauses Act. There is no authority to the contrary. *Farmer* v. *London and North-Western Railway* is not such an authority. I think that Wright, J., was right.

Appeal dismissed.

Solicitors, *A. M. Bramall; C. E. Mortimer.*

From K. B. Div.
(Collins, M.R., and Stirling and Mathew, L.JJ.) May 7, 1903.

MAYNARD v. CONSOLIDATED KENT COLLIERIES CORPORATION (LIMITED). (a.)

Company—Shares—Transfer—Registration—Consideration not truly stated—Insufficient stamp—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 14, *sub-section* 4; *s.* 17.

Where, in a transfer of shares in a company, the consideration is not truly stated, and the stamp, though sufficient for the consideration as stated, is insufficient for the true consideration, the company are not bound to register the transfer.

Application by the plaintiff for judgment or a new trial in an action tried before Lawrance, J., and a special jury. The action was brought to recover damages for the refusal to register a transfer of shares in the defendant company.

The facts, so far as material to raise the question for which the case is reported, were as follows: Tucker was the registered holder of 1,300 £1 shares in the defendant company, which had been issued to him in exchange for shares in another company which had been taken over with other companies by the defendant company. These shares were credited with 17s. 7d. paid up on each share, leaving 2s. 5d. unpaid. The 2s. 5d. a share having been called up, in April, 1901, Tucker agreed to sell the shares to the plaintiff, who inquired from the defendant company how much was owing upon them. He was told that £158 8s. 3d. was due, and he paid this sum to the company, and a further sum to Tucker, and a transfer of the shares was executed by Tucker and the plaintiff. The transfer stated that the consideration therefor was £158 8s. 3d., and bore a stamp proportionate to that sum. The consideration so stated was admittedly too small, and if the consideration had been truly stated in the transfer, a stamp of a higher value would have been necessary. The company refused to register the transfer, but in March, 1902, they consented to register it. The shares in the meantime had considerably depreciated in value, and the plaintiff brought this action to recover damages for the wrongful refusal to register the transfer, contending that the company could not go behind the consideration stated on the face of the transfer, and that if the stamp was sufficient for the consideration so stated the company were bound to register the transfer. The jury found that the consideration was not truly stated in the transfer, and they assessed the damages provisionally at £150.

Lawrance, J., gave judgment for the defendants.

By the articles of association of the defendant company, under the heading "Transfer and Transmission of Shares," article 29 provides that the instrument of transfer of any share shall be signed both by the transferor and transferee, and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register in respect thereof. By article 30, the instrument of transfer of any share is to be in writing and in the usual common form or in the following form [setting it out], which states that the transferee is to hold the shares subject to the several conditions on which the transferor held the same immediately before the execution of the transfer. [This was the form of the transfer in question.] By article 31, the board may decline to register any transfer of shares, not being shares fully paid, upon which the company has a lien, and may decline to register a transfer to a transferee of whom they do not approve. By article 32, every instrument is to be left at the office for registration accompanied by the certificate of the shares; and by article 33 all instruments of transfer which shall be registered are to be retained by the company.

By section 14, sub-section 4, of the Stamp Act, 1891, "Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdon, shall not, except in criminal proceedings, be given in evidence. or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

By section 17, "If any person whose office it is to enrol, register, or enter in or upon any rolls, books, or records any instrument chargeable with duty, enrols, registers, or enters any such instrument not being duly stamped, he shall incur a fine of £10."

Gore-Browne, K.C., and *G. A. Bonner*, for the plaintiff.

Hammond Chambers, K.C., and *C. C. Scott*, for the defendants.

COLLINS, M.R.—The arguments in this case have ranged over a wide area, but the question is now reduced to a short one. The action is brought to recover damages for the refusal to register a transfer of shares from Tucker to the plaintiff. Tucker was the registered holder of 1,300 £1 shares in the defendant company, with 17s. 7d. paid up on each share, thus leaving 2s. 5d. unpaid. The plaintiff agreed to take over the shares from Tucker, and he and Tucker went to the company's office and were informed that £158 8s. 3d. still remained due on the shares. A transfer wes accordingly executed, and it bore on its face the consideration of £158 8s. 3d., with a stamp proportionate to that amount. The transfer was sent to the company's office, and a receipt for the transfer was sent to the plaintiff, and the plaintiff demanded registration thereof. The company refused to register it, but ultimately, in 1902, tney registered it, and waived any claim for interest. The shares had then fallen considerably, and the plaintiff claimed damages for the refusal to register the transfer. The whole point turns upon the question whether the directors of the defendant company were entitled to withhold the registration of the plaintiff as transferee of the shares. The defendants in their defence alleged that they were justified in not inserting the plaintiff's name in the share register by reason of the consideration for the alleged transfer not being truly stated and the transfer not being properly stamped. The transfer on its face was for the consideration of £158 8s. 3d. The secretary of the company came to the conclusion that that sum, which was only the amount remaining unpaid on the shares, was not the true consideration, and that therefore the document was of no validity, by reason of section 14, sub-section 4, of the Stamp Act, 1891. Inquiries were accordingly made by the company and it was found that the consideration was not truly stated, and the company refused to register the transfer.

It is said that the company had no right to refuse to register. It is urged that the obligation of the secretary is defined by section 17, which provides that "if any person whose office it is to enrol, register, or enter in or upon any rolls, books, or records any instrument chargeable with duty, enrols, registers, or enters any such instrument not being duly stamped, he shall incur a fine of £10." It is contended on behalf of the plaintiff that the secretary does not come within the description of the person whose duty it is to enrol or register the instrument; and further,

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

that, even if he does, he cannot go beyond the face of the document, and that he has no right to travel outside the consideration stated on the face of the document, and that, as the stamp was a proper stamp for the consideration stated on the face of the document, no objection can be taken to it. That is the principal point raised. But what is to be done where the directors have been informed that the consideration is wrongly stated on the face of the document? It is said that the directors can not in such a case go behind the document and take the objection. No decision has been cited in support of that proposition, and it seems to me that there is express authority the other way; and apart from authority, it is contrary to common sense. The instrument, not being stamped according to law, is void and cannot be made available for any purpose whatever. How is effect to be given to the statute if it is not possible to go behind the consideration stated on the face of the document? That put the directors of the company in the position of having to determine whether or not they would accept the transfer subject to its invalidity. It was a serious matter for them, because the company keep possession of a transfer as a justification for their taking one person's name off the register and putting another person's name on, and if the transfer is bad it will not be available for any purpose whatever, and will be no protection to them. If the transfer is not available for any purpose whatever, are they bound to register it? In my opinion they are not. It was the plaintiff's duty to tender a transfer in all respects right in point of law, and unless he did so the company were under no obligation to register it. That is the answer to the plaintiff's claim. There are other points raised none of which it is necessary to deal with. The judgment of the learned judge was right, and the application fails.

STIRLING, L.J.—I am of the same opinion. In my opinion the objection of the company that the transfer was not properly stamped owing to the consideration not being truly stated is a good objection in law. By section 22 of the Companies Act, 1862, shares in a company are capable of being transferred in manner provided by the regulations of the company. The articles of association of the defendant company provide that the transfer must be signed by the transferor and the transferee, and must be in a prescribed form, which says that the transferee is to hold the shares subject to the conditions on which the transferor held them immediately before the execution of the transfer; and by article 33 all instruments of transfer, which shall be registered, are to be retained by the company. The company has two objects in retaining the transfer—first, that the transfer may be used by the company as a means of enforcing the obligations of the transferee; and, secondly, because it is a document which, when acted upon, can be vouched by the company as a justification for altering the register, if the alteration is called in question in a court of justice. In these circumstances the company cannot be called upon to act upon a transfer which cannot be made available in a court of justice either for enforcing the obligations of the transferee or for defending themselves against an attack for having altered the register. The principle has been frequently acted upon in dealings between vendor and purchaser. The case of *Whiting to Loomes*, 29 W. R. 435, 17 Ch. D. 10, is an instance. That was a case of a contract for the sale of real estate, which had been mortgaged to secure an advance. The mortgage deed bore a 10s. stamp. The purchaser objected that the stamp was insufficient, and that the deed ought to be stamped with the full *ad valorem* stamp. This court held that the objection was a good one, and that the purchaser was entitled to take it, and that the deed must be stamped with the full *ad valorem* stamp. James, L.J., said: "The purchaser says, 'Here is a title-deed. It ought to be stamped with a proper stamp, and it is not so stamped.' As long as it is not stamped with a proper stamp he cannot use it for any purpose whether to defend his title or attack a wrongdoer. It is impossible to say he will not want it." Cotton, L.J., said: "The purchaser may clearly require this as a deed for certain purposes, even if he may not hereafter require it as a mortgage deed. Then can it be put in evidence? It cannot as a mortgage deed, because it is not properly stamped. But it is said it is sufficiently stamped as a deed, and therefore can be put in evidence. It is not a deed *simpliciter*, but what is described in the schedule to the Act as a mortgage deed, and when we look at the schedule we find that the only thing that can be properly stamped with a 10s. stamp is a 'deed of any kind whatever not otherwise described in the schedule.'" Lush, L.J., said that "the court is not entitled to speculate whether the purchaser may or may not have occasion to use the deed. A purchaser is entitled to have every deed forming a step in his title in such a shape that he can, if he needs it, give it in evidence." That principle applies in the present case, and the company are entitled to say that they ought to have a transfer in such a form that they can put it in evidence, if it becomes necessary to do so. It is said that the deed was properly stamped on the face of it, and that it is impossible to go behind the face of a document upon a stamp question. In my opinion, that is not in accordance with the law. The Master of the Rolls has already stated the reasons. I will only refer to the case of *Field* v. *Woods*, 7 A. & E. 114. That was an action against the drawer of a cheque payable to bearer. The plea was that the defendant did not make the draft in manner and form, &c. At the trial the draft was produced by the plaintiffs, unstamped, and the defendants' counsel proposed to prove that the draft was post-dated, and for that reason he contended that it could not be received in evidence, having no stamp. The judge rejected the evidence upon the ground that the post-dating was a defence which ought to have been pleaded. The Court of King's Bench held that the objection need not have been pleaded, and that the evidence was admissible. Lord Denman said: "The plaintiffs proceed upon an instrument which appears *primâ facie* good; but then, upon the evidence at the trial, something arises which makes a stamp requisite. In *Dawson* v. *Macdonald*, 2 M. & W. 26, the action was brought on a bill of exchange; the defendant had found that the bill was written on paper improperly stamped, and he attempted to plead that fact in addition to a plea of non-acceptance; but Parke, B., said: 'The only consequence of the wrong stamping is that the instrument cannot be given in evidence.' There can be no question that this defence is admissible under a plea that the defendant did not make the draft." Littledale, J., said; "Is the objection one which it is necessary to show in pleading? I think not. The Acts being prohibitory, the moment the cheque was produced, if the defect appeared, the judge would say that he could not allow the document to be received. Here, however, it was received; and the objection was not made apparent till the opening of the defendant's case, when he offered evidence to show the defect. The practice has been lately that, if a document was once read, an objection should not be taken to it afterwards, but that has been where the defect has

appeared on the document itself, as where the stamp was too small compared with the forms of the instrument or the number of words; those are different cases from the present, where the objection arose on matter extrinsic, and the judge could do nothing, in the first instance, but admit the document subject to an objection to be raised afterwards by proof." Patteson, J., said: "Supposing therefore that the document here had been given in evidence, the Acts say that it shall not be available. But it was given only as evidence *primâ facie* and subject to the objection which was raised by extrinsic evidence." That is a clear authority that in a proper case where the defect of a stamp does not appear on the face of the document extrinsic evidence is admissible to show the defect. If therefore the company had accepted the transfer, extrinsic evidence might be given in a court of law to show that the transfer was not sufficiently stamped and was consequently of no validity. For these reasons I think that the company were not bound to register the transfer, and that therefore the appeal must be dismissed.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Burnie & Co.*

Solicitors for the defendants, *Dale, Newman, & Hood.*

High Court of Justice.

Chan. Div. Buckley, J. } Oct. 30, 31, 1902.

In re RICHARDSON.
PARRY *v.* HOLMES. (*a.*)

Will — Construction—Estate tail—Cy-près—*Perpetual succession of life estates—Distribution* per stirpes.

In a devise to A. for life, and after her death to her child or children, equally between them share and share alike if more than one, and if but one to such only child for life, and so to be continued and distributed in a descending line per stirpes *from issue to issue for life so long as any issue should be living descended from A., the children of the parent dying taking their parent's share equally between them in all cases of decease, there being no gift over on failure of the issue of A.:*

Held, that no estate tail, by the operation of the doctrine of cy-près, *was given to A., and that the limitations subsequent to the life estate of A. being void for remoteness, there was an intestacy on the death of A.*

Seaward *v.* Willock, 5 *East* 198, *applied.*

Mortimer *v.* West, 2 *Sim.* 274; Forsbrook *v.* Forsbrook, 16 *W. R.* 290, *L. R.* 3 *Ch. App.* 93; *and* Parfitt v. Hember, *L. R.* 4 *Eq.* 443, *distinguished.*

Augusta Ann Holmes Richardson died on the 24th of August, 1902, a spinster and intestate, and Mary Josephine Parry became her administratrix.

On an originating summons, taken out by the administratrix for the determination of certain questions concerning the estate of the deceased, an order was made directing, amongst other things, an inquiry what real estate the intestate was seized of or entitled to at the time of her death. The only real estate in which she had any interest was certain freehold property at Kentish Town, and the interest she had therein depended upon the construction of the will of her grandfather, William Holmes. The master adjourned the matter into court in order that the judge might construe the will.

By his will, dated the 11th of November, 1832, William Holmes devised unto his daughter Caroline, his son George, and his daughter Mary, certain property in Kentish Town upon the trusts and subject to the provisoes thereinafter declared concerning the same; and he declared that his said children and the survivors, or survivors of them, should stand seized of the said property upon trust after making certain payments thereout, to retain the rents thereof in equal shares during the term of their natural lives. The will continued as follows:

"Provided always, and I do hereby declare, that if any such of my said children shall depart this life unmarried, or being married without leaving any child or children, then the part or share of him, her, or them so dying, shall go and accrue to the survivor or survivors of my said children, to be equally divided between them, if more than one, share and share alike, and that the last survivor of my said children shall stand and be possessed of all my said freehold for his or her own absolute use and benefit, with full liberty and power to dispose thereof either by deed or will as his or her own absolute estate and effects. But in case such son or daughter so dying shall leave issue at his or her decease, whether before or after the age of twenty-one years, the share of such child so dying to go and be divided equally amongst his or her child or children, whether sons or daughters, for life, share and share alike if more than one, and if but one then the whole share to such only child for life, and to be paid and applied towards their maintenance and support during their minority, and so to be continued and distributed in a descending line *per stirpes* from issue to issue for life, so long as any issue shall be living descended from my said children, the children of the parent dying taking parent's share equally between them in all cases of decease."

The will contained a gift of the residue of the real estate. There was no gift over in default of issue.

The testator died on the 7th of March, 1835, leaving him surviving the above-named children, who during their joint lives shared the rents of the property in thirds.

George died in 1856, a bachelor and intestate, and the rents were then divided between the two surviving children in moieties.

Caroline married a Mr. Richardson and died intestate in 1874, leaving her surviving her husband (who died in 1899) and A. A. H. Richardson, the above-named intestate. The rents were thereafter shared by A. A. H. Richardson and Mary Holmes.

Mary Holmes died in 1890, a widow, having devised all her real estate to A. A. H. Richardson absolutely.

From 1890 to her own death in 1902 A. A. H. Richardson was in undisturbed possession of the whole of the property and the rents thereof.

On the 14th of July, 1892, A. A. H. Richardson, having been advised that she was tenant in tail of the property, executed a disentailing deed. She afterwards sold some of the property.

William Holmes, the defendant in the originating summons, was appointed to represent the heir-at-law of William Holmes, the testator.

It was admitted at the hearing (1) that the words of the will were sufficient to pass the fee; and (2) that on the construction of the will, and in the events which happened, only the moiety of the property passed to the last survivor. Mary Holmes.

Consequently the only question argued was as to the estate which Caroline Holmes, and through her A. A. H. Richardson, took in the other moiety.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

Buckmaster, K.C., and *A. Herbert*, for the heir-at-law of A. A. H. Richardson.—The question is whether the limitation of an indefinite series of life estates, which in itself would be void for perpetuity, will not be construed as an estate tail, by the application of the doctrine of *cy-près*. The principles on which the doctrine is applied are stated in *Monypenny* v. *Dering*, 16 M. & W. 418, 432. In Theobald on Wills (5th ed.), p. 533, it is said that the present point is not covered by authority, but that the doctrine will not apply where the intention is to create only a limited number of life estates. In *Humberston* v. *Humberston*, 1 P. W. 332, where the limitations of successive life estates were executory, the court gave effect to them, as far as possible, by making all the persons in being life tenants and giving an estate in tail male to the first unborn son. In the present case, notwithstanding the departure from the terms of the will, the only way of giving effect to the limitations is to give an estate tail. In *Mortimer* v. *West*, 2 Sim. 274, where the limitations were almost identical with those in the present will, except that there was a gift over on the ultimate failure of the issue, it was decided that there was an estate tail. It is true that the Vice-Chancellor based his judgment on the fact that there was a gift over. That was because he relied on *Seaward* v. *Willock*, 5 East, 198, as establishing the proposition that a mere series of life estates is not by itself sufficient to show the general intent that all the children and their issue are to take, which is necessary to create an estate tail by implication. He said that a gift over on a general failure of issue coupled with the life estates showed the general intention that the gift was to last as long as there was issue of the children. In the present will there is contained in express words what may be gathered by implication from the gift over. Again, the current of modern authority is that an indefinite series of life estates does not need to be supported by a gift over in order to result in an implied estate tail. In *Forsbrook* v. *Forsbrook*, 16 W. R. 290, L. R. 3 Ch. App. 93, at p. 99, there is a *dictum* by Rolt, L.J., to the effect that the application of the doctrine of *cy-près* to a perpetual succession of life estates would produce an estate tail. In *Parfitt* v. *Hember*, L. R. 4 Eq. 443, at p. 446, Lord Romilly, M.R., said that the doctrine of *cy-près* was not to be confined to executory devises, but was a rule of construction, and he applied it to a gift in trust for devisees for their lives and their issue for their lives for ever. In *Hampton* v. *Holman*, 25 W. R. 459, 5 Ch. D. 183, 193, where the question was raised, but not decided, Jessel, M.R., said that he would have been bound, if necessary, to have followed the opinion of Rolt, L.J. The decision, therefore, in *Mortimer* v. *West* need not have been based on the gift over, but might have been based only on the successive life estates. It consequently covers the present case, and A. A. H. Richardson took an estate tail which she barred.

Birrell, K.C., and *Harman*, for the heir-at-law of W. Holmes, the testator.—As regards this moiety, there is an intestacy, unless, by the operation of the doctrine of *cy-pres*, for the void gifts of perpetual life estates with stirpital continuations is substituted for the absolutely dissimilar estate of an estate tail. The true limitations of the doctrine, which ought not to be allowed to run wild, are stated in *Monypenny* v. *Dering*, 16 M. & W., at p. 428: see also Jarman on Wills (5th ed.), p. 267. It does not apply to limitations of successive life estates to the issue of an unborn person, either for a definite or an indefinite series of generations: *ibid.*, pp. 270, 271. The *dictum* of Rolt, L.J., is, apart from *Mortimer* v. *West*, the only authority to the contrary. In *Mortimer* v. *West*, the Vice-Chancellor held that the gift over was the circumstance which the judgment of Lord Eldenborough in *Seaward* v. *Willock* compelled him to decide the case as he did. *Forsbrook* v. *Forsbrook* is distinguishable from *Seaward* v. *Willock*, because the last lines in the will "indicate a series of inheritances and constitute words of limitation": see per Lord Cairns, L.J., at p. 97. And in *Forsbrook* v. *Forsbrook* there was no question of stirpital distribution. A possible reason for the importance attached to the gift over in *Mortimer* v. *West* is that, before the Wills Act, a devise to A. for life and then to his issue, and on failure of his issue over, conferred an estate tail on the principle explained in Jarman on Wills, at p. 521. The Vice-Chancellor, thinking that the gift over was on an indefinite failure of issue, may have implied an estate tail; and having found an estate tail, he may have rejected the life estates as a mere nullity: *Reece* v. *Steel*, 9 Sim. 233, 236. In *Monypenny* v. *Dering*, 2 D. M. & G. 146, 179, Lord St. Leonards commented on *Mortimer* v. *West*.

They also referred to *Somerville* v. *Lethbridge*, 6 T. R. 213; *Beard* v. *Westcott*, 5 Taunt. 393, 5 B. & Ald. 81; and *Hugo* v. *Williams*, 14 Eq. 225, 21 W. R. Dig. 258.

BUCKLEY, J., held that the dispositions of the testator were so worded as to pass the fee, and that on the construction of the will, the death of one of the children unmarried—namely, George, did not, in view of the fact that Caroline died leaving a child, operate to carry the whole of the property to the last survivor—namely, Mary, and, consequently, that on the death of Caroline the property so passed as that Mary and Caroline's child were each entitled to a moiety of it. His lordship said that there was no question as to the moiety of Mary, which passed under a disposition in her will to Augusta (Caroline's child). Dealing with the question as to what happened to Caroline's moiety, he read from the will the disposition of successive life estates, and continued: Now if those are what on the face of the will they purport to be, successive life estates, there is no question but that they are void after the life estate in favour of Augusta, who is now dead. But it is argued that the result was that Augusta, or her mother, took an estate tail, and that Augusta, having become entitled to an estate tail, purported to bar it by a deed of the 14th of July, 1892, and that she thus became entitled absolutely to the other moiety. Mr. Birrell, for the heir-at-law of the testator, says that there was no estate tail, that on the death of Augusta there was an intestacy, and that he is now entitled.

In my opinion, that contention must succeed. The question is whether I can so construe the limitations of this will, having regard to the decisions to which I will refer, as to be able to arrive at the conclusion that effect is to be given to the paramount intention of the testator by giving an estate tail, although, in point of fact, his language is that there shall be successive estates for life.

Before going to the cases, let me say under what circumstances this doctrine of *cy-près*, as it seems to me, is applicable. If you find a number of successive limitations to persons indicated, or pointed to, who would take thereunder an estate tail, if you construe them as being an estate tail, but who cannot take by reason of the limitations as they stand being void, then it may be possible, under certain circumstances, to apply the doctrine of *cy-près*, and to say that, instead of the estates purported to be given by the will, the court will hold that an estate tail has been created; because if you do that, every person indicated will in his turn occupy and enjoy the property for his life, in the sense that he cannot

enjoy it after his death, although it is true he will enjoy it, not as tenant for life, but as tenant in tail. The result will be that, if the estate tail is not barred, the persons indicated will in succession each enjoy the property during his life. To put it in the language of Rolfe, B., in *Monypenny* v. *Dering*, 16 M. & W., at p. 428, "By these means, the estate, if left, as it were, to itself, will go in the precise course marked out by the testator, though it will be (contrary to what he intended) liable to be diverted from that course by the act of the first taker." Each successive person will enjoy it so long as he is alive, but, of course, the estate tail, if barred, will defeat the intention of the testator; otherwise, if you leave it alone, it will go the right way. In such a case you may apply the doctrine of *cy-près*, and say that an estate tail will, in substance, give effect to the paramount intention. But directly you find that the persons to benefit are a class larger than those who would take under an estate tail, that the estate tail, if left alone, will not reach the intended beneficiaries, but only some of them, then the matter is a totally different one; and here the whole point of the case, as it seems to me, lies in this, that, as you pass from generation to generation, the children of the parent dying are to take their parent's share equally between them. As you come to each generation, it is not the heir in tail who is to take, but the heir in tail and all his brothers and sisters are to take equally between them. That is a direction hopelessly inconsistent with an estate tail, and you cannot, by giving an estate tail, give effect to that intention at all.

Now, passing from that to the authorities, I want to see under what circumstances the court can, in any case, merely from a succession of life estates, infer that an estate tail is given. Now on that the decision of Lord Ellenborough in *Seaward* v. *Willock* seems to me to be a plain decision, that from a mere succession of life estates you cannot infer an estate tail. It is true that, in that case, the successive life estates were given only down to the tenth generation, and not indefinitely, which, of course, is a cardinal and important fact. But Lord Ellenborough did not rely upon that fact at all. The ground upon which he puts his decision is this. He says: "His" (the testator's) "meaning clearly was to give estates for life only to his grandson, and after him to his sons, and after them to their sons down to the tenth generation, for he has added the words 'during his or their natural lives' to each limitation." I pause there to say that that is exactly the case in the present will—a life estate is expressly mentioned in each case. "But," continues Lord Ellenborough, "this he could not do by law, inasmuch as the law will not allow of a successive limitation of estates for life to persons unborn. Can we, then, make another will for the testator giving to his devisees different estates than those he meant to give to them, because the estates he intended cannot by the rules of law take effect? This, I conceive, would be assuming a power which does not belong to us, of turning a legal devise into an executory trust." Then a little lower down, after reading the devise as he says it should be read, he proceeds: "And so reading it, we find no words showing a general intent to give an estate tail in contradiction to the express estates for life, so precisely given to each description of persons who are to take under the will." It appears to me that the reasoning of Lord Ellenborough there is exactly applicable to this case. This is not an executory trust; these are dispositions in favour of the children, and they are simply dispositions of successive life estates, and, as I pointed out, the successive takers of the life estates are to be a larger class of persons than ever could take under an estate tail.

But there are cases in which a disposition simply giving successive life estates, with something more, may be, and have been, construed as creating an estate tail. I refer to *Forsbrook* v. *Forsbrook*. But the point there is that the limitations were in each case to the eldest son of C., and the eldest son of T., and so on—"the eldest son of each of the two families to inherit the same for ever," so that the persons who were to take were confined to the persons who could take under an estate tail, and the great point of difficulty here, that all the brothers and sisters take, did not arise. But, as I read Lord Cairns' judgment, he was not differing at all from *Seaward* v. *Willock*, and I think he would not have decided the case in the way in which it was decided if the limitations had been equivalent to those in *Seaward* v. *Willcock*, because he relies upon this fact, that after giving to persons successively for life, and so on, the testator says, "And so on, the eldest son of the two families of the name of Forsbrook to inherit the aforesaid property for ever"; and Lord Cairns says: "These last words clearly indicate a series of inheritances, and constitute words of limitation." So there you have got, not merely successive life estates, but that which the court held to be words of limitation giving an estate of inheritance. There they held that there was created an estate tail.

Another case which falls, I think, at this point for consideration, is *Parfitt* v. *Hember*. There you have got words which might have created the difficulty which arises in the case before me—namely, similar words; that it is to go to the "nephews and niece, and the survivors of them, for their respective lives and the life of the longest liver of them, and to the issue and issues of them respectively for their respective lives for ever, as tenants in common." The testator was, therefore, contemplating a plurality of persons who were to take. They are words to some extent similar to "children taking their parent's share equally between them"; but it was possible to give effect to those words without creating the difficulty, because what was being spoken of was a number of stocks. It was the nephews and niece and the survivors of them for their lives, and the issue and issues of them respectively for their respective lives; therefore you could give effect to the plurality by the idea of plurality of stocks, without necessarily inferring that it meant a plurality of persons in the stocks. Moreover, in that case there was this further, that the then testator spoke of the estate which he was creating as an entail. He says, "The before-stated entails to my nephews and niece and their respective issues as aforesaid." So that in that case there were the means of coming to the conclusion, and the court did come to the conclusion, that the *cy-près* doctrine might be adopted so as to create an estate tail.

Now, excepting cases of that class, so far as I can see, but for the case of *Mortimer* v. *West*, to which I must come, there is no ground for inferring an estate tail in a case of this kind.

I find that Mr. Jarman (5th ed., p. 271), after referring to this doctrine of *cy-près*, says: "It has been decided" that the doctrine "is inapplicable where an attempt is simply made to limit a succession of life estates to the issue of an unborn person, either for a definite or indefinite series of generations."

In *Humberston* v. *Humberston*, the case which lies to some extent at the root of this, the point decided was that, the trust being merely an executory trust, the court would give effect to it by directing a settlement to be executed so as to carry out that which the court found to be the intention of the party. The order was that "the master should see a settlement made of the trust estate pursuant to the will with

limitations" in a particular way, giving an estate tail. But that decision has no application here, where the trust is not executory, but where the estates are created by the will itself.

With that I pass to *Mortimer* v. *West*, the case which creates the great difficulty here. In *Mortimer* v. *West* the language of the will was to a very great extent identical with that of the will before me. The gift was, after the decease of the children of Martha leaving issue, "the share of such child so dying to go and be divided equally between his or her children . . . share and share alike . . . and so to be continued and distributed, in a descending line, *per stirpes*, from issue to issue, for life, so long as any issue shall be living descending from the said Martha Davies, the children of the parent dying to take such parent's share equally between them." I have here exactly the point to which I called attention just now; the class to take is larger than the class which could take under an estate tail. But there was in that case a gift over; "and for default of any such issue descending and proceeding from the children of Martha Davies," then over. I pause there for the moment to say that *Mortimer* v. *West* is not the case before me, because here there is not a gift over; there is a gift of residue, but that is not, of course, equivalent to a gift over. Then what is the decision? It is the decision, and the principle of the decision, which binds me. The Vice-Chancellor says this: "In this will there is an evident and expressed intention that all the children who take in the first instance, and their children, should take estates for life. Now, in *Seaward* v. *Willock* the court was compelled to say that, as there was a single intent to create a succession of life estates, which was not warranted by law, Thomas Southcomb took an estate for life only in the property devised to him and his descendants." If I stop there, I understand the Vice-Chancellor to say, that there is a decision in *Seaward* v. *Willock* which would dispose of this case in a way the contrary of that in which he was going to decide it, and which he should have to follow but for a circumstance which he was going to mention; and he goes on: "But here, besides the intention to give life estates, there is an intention that the estates shall not go over until there is a general failure of issue. That circumstance, according to the judgment of Lord Ellenborough, C.J., in *Seaward* v. *Willock* and the decision in *Jesson* v. *Wright*, compels me to hold that the persons who are to take under this will take estates tail in the freeholds and copyholds."

Now it is not necessary for me to stop to consider why the presence of this gift over should make all that difference. If I had a case which was on all fours with *Mortimer* v. *West* I should follow *Mortimer* v. *West*, but as it appears to me it does not govern the case before me, for the reason that the cardinal circumstance on which the Vice-Chancellor decided the case, namely, that there was a gift over, does not here occur. As I read his judgment, in the absence of that, he would have decided it the other way on the footing of *Seaward* v. *Willock*. I ought so to decide it on the other cases which have been referred to. I am very sorry to come to this decision, because, as I understand, a disposition of the property has been made on the footing that the lady (Augusta), did take an estate tail, and that she barred it. The matter has never come before the court to decide, and I can only decide it as seems right to me.

I decide it on these grounds, that there are here simply successive limitations of life estates, not followed, as in *Forsbrook* v. *Forsbrook*, by anything indicating estates of inheritance, and that, apart altogether from that point, the beneficiaries who are to take are not such as would take under an estate in tail, but are a larger class—namely, all the children of every generation. I agree that that circumstance occurred in *Mortimer* v. *West*. How it was got over I do not pretend to understand, but inasmuch as there is not present here that which was relied on in *Mortimer* v. *West*, the presence of a gift over, I think it does not apply. Therefore I do not follow it.

I think I am bound to decide it according to my own judgment. I hold that on the death of Augusta there was an intestacy, and the heir-at-law of William Holmes, the testator, is entitled.

I ought, perhaps, to add that in *Monypenny* v. *Dering*, 2 D. M. & G., at p. 179, Lord St. Leonards refers to *Mortimer* v. *West* in terms which I will simply read without commenting upon them. He says: "The other case referred to was *Mortimer* v. *West*, before the the Vice-Chancellor, in which, though there were void estates for life, his honour relied upon a general gift over (whether properly or not I need not now consider); but it is no authority on which I can act for the general proposition which I do not think can be maintained." The general proposition will be found stated at the head of p. 178 in these words. He says: "It has also been argued here very ingeniously that wherever you find an estate tail given to the parent, either under an actual limitation which would admit of no difficulty, or by implication (as, for example, to A., and if he dies without issue to B., where an estate tail arises by implication from the gift over) if the preceding or following limitations in the will are to the children of that person, they may be rejected, and that it is utterly unimportant that successive estates are by these limitations attempted to be raised which would be void for perpetuity." "I know," says Lord St. Leonards, "of no such rule, and must deny that any such exists."

Solicitors, *Vandercom & Co.*

Chan. Div. } June 22, 23, 24, 25, 29; July 4.
Joyce, J. }

HODSON v. DEANS. (a.)

Mortgage to friendly society—Sale by mortgagees—Purchase by official of society—Sale set aside.

In a sale by mortgagees, who were the trustees of a friendly society, the mortgaged property was purchased by a member of the investment committee which had charge of realising the mortgage securities. At the sale the mortgagor had bid more than sufficient to cover principal, interest, and costs. In an action by the mortgagor against the mortgagees and the purchaser,

Held, that under the circumstances under which the sale was carried out the plaintiff had not been fairly treated; that the onus *lay on the defendants of proving the* bona fides *of the transaction, and that as this* onus *had not been discharged the sale must be side aside, following* Farrar *v.* Farrars, 37 *W. R.* 196, 40 *Ch. D.* 395, *and* Martinson *v.* Clowes, 30 *W. R.* 795, 21 *Ch. D.* 857.

Action by mortgagor to set aside sale of mortgaged property by mortgagee.

The plaintiff, Mrs. Hodson, was the wife of a gardener, and the defendants were, the trustees of the London United District of the Ancient Order of Foresters, and Drew, the purchaser of the mortgaged property from the society, who was also a member of the investment committee of the society which had the superintendence of the investment and re-investment of the funds of the society, and also of the

(a.) Reported by A. C. THOMAS, Esq., Barrister-at-Law.

getting in and the realization of all mortgage securities.

On the 6th of April, 1899, the plaintiff mortgaged five leasehold houses in Islington to the trustees of the London United District of the Ancient Order of Foresters to secure the sum of £1,300 and interest repayable by instalments. The plaintiff having fallen into arrears with her payment of instalments under the mortgage, the society recovered judgment against her for £82. A receiver was subsequently appointed, and the investment committee ultimately decided to sell the property, which was put up for sale by auction and sold for £1,475 to the defendant Drew, a member of the said investment committee. Shortly afterwards Drew obtained from the society an advance of £1,450 upon this property, coupled with a small collateral security. Notice of the intended sale was not given to the plaintiff, and she only heard of it by accident shortly before it took place, neither was she told what the reserve price was. Under these circumstances the plaintiff brought this action claiming a declaration that the sale was not binding on her, that she was still entitled to claim redemption of the mortgaged property, and an account of what was due under the mortgage.

Beddall, and *S. R. Earle*, for the plaintiff.—A mortgagee cannot sell to himself nor to his solicitor, whether he acts for himself or as an agent for a third party, nor to anyone connected with the sale on his behalf, and he must act in good faith: *Kennedy* v. *de Trafford*, 45 W. R. 671, [1897] A. C. 180. Drew knew the reserve price, and intended to buy the property for himself, while the plaintiff was left in ignorance. It is impossible to say that on the facts the sale took place in good faith, and it is therefore bad as against the plaintiff: see *Martinson* v. *Clowes*, 30 W. R. 795, 21 Ch. Div. 857. In an ordinary case the onus rests upon the mortgagor of proving absence of *bona fides*, but if there are suspicious circumstances the onus is shifted, and the burden of upholding the sale is thrown upon the mortgagee: *Farrar* v. *Farrars* (*Limited*), 37 W. R. 196, 40 Ch. D. 395. The property was sold at an undervalue, and the sale was chilled by the presence of many foresters and the fact that Drew, as member of the committee, was the principal bidder: *Twining* v. *Morrice*, 2 Bro. C. C. 326, at p. 331; *Nelthorpe* v. *Pennyman*, 14 Ves. 517. The investment committee could not have sold the property by private contract to themselves nor to one of their number: *Parnell* v. *Tyler*, 2 L. J. Ch. 195; *Tennant* v. *Trenchard*, L. R. 4 Ch. App. 537, 17 W. R. Dig. 172; *Guest* v. *Smythe*, 18 W. R. 742, L. R. 5 Ch. App. 551.

Hughes, K.C., and *Martelli*, for the defendants other than Drew.—So far as the trustees are concerned the sale was in good faith and perfectly proper. The fact that Drew was a member of the investment committee was immaterial unless it can be shown that he purchased on behalf of the committee. The fact that the sale took place by auction made the sale good, which might have been doubtful if it had taken place privately. The only duty that a mortgagee who is selling owes to the mortgagor is to act in good faith: *Kennedy* v. *de Trafford*; *Farrar* v. *Farrars* (*Limited*).

G. Lawrence, for the defendant Drew.—Drew is in the same position as the other defendants. The trustees were the true vendors. The plaintiff has failed to prove absence of *bona fides*. *Martinson* v. *Clowes* was a different case; it only decides that a mortgagee cannot sell to an agent employed to conduct the sale. A mortgagee can sell to an agent acting in other matters: *Nutt* v. *Easton*, 47 W. R. 430, [1899] 1 Ch. 873.

Beddall replied.

Cur. adv. vult.

July 4.—JOYCE, J.—The plaintiff in this case is a married woman of some business capacity, but of imperfect education. The mortgagees are an artificial person, a friendly society, and the hand by which they have acted in dealing with this mortgage is the investment committee. The defendant Drew, who is described as a builder, was a member of that committee. Immediately after a receiver had been appointed of the plaintiff's five houses, Drew, without informing his colleagues, privately made a careful inspection of the houses, which he decided to buy and make a profit out of for himself. On the 20th of June Drew called on the plaintiff, and there is a conflict of evidence as to what took place on that occasion. I see no reason to doubt the veracity of the plaintiff, her story being corroborated by evidence called on behalf of the defendants, and I am clearly of opinion that the defendant Drew's account cannot be accepted. The plaintiff says he came to see her under the name of Deans; he told her that a receiver had been appointed of the five houses, and that it was the duty of the society to buy them in. Drew denies that he said anything about buying in, but I am sure he did because of his own evidence. What was his motive in going to see the plaintiff? He says he went to put her on her guard, purely out of a friendly feeling for her, and that he had no idea of buying the property for himself. In my opinion all this is untrue. I think Drew went to the plaintiff in order to get the property for himself without a sale, but in this he did not succeed. On the 3rd of July there was a meeting of the investment committee, when it was decided to put the property up for sale. The society were entitled to sell, but they were under a duty to realize the property to the best advantage. According to the minute-book, which was not disclosed, although it is very important, on many occasions when mortgagors had fallen into arrears the society had allowed payment of the instalments representing principal to stand over. I think in this case the society would have been satisfied with the payment of the interest without proceeding to a sale. Who, then, instigated the sale? Two officials of the society could not swear it was not Drew who proposed it. In my opinion Drew proposed the sale and also nominated the auctioneer; at any rate, he was present when the instructions were given to the auctioneer. The reserve price was fixed, on the 17th of July, at £1,350. Some witnesses for the defendants have said that the reserve prices were always fixed by the trustees. I am satisfied that is not the case, and that the reserve prices are fixed by the investment committee, and I am confirmed in this by the entries in the minute-book. I think it is highly probable that Drew himself, directly or indirectly, fixed the reserve price at what he was prepared to give for the property. The sale was fixed for the 28th of July, but no notice of the sale was sent to the plaintiff; she only heard of it by the merest accident three days before it took place. Drew had informed the secretary that he was going in for the property, and he was the only member of the investment committee present at the sale. There were also many ordinary members of the society at the sale, a leaflet having been issued inviting them to attend. Drew was the principal bidder, with the result that the sale must have been discouraged. The bidding eventually resulted in a competition between Drew and the plaintiff, and it was eventually knocked down to Drew for £1,475, although the plaintiff had bid more than sufficient to cover the principal, interest, and costs of the mortgage. Drew knew what the reserve price was, but the plaintiff did not know. If

she had known she could have stopped the sale immediately the reserve price was passed. After the sale Drew said to the plaintiff: "I am sorry for you, but I told you I should have to buy them in." The plaintiff thought the property had been bought in on behalf of the society. Her solicitors subsequently applied for the name of the purchaser, but this was refused.

What is the law with reference to this case? It is true that a mortgagee is not a trustee for sale in the ordinary sense; he has rights of his own, but he is also under obligations to the mortgagor. The mortgagee in this case is not an individual, but an artificial person, a society acting through a committee, and an agent acting in the sale cannot as against the mortgagor sell to himself. In *Farrar* v. *Farrars (Limited)*, 37 W. R. 196; 40 Ch. D. 395, Lindley, L.J., at p. 409, said: "It is perfectly well settled that a mortgagee with a power of sale cannot sell to himself, either alone or with others, nor to a trustee for himself . . . . nor to anyone employed by him to conduct the sale. . . . A sale by a person to himself is no sale at all, and a power of sale does not authorise the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power." He also approved of *Martinson* v. *Clowes*, 30 W. R. 795; 21 Ch. D. 857, where the circumstances, although not precisely the same as the present case, were analogous. In that case North, J., said: "It is quite clear that a mortgagee exercising his power of sale cannot purchase the property on his own account, and I think it clear also that the solicitor or agent of such mortgagee acting for him in the matter of the sale cannot do so either." Then as to agents for sale, Lord Cottenham, *In re Bloye's Trusts*, 1 M. & G. 488, at p. 494, said: "If the principal is incapacitated, can the agent do that which the principal could not? The question arose (though I am not aware that it was the subject of decision) and was matter of observation by Lord Eldon in the case of *Downes* v. *Grazebrook*, 3 Mer. 200. There Lord Eldon laid it down, not as a new proposition, but as a necessary result of the doctrine of the court, that an incumbrancer with a power of sale was in the first instance a trustee for sale and being such was affected with all the disability of purchasing which any other trustee would be. That was the case there, and the only point calling for decision; but Lord Eldon alludes to the fact of the attorney purchasing, and asks the question (in a way in which those who are familiar with Lord Eldon's mode of putting a question may know what answer he would have given if he had been called upon to answer it) whether the attorney could do that which the principal could not; whether, if a party is incapacitated from purchasing, he can employ an agent to do that which he could not do himself; and whether that agent had a power to purchase which his principal had not—it would be the most absurd distinction in the world."

In this case I am satisfied, and find as a fact, that the property was sold at an undervalue, not of itself so great as to invalidate the sale, but still at an undervalue.

In my opinion the investment committee could not have sold privately to themselves either as a committee or as individuals at a price fixed by themselves, and the suggestion that this defect was cured by the fact that the sale was a sale by auction is not well founded. The fact that Drew was bidding probably chilled the sale; if he had ceased bidding the plaintiff would have purchased the property and the mortgage would have been paid off. The investment committee in fact sold to one of themselves after the plaintiff had bid more than sufficient to cover the principal interest and costs of the mortgage. I think that the principle laid down in *Farrar* v. *Farrars (Limited)*, applies to this case, and, therefore, the onus is thrown upon the defendants of proving that everything connected with the sale was fair and *bonâ fide*. Has that onus been discharged? Although no fraudulent conspiracy has been proved, there appears to have been a total absence of *bona fides* on the part of Drew. Whenever his interest was in conflict with that of the plaintiff, he preferred his own, and the defendants have not satisfied me that there was no collusion between the members of the committee and Drew. Under all the circumstances the case is a very suspicious one, and I distrust all the persons who were mixed up in the sale. I do not think the plaintiff has been fairly treated, nor that all the proceedings were *bonâ fide*. Therefore, the sale must be set aside and the defendants must pay the costs.

Solicitors for the plaintiff, *Churchman & Winser*.

Solicitor for the defendant Drew, *G. H. Daniell*.

Solicitors for the defendant trustees, *Whittington, Son, & Barham*.

Chan. Div.
Swinfen Eady, J. } Aug. 5, 6, 12, 1903.

In re MARQUIS OF ANGLESEY.
DE GALVE *v.* GARDNER. (*a.*)

Practice — Receiver — Equitable execution — Subsequent mortgagees and judgment creditors — Stop order — Charging order—Priority.

An order appointing a receiver prevents the debtor from dealing with the moneys, over which the receiver has been appointed, to the prejudice of the execution creditor, and prevents any subsequent execution creditor from gaining priority over the creditor obtaining the order, if at the date when the order appointing the receiver was obtained, the property of the judgment debtor can not be taken in execution or made available by any other legal process.

Persons obtaining charging orders or stop orders on a fund in court paid in subsequently to the date of the receiving order do not obtain a priority.

Summons to vary the master's certificate.

By his will, dated August, 1898, the fourth Marquis of Anglesey, bequeathed his residuary personal estate to the plaintiff, the Countess de Galve, and appointed the defendant Gardner his executor.

On the 13th of October, 1898, the testator died; on the 1st of May, 1899, an order for the administration of his personal estate was made in a creditor's action. The personal estate was paid into court to the credit of the action.

On the 18th of July, 1899, Hartog obtained an order appointing a receiver of the plaintiff's interest in the residuary personal estate, without prejudice, to the rights of prior incumbrancers. The receiver was directed to apply any moneys received by him in satisfying two judgments obtained by Hartog against the plaintiff in June, 1899. Notice of this order was given to the executor on the same day, and it was served on his solicitors.

On the 9th of February, 1901, an order on further consideration was made, directing that the amount of the testator's debts as certified by the master's certificate should be paid.

On the 10th of June, 1901, an order was made for

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

general administration of the personal estate and (if necessary) of the real estate.

On the 5th of June, 1902, an order was made in the creditors' action directing that the net residue after certain payments should be carried over to the credit of the present action, subject to restraints imposed by stop orders and charging orders obtained subsequently to the order on further consideration, by certain mortgagees and judgment creditors of the plaintiff.

On the 27th of February, 1903, the master made his general certificate, by which he gave Hartog priority in respect of his receivership order over the subsequent mortgagees and judgment creditors who had obtained restraints.

Poitevin, a judgment creditor who had obtained a stop order and a charging order, took out a summons to vary the master's certificate by postponing Hartog's claim. The mortgagees and the other judgment creditors who had obtained restraints adopted and claimed the benefit of the summons on this point.

Austen-Cartmell, for the plaintiff.

J. G. Wood, for Poitevin.

Maugham, for Hartog.

Ashton Cross, *Le Riche*, *Edward Bray*, *Ashworth James*, *Edward Beaumont*, and *William Baker*, for other parties.

SWINFEN EADY, J., read the following judgment: Maurice Hartog, on the 18th of July, 1899, obtained an order appointing a receiver of the Countess de Galve's interest in the residuary personal estate of the late Henry, fourth Marquis of Anglesey, without prejudice to the rights of prior incumbrancers; and such receiver was ordered to apply any moneys received by him in satisfying two judgments obtained by Hartog against the countess for £2,744 6s. 9d. Notice in writing of this order was given on the same day to the executor of the marquis.

The effect of an order appointing a receiver, by way of equitable execution, has been often considered. It does not make the execution creditor a secured creditor within the meaning of the Bankruptcy Acts, 1869-1883, and it does not create a charge: *In re Dickinson, Ex parte Charrington & Co.*, 37 W. R. 130, 22 Q. B. D. 187; *In re Potts, Ex parte Taylor*, 41 W. R. 337, [1893] 1 Q. B. 648. If the judgment debtor is a company, and an order to wind up the company be made before the order appointing a receiver has been acted on, the execution creditor will not be a secured creditor in the winding up; nor, in the absence of special circumstances, will the court, in the exercise of its discretion under section 87 of the Companies Act, 1862, allow the order to be further proceeded with: *Croshaw* v. *Lyndhurst Ship Co.*, 45 W. R. 570, [1897] 2 Ch. 154. But, on the other hand, the order appointing a receiver operates as an injunction to restrain the judgment debtor from himself receiving the moneys over which the receiver is appointed (*Tyrrell* v. *Painton*, 43 W. R. 163, [1895] 1 Q. B., at p. 206, *per* Lindley, L.J.), and in my opinion it prevents the debtor from dealing with the moneys to the prejudice of the execution creditor; and it also prevents any subsequent execution creditor from gaining priority over the creditor obtaining the order, if at the date when the order was obtained the property of the judgment debtor cannot be taken in execution or made available by any other legal process. The case of *Levasseur* v. *Mason & Barry*, 39 W. R. 596, [1891] 2 Q. B. 73 (in the Court of Appeal), shows the advantage of obtaining such an order. In that case a judgment creditor had obtained the appointment of a receiver of certain copper, which was subject to a lien, and subsequently the debtors were adjudicated to be in judicial liquidation in France, and the plaintiffs were appointed liquidators. The order, as varied by the Divisional Court and affirmed by the Court of Appeal, did not contain any direction to pay the judgment debt; and, moreover, nothing whatever had been received by the receiver before the appointment of the plaintiffs as liquidators. It was nevertheless held by the Court of Appeal that the execution creditors and not the liquidators were entitled to the proceeds of the copper, Lord Esher stating (at p. 80) that the receivership order had the effect of giving to the judgment creditor a right to have the property in dispute handed to him, after a certain difficulty had been got rid of. At the time when Hartog obtained the appointment of a receiver there was no other method open to him of taking in execution the share of the Countess de Galve in the residuary estate of the marquis. The difficulty in his way was that the debts of the marquis, legacies, and costs must be paid before the residuary estate which belonged to the countess could be ascertained. The case of *Dixon* v. *Wrench*, 17 W. R. 591, L. R. 4 Ex. 154, shows that he could not have obtained a charging order under the statutes 1 & 2 Vict. c. 110 and 3 & 4 Vict. c. 82. And there was not any fund in court which could be affected by any charging order or stop order, as at that date only £40,000 had been paid into court in the creditors' action of *Willmot* v. *Gardner*, and that amount was not nearly sufficient to pay the testator's creditors, who had the first claim upon that fund. The question then arises: Has any other person subsequently obtained priority over Hartog? It is well settled that an execution creditor is not in the position of a purchaser, and the rule of obtaining priority by notice does not apply to him. An execution creditor takes subject to all prior equities: *Scott* v. *Lord Hastings*, 6 W. R. 862, 4 K. & J. 633; *Arden* v. *Arden*, 33 W. R. 593, 29 Ch. D. 702, at pp. 709, 710. Even in the case of mortgagees, if when they take their security they give proper notice of it to the trustees, and the funds are not in court, they will not be postponed by a subsequent incumbrancer obtaining the first stop order after the subsequent transfer of the funds into court: *Livesey* v. *Harding*, 23 Beav. 141. The effect of a garnishee order is to give the garnishor a lien on the debt (per Cotton, L.J., in *In re Combined Weighing and Advertising Machine Co.*, 38 W. R. 233, 43 Ch. D., at p. 104. But a garnishee order can only bind so much of the debt as the judgment debtor can honestly deal with when the order is obtained and served and does not affect the claims of creditors in whose favour he has charged the debt, though they have not given notice of their claim: *In re General Horticultural Co.*, 34 W. R. 681, 32 Ch. D. 512; *Badeley* v. *Consolidated Bank*, 36 W. R. 745, 38 Ch. D. 238; *Davis* v. *Freethy*, 24 Q. B. D. 519, 38 W. R. Dig. 193. The same rule must be applied to charging orders obtained under the statutes 1 & 2 Vict. c. 110 and 3 & 4 Vict. c. 82 as to garnishee orders. They are both processes of execution to enforce payment of money under a judgment or order, and the execution creditor can only obtain what the judgment creditor can honestly give him. The persons who have obtained charging orders or stop orders on the fund in court, all of which has been paid in since the date of Hartog's order, have not thereby obtained any priority over him. It follows that, in my opinion, Hartog has the first claim to be paid out of the fund now in court. His equitable right is prior in date to that of any other party. To decide otherwise would be to hold that an order appointing a receiver by way of equitable execution has no effect whatever and still leaves the property to be dealt with by the debtor as he pleases, as, of course,

a residuary legatee may charge or incumber his interest before the net residue is ascertained. It was further urged on behalf of the applicant Leon Poitevin, No. 8 in the master's certificate, that he ought to be placed before No. 7 in the same certificate, John Blackburn, on the ground that his stop order was lodged at the Chancery Pay Office before Blackburn's stop order was lodged, but I have already pointed out that an execution creditor who obtains a charging order and a stop order does not gain any priority over a prior incumbrancer by lodging a stop order before the prior incumbrancer does so. The result is that the summons to vary fails; but as other incumbrancers have claimed the benefit of it, the proper order as to costs will be, to make the costs of the summons costs in the action.

Solicitors, *Langford & Fisher; Munns & Longden; McKenna & Co.; Denton, Hall, & Burgin; Hubbard & Shepard; Warrens; Farrer & Co.; Harries, Wilkinson, & Raikes; Fraser & Christian.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) July 14, 1903.

ANDREW *v.* RAMSAY. (*a.*)

Principal and agent—Secret commission—Breach of duty—Right of agent to commission.

The relation of principal and agent implies that the agent will act solely on behalf of his principal. If, therefore, in breach of his duty as agent, he receives a secret commission from the other side, he is not only liable to refund the secret commission, but he is not entitled to any commission; and the principal is entitled to recover any commission that he has paid the agent.

Appeal by the defendant from the county court judge at Clerkenwell.

The following facts appeared from the statement of counsel:

The plaintiff was a builder, and the defendants were auctioneers and estate agents.

In June, 1902, the plaintiff instructed the defendants to find a purchaser for certain property of which he was the owner at the price of £2,500, and agreed to pay them £50 as commission if a sale was effected.

The defendants in July put forward a Mr. Clutterbuck as purchaser, and after some negotiation the price was fixed at £2,100. Clutterbuck paid the defendants £100 deposit, out of which they handed to the plaintiff £50 and retained £50 as their commission. Clutterbuck subsequently gave information to the plaintiff that the defendants had received from him a sum of £20 as secret commission. An action was then brought to recover that sum, and the defendants paid that amount into court.

The plaintiff then brought this action to recover the sum of £50 which had been retained by the defendants as their commission.

The county court judge gave judgment for the plaintiff on the ground that he would have been justified in refusing to pay them their commission if he had been aware of the true facts.

The defendants appealed.

A. Neilson, for the defendants.—I admit that if the commission had not been paid the defendants could not have recovered it, but where the commission has been paid the plaintiff can only recover on a total failure of consideration, and that cannot be said to be the case here. The case of *Salomans* v. *Pender*, 13 W. R. 637, 3 H. & C. 639, is distinguishable, and the passage at the end of Martin, B.'s, judgment is in my favour.

Chester Jones, for the plaintiff, was not called upon.

Lord ALVERSTONE, L.C.J. — This is an action brought to recover the sum of £50, which had been retained by the defendant as remuneration for services rendered, or alleged to have been rendered, by him as agent to the plaintiff in respect of the sale of certain property. The claim is grounded on the fact that the defendant, in breach of his duty, accepted a secret commission of £20 from the purchaser. The first point taken on behalf of the defendant—that, as the plaintiff sued for and recovered the £20, the present action is not maintainable. I cannot accede to that view. The contract of sale entered into between the purchaser and the plaintiff is entirely distinct from the contract of agency between the plaintiff and defendant. The plaintiff recovered the £20 as part of the price at which his property had been sold to the purchaser, and that does not prevent him in any way from recovering the £50 if the defendant has not faithfully discharged his duty as agent. It is next urged that there has been no total failure of consideration, as a sale was in fact arrived at through the agent. This argument takes no account of the decision in *Salomans* v. *Pender*, where it was held that though the agent had effected a sale yet, as in doing so he had been guilty of a breach of his duty as agent, he could not recover his commission, and though the breach of duty in that case consisted in the agent selling to a company in which he was himself interested, the decision did not turn on the technical rule that an agent may not contract with himself, but upon the general principle that an agent must act fairly and impartially by his principal, and that, if he does not so act, he is not entitled to any commission. The case itself affords only one illustration of that principle. Martin, B., there said during the argument: "The plaintiff was employed to sell the property upon the best terms he could"; and subsequently, after Bramwell, B., had given expression to the narrower view that the agent, by offering to sell the property, undertook that a third person should be the purchaser, Martin, B., in the course of his judgment, quotes and adopts the following passage from Story on Agency, s. 210 (9th ed.), p. 239: "In this connection also it seems proper to state another rule in regard to the duties of agents which is of general application — that in matters touching the agency agents cannot act so as to bind their principals where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration that the principal bargains in the employment, for the exercise of disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. It is a confidence necessarily reposed in the agent that he will act with a sole regard to the interest of his principal so far as he lawfully may; and even if impartiality could possibly be presumed on the part of the agent where his own interests are concerned, that is not what a principal bargains for, and in many cases it is the very last thing which would advance his interests. The seller of an estate must be presumed to be desirous of obtaining as high a price as can fairly be obtained therefor, and the purchaser must equally be presumed to desire to buy it at as low a price as he may." Where the agent of the seller does not act solely in the interests of his principal, no one can say that the price which he obtains is the best price obtainable. A faithful servant might have obtained a better. The principal is entitled to expect that the agent will act fairly and honestly for

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

his exclusive advantage, and if the agent works for the other side or for himself so as to sacrifice his principal's interests, he is not entitled to any commission. The principle laid down in *Salomons* v. *Pender* clearly applies to this case, though it does not precisely cover it.

WILLS, J.—I am of the same opinion. I adopt the reasons which have been given by my lord, but I think there is another reason why the plaintiff is entitled to recover in this action. The £100 deposit was paid to the defendant by Clutterbuck as part of the purchase-money of the plaintiff's property. The plaintiff allowed the defendant to retain his commission of £50 out of the £100 so deposited, because he supposed that the defendant had duly earned his commission. If he had known that the defendant had been acting improperly, he might have insisted on his paying over the whole £100, and the defendant at best could only have set off a claim for £50 as commission. If the defendant had brought an action against the plaintiff for the £50, he clearly could not have recovered, and he ought not to be in any better position merely because he happens to be in possession of the money.

The defendant is not entitled to retain the sum in dispute, and must account for it to the plaintiff.

CHANNELL, J.—I agree. I think there are many grounds on which the claim might be placed, but I am content to adopt those which have been stated by my learned brothers.

Appeal dismissed.

Solicitors for defendants, *Whittington, Son, & Barham.*

Solicitors for plaintiff, *Lewis & Sons.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) June 30, 1903.

KESLAKE *v.* THE BOARD OF TRADE. (*a.*)

Ship—Seaman—Master and servant—Illegal deductions—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 31, 221, 232.

No deduction from the wages of a seaman can be made for the offence of desertion, except by a court of summary jurisdiction, in accordance with sections 221 *and* 232 *of the Merchant Shipping Act,* 1894; *and any private arrangement with the seaman that such deduction should be made is illegal.*

Case stated by the magistrate of Thames police-court.

The special case set out the following facts:

One Charles Mellen signed an agreement, as provided by 57 & 58 Vict. c. 60, s. 115, to serve as a fireman on board the steamship *Saxony*, owned by D. MacIvor, of Liverpool, on the 14th of June, 1902, for a voyage from Liverpool to the River Plate and back for a period not exceeding twelve months, at the rate of £4 per month. He received an advance of £3 10s.

On the 15th of July, 1902, at the arrival of the steamship *Saxony*, C. Mellen deserted the ship, and in consequence the owners were compelled to engage a fireman as substitute and to pay him the sum of £4 10s. per month, being the rate of wages prevailing at the port. In consequence of this breach the owners of *The Saxony* incurred a loss of 15s. 3d.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

On the 21st of October, 1902, C. Mellen signed an agreement to serve as fireman on board the steamship *Urmston Grange* at Buenos Ayres, at the rate of £4 10s per month.

On the 15th of December, 1902, *The Urmston Grange* arrived at the West India Docks, and the appellant, W. Keslake, the master of the steamship *Urmston Grange*, was then made aware of C. Mellen's desertion by a letter from the Shipping Federation.

By that letter, after setting out the desertion and the penalty for desertion under section 221 of the Merchant Shipping Act, 1894, and that it was the intention of the federation to prosecute in the present instance, if necessary, the appellant was requested on behalf of the owners of *The Saxony* to withhold payment of the wages due to Mellen pending the issue of proceedings which were contemplated. The letter further contained the following paragraphs:

"The amount of the owner's claim is 15s. 3d.; please give the above-named the option of agreeing to one of the following courses: (*a*) If the balance of wages due exceeds the amount of the owners' claim by £2 or more, give him the opportunity of voluntarily agreeing to the deduction of the claim from such balance of wages. (*b*) If the balance of wages is less than or does not exceed by more than £2 the amount of the owners' claim, give him the opportunity of voluntarily agreeing to the deduction of all but £2 from such balance of wages."

C. Mellen then agreed to 15s. 3d., the amount of the loss incurred by the owners of *The Saxony*, being deducted from his wages earned on board *The Urmston Grange*, and signed a form of authority which had also been read to him, and which he thoroughly understood.

In consequence of this agreement and authority, the appellant entered in the account of wages on the form approved by the Board of Trade under the heading "Other Deductions," the words following "Deducted by your Authority, 15s. 3d.," and handed the said amount of wages to C. Mellen in pursuance of section 132 of the Merchant Shipping Act, 1894, who raised no objection thereto.

On the 11th of December, 1902, the appellant attended at the offices of the Board of Trade for the purpose of paying off C. Mellen and the other members of the crew of *The Urmston Grange*, in accordance with section 131 of the Merchant Shipping Act, and C. Mellen likewise attended.

The superintendent then read to the appellant sub-section 1 of section 221 of the Merchant Shipping Act, 1894, and expressed his view that the deduction of 15s. 3d. from the wages of C. Mellen was not legally made, and refused to accept the said wages with the deduction aforesaid, or to allow them to be paid to the said C. Mellen in his presence.

The superintendent then left the office, and the appellant, while still in the office, but in the absence of the superintendent, paid the balance after deducting the 15s. 3d. to C. Mellen, who signed the account of wages.

The magistrate was of opinion that a forfeiture for desertion of any part of a seaman's wages must be determined by a court of competent jurisdiction in accordance with the provisions of sections 221 and 232 of the Merchant Shipping Act, 1894; that it could not be the subject of private arrangement, and that the deduction of 15s. 3d. from the seaman's wages was illegal. He accordingly convicted the appellant. He would not have so convicted him if he had not agreed with the view taken by the superintendent of mercantile marine, for if the appellant was legally entitled to have made the deduction from the seaman's wages, he should have held (as was contended by counsel for the respondents) that the superintendent should have

afforded the appellant facilities for paying the wages less the deduction in his presence, and that the payment must be taken to have been so made.

The question for the opinion of the court was, whether the magistrate's determination, based on his construction of the aforesaid sections of the Merchant Shipping Act, 1894, was correct in point of law.

J. A. Hamilton, K.C. (*Noad* with him), for the apellant.—This was simply a compromise by the owners of their rights under section 226 with the seaman and did not effect the rights of the Board of Trade under section 221 to take criminal proceedings. The superintendent was, therefore, wrong in refusing to be present.

Sir E. Carson, S.G. (*Sutton* and *Howard Smith* with him), for the Board of Trade, was not called upon.

Lord ALVERSTONE, L.C.J.—I am of opinion the decision of the magistrate was perfectly right, and for the reasons he has given. I only desire it should not be supposed that anything I may have said in the course of the case for the purpose of following counsel's argument is to be taken as in any way expressing what would be my own view in any other case.

In this case the captain was summoned for not paying the seaman his wages in the presence of the superintendent of marine, and if wages are paid otherwise than as provided by section 131, that is to say, through or in the presence of the superintendent of marine, the captain is clearly liable to a penalty. Those words are not merely formal words to show that it does not pass through the hand of a crimp or anybody who will deduct a portion of the money, but it is obvious the superintendent is there for another purpose. An account has to be delivered, and any deduction from the wages must appear in this account. Now, of course the superintendent would, on the face of the document, see nothing but "deducted by your authority, 15s. 3d." That might mean anything, but it was in fact a deduction made in pursuance of the bargain between the captain and the fireman, a bargain which I shall, for this purpose, assume he understood. That being so, what did the bargain amount to. By section 221 of the Merchant Shipping Act it is provided that if a seaman commits the offence of desertion he shall be liable to forfeit all or any part of the effects he leaves on board, and of the wages he has then earned, and also, if the desertion takes place abroad, the wages he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him. By section 232, "Where any wages or effects are under this Act forfeited for desertion from a ship, those effects may be converted into money, and those wages and effects, or the money arising from the conversion of the effects, shall be applied towards re-imbursing the expenses, caused by the desertion, to the master or owner, and, subject to that re-imbursement, shall be paid into the Exchequer and carried to the Consolidated Fund." Therefore, in any proceedings for desertion before the magistrate the claim of the owners of *The Saxony* would be a first charge upon any money the magistrate might think fit to direct should not be paid to the seaman, and any balance would be payable to the Exchequer. It is plain, therefore to my mind that this was not merely a bargain with reference to the claim of the owners of *The Saxony*, but one which placed the seaman in a different position with reference to the consequences of his desertion as provided for by sections 221 and 232; in other words, it dealt with his liabilities under the desertion without the sanction of the court. Now, having regard to what is shown on the face of the bill, I think the presence of the superintendent would have been to sanction certainly directly—I think, to a certain extent, directly—the legality of the deduction. That being so, the superintendent was right in saying, "I will not be a party to a deduction made upon the basis of this statement, and therefore I decline to be present when the wages are paid." The man is then paid without the superintendent being present, and, that not being a lawful payment, the captain took the responsibility of paying it. I only desire to add that what I said does not conflict in any way with anything in section 226. As to what may be the rights of the shipowner, apart from those reserved to him by section 226, I express no opinion. In my opinion those rights have no bearing upon sections 131, 221 and 232, under which this arrangement purported to be carried out. For these reasons I am of opinion the learned magistrate was right in the view he took.

WILLS, J.—I am of the same opinion, and I also wish to limit my judgment to the facts of this case. Section 226 does undoubtedly preserve certain civil remedies to the owner, and whether there is any objection to their application in such a case as this I do not know; but it has been suggested that, even on that point, there might be a question, and as we have not had our attention directed to anything which might conflict with the *primâ facie* meaning of section 226, I desire to say that I express no opinion that under section 226 exactly what has been done here could be done, if there were nothing in the agreement amounting to a compromise of the criminal proceedings. That must be considered when it arises, but the present case is to my mind quite plain. The letter which has been read, and after reading which the seaman signed the authority, seems the clearest possible intimation that if he signed that authority the owners of *The Saxony* would not prosecute him for desertion, and inasmuch as they were the only people who were likely to prosecute, that is a pretty strong consideration leading him to agree to this, because by so doing he would get rid of the criminal proceedings. It is quite true that under section 232, sub-section 1, all that the owners of *The Saxony* would get would be the 15s. 3d., but it is also clear that if proceedings were taken under section 221 nothing could prevent the magistrate, if he thought right, from forfeiting the whole of the seaman's wages. Therefore the bargain is one by which he gets rid of the liability to criminal proceedings, which might result in a fine or the forfeiture of the whole of his wages. I think, therefore, the superintendent was justified in refusing to be present when the wages were paid under such circumstances; it is plain his functions under the Act are much more than merely to be present; they are of a different character to that. For these reasons I agree with the magistrate in the decision which he has arrived at.

CHANNELL, J.—I am of the same opinion. I think the magistrate was quite right in saying that a forfeiture for desertion of any part of a seaman's wages must be determined by a court of competent jurisdiction, and cannot be the subject of private arrangement. It is clear that these provisions as to forfeiture are in the nature of criminal proceedings. The forfeiture is a penalty according to the section, and it speaks about the offence, and so on. There can be no doubt about that part of the case. There can be equally no doubt that the private arrangement which was come to in this case was in the nature of an arrangement with respect to forfeiture of the seaman's wages. The document refers to that, and it refers

not only to the wages earned in the first ship, but to those earned subsequently, and it asks the owners of *The Urmston Grange* if the man does not agree to the compromise to retain all his wages earned in the second ship.

The result, therefore, is, that it is an arrangement settling what is to be done with respect to that claim for forfeiture, though, no doubt, the seaman fully knew what he was doing.

As to the case which might arise, although it would not be so effective—namely, the Shipping Federation sending to the master of the second ship a notice to the effect that the seaman has committed a breach of contract, and would be liable to be sued in the county court, and requesting the seaman to agree that those damages should be deducted from his wages, I do not think it would be right for the court to express any opinion. All we do say is, it would be a very different case to the present.

Appeal dismissed.

Solicitors for the appellant, *Botterell & Roche.*

Solicitor for the respondent, *Solicitor to the Board of Trade.*

Court of Appeal.

From K. B. Div. Collins, M.R., and Mathew, L.J.) Oct. 28.

CHESTERFIELD RURAL DISTRICT COUNCIL *v.* NEWTON AND OTHERS. (*a.*)

Practice—Costs—Extraordinary expenses of repairing highway—Action in High Court—Sum not exceeding £250 recovered—High Court costs—Locomotives Act, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-section* 1 (a).

By section 12, *sub-section* 1 (a), *of the Locomotives Act,* 1898, *extraordinary expenses incurred in repairing a highway are not recoverable in a summary manner, but "may be recovered, if not exceeding £250, in the county court, and if exceeding that sum, in the High Court."*

A local authority brought an action in the High Court to recover a sum exceeding £250 for extraordinary expenses in repairing a highway. At the trial the jury awarded a sum of £60, and judgment was entered for the plaintiffs, with costs. The master taxed the plaintiffs' costs upon the High Court scale, and the judge at chambers refused to direct a review of taxation.

Held, that the High Court had jurisdiction to entertain the action, and as the trial was with a jury the costs followed the event, and the plaintiffs were entitled to High Court costs.

Appeal from an order of Walton, J., at chambers.

The plaintiffs brought an action in the King's Bench Division against three defendants to recover the sum of £732 for extraordinary expenses alleged to have been incurred in respect of the repair of a highway owing to the damage caused to it by extraordinary traffic conducted by the defendants along it. In the statement of claim the sum claimed as against the defendant Newton was £634, and the balance against the other two defendants. These latter defendants settled with the plaintiffs, and the action proceeded as against Newton. At the trial, before Ridley, J., and a jury, the jury found that the weight was excessive and the traffic extraordinary, and they assessed the expenses at £120. Of this sum it was agreed that £60 was attributable to the traffic belonging to the defendant Newton, and judgment was entered for the plaintiffs against him for that sum with costs, the learned judge certifying for costs upon the High Court scale if it were necessary for him to do so. Upon the taxation the master taxed the plaintiffs' costs upon the High Court scale, and Walton, J., refused to direct a review of taxation. The defendant Newton appealed.

By section 23 of the Highways and Locomotives (Amendment) Act, 1878, "where by the certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner" the amount of such expenses.

By section 12, sub-section 1, of the Locomotives Act, 1898, "Section 23 of the Highways and Locomotives (Amendment) Act, 1878 (which relates to the recovery of expenses of extraordinary traffic) shall be amended as follows: (*a*) Expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding £250 in the county court, and if exceeding that sum in the High Court."

G. A. Bonner (*Hugo Young, K.C.*, with him), for the defendant Newton.—The judge at the trial has no power, when £250 or under is recovered, to award costs upon the High Court scale. Section 12, sub-section 1 (*a*), of the Locomotives Act, 1898, gives the county court exclusive jurisdiction up to £250. The words "may be recovered" mean "must be recovered." The right of a plaintiff to costs depends upon the amount recovered, not upon the amount claimed: *Solomon* v. *Mulliner*, 49 W. R. 364, [1901] 1 K. B. 76. This is not an action of tort within section 116 of the County Courts Act, 1888, and that section does not apply to such a claim. The action is founded upon a statute. The user of the highway was not wrongful. The user was a lawful user subject to the statutory obligation to pay for the damage done to it.

Etherington Smith and *T. H. Walker*, for the plaintiffs.—The judge at the trial gave judgment for the plaintiffs "with costs"; and, apart from the certificate, the plaintiffs were entitled to costs upon the High Court scale. By ord. 65, r. 1, the action having been tried with a jury, the costs follow the event unless "good cause" is shown to deprive the plaintiffs of costs. No good cause was shown here. Nor is there any Act or rule to the contrary. Section 116 of the County Courts Act, 1888, does not apply, because even if this was an action of tort, the amount recovered was not less than £20. There is no other statute that could be said to apply. The mere fact that the action might have been commenced in the county court does not of itself, apart from section 116 of the County Courts Act, 1888, affect the right to costs. The Locomotives Act, 1898, is silent as to costs. The plaintiffs are therefore entitled to High Court costs. This is not like an ordinary action, as the local authority had to act upon the certificate of their surveyor and bring an action for the amount certified by him.

They also referred to section 5 of the Judicature Act, 1890.

Bonner replied.

COLLINS, M.R.—In my opinion this appeal fails. The action was brought by a local authority under section 23 of the Highways and Locomotives (Amend-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

ment) Act, 1878, to recover the amount of certain extraordinary expenses incurred in repairing the damage done to a highway owing to the defendants sending extraordinary traffic along it. The main provisions of that section stand, but the remedy is dealt with by section 12 of the Locomotives Act, 1898, which by sub-section 1 (a) provides that the expenses under section 23 of the Act of 1878 shall cease to be recoverable in a summary manner, but may be recovered if not exceeding £250 in the county court, and if exceeding that sum in the High Court. As has been pointed out in the course of the argument, the certificate of the surveyor is a condition precedent to the bringing of the action, and the certificate of the surveyor, as a matter of fact, stated the amount of the expenses at £732. In these circumstances this action was brought to recover that amount. The jury fixed the amount at £120, and by agreement, of this sum £60 was apportioned as payable by the defendant Newton. The learned judge accordingly gave judgment for the plaintiffs for £60 as against Newton with costs, and gave a certificate for High Court costs in case it was necessary. The costs were accordingly taxed on the High Court scale, and the judge at chambers refused to direct a review of taxation. The defendant appeals here.

It is said that the judge at the trial had only jurisdiction to award county court costs upon the ground that section 12 of the Locomotives Act, 1898, provides that expenses under section 23 of the Act of 1878 "may be recovered if not exceeding £250 in the county court, and if exceeding that sum in the High Court." The argument is that the word "may" there means "must," and as the amount recovered did not exceed £250, though the claim exceded £700, the action could only have been brought in the county court, and the only costs recoverable were county court costs. It seems to me to be clear that this is an action which, under section 12 of the Act of 1898, could have been brought in the county court. It seems to me to be equally clear that this is an action which the High Court had jurisdiction to entertain. It is argued on behalf of the plaintiffs that the case falls within ord. 65, r. 1, that the action was one which the High Court had jurisdiction to entertain, and that, as it was tried with a jury, the costs must follow the event unless good cause be shown for depriving the plaintiffs of costs. This action, as I have said, might have been brought in the county court, the amount recovered not exceeding £250, but it is said that, apart from special legislation, that option cannot affect the right of the plaintiffs to costs when the action is brought in the High Court. In support of that argument the instance was given of an action of tort where a sum between £20 and £50 is recovered, which might have been brought in the county court, and yet the plaintiff would get High Court costs. It is clear that the fact that an action could have been brought in the county court does not affect the right to costs unless there is some special legislation dealing with costs in such a case. The only special legislation referred to is section 116 of the County Courts Act, 1888. That section obviously has no application to this case because the amount recovered exceeds the limits specified in that section. But assuming that the case, as regards amount, comes within section 116, then the act complained of either is not a tort, in which case it stands outside section 116, or it is a tortious act because it is extravagant, unreasonable, and excessive, in which case it comes within section 116, and the learned judge has exercised the discretion conferred upon him by that section and has given a certificate for High Court costs. In either view the plaintiffs are entitled to High Court costs. The costs must, by ord. 65, r. 1, follow the event, and there is no statutory provision disentitling the plaintiffs to High Court costs. With reference to section 5 of the Judicature Act, 1890, that section seems to me to have no application. The provisions of that section are subject to the Judicature Acts and rules of court, and, as this case was tried with a jury, ord. 65, r. 1, applies and deals with the costs.

For these reasons I think that the appeal fails.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Stevens, Sons, & Parkes*, for *Jones & Middleton*, Chesterfield.

Solicitors for the defendant, *Stanley Evans & Co.*

From K. B. Div. (Collins, M.R., and Mathew, L.JJ.) } July 29, 1903.

In re AN ARBITRATION BETWEEN STONE AND HASTIE. (a.)

Metropolis—Building—Raising party-wall by building owner—Lease of premises—Subsequent user of raised party-wall by adjoining owner—Right of lessee to proportion of expense of raising wall—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 88-95.

The owner of a house in London, acting under the powers of the London Building Act, 1894, *raised at his own expense the party-wall separating that house from the adjoining one. Subsequently he granted a lease of the house to the appellant for twenty-one years. The respondent, who was the owner of the adjoining house, being desirous of rebuilding the house, served notice on the appellant of the work which he proposed to execute, and which included the use of the raised party-wall beyond the use thereof made by him before the alteration. The appellant did not express his consent to the notice, and the matters in difference were thereupon referred to arbitration in accordance with the provisions of the Act. The appellant claimed* (inter alia), *under section* 95, *sub-section* 2, *of the Act, a proportion of the original expense of raising the party-wall, such claim being made in respect of the increased user thereof by the respondent. The arbitrators awarded the appellant a sum of money in respect of this claim.*

Held, that the arbitrators had no jurisdiction to entertain the claim, as the Act only contemplated a proportion of the original expense of raising the party-wall being paid to the person who actually incurred the expense, and not to a person who became tenant after the expense had been incurred.

Appeal from an order of Walton, J., at chambers, upon an application under section 12 of the Arbitration Act, 1889, for leave to enforce an award made under the London Building Act, 1894.

On the 24th of June, 1897, the appellant Hastie took a lease of 17, Queen-street, Mayfair, from certain trustees for a term of 21 years at a rent of £300 a year. Before the date of the lease the trustees had at their own expense, under the powers of the London Building Act, 1894, raised the party-wall between 16 and 17, Queen-street, for the purpose of building new rooms at the back of No. 17. The trustees were not the owners of No. 16. Subsequently the respondent Stone acquired a long lease of 16, Queen-street, and being desirous of building upon the premises he served notice upon the appellant, under section 90 of the London Building Act, 1894, of his intention to do certain works, particulars of

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

which were stated, and which involved the rebuilding of No. 16 and the use of the party-wall beyond the use which had been made of it by the owners of No. 16 before it was raised by the trustees. The appellant did not within fourteen days express his consent to the notice—that is to say, to the execution of the works, and therefore by virtue of section 90, sub-section 7, of the London Building Act, 1894, he was taken to have dissented therefrom, and a difference was deemed to have arisen between the appellant and the respondent. Each party thereupon appointed a surveyor under section 91 of the Act to settle the matter in difference, and the two surveyors appointed a third surveyor. The appellant made two claims against the respondent: (1) For damage to No. 17 by and during the building operations; and (2) for a proportion of the cost of raising the party-wall, this latter claim being made in respect of the extra use made by the respondent of the party-wall beyond the use made of it before it was raised by the trustees. Upon the 25th of April, 1903, the surveyors made an award, in which all three concurred, as follows: "(1) That the sum of £18 be immediately paid by the building owner (the respondent) to the adjoining owner (the appellant) in full discharge of all damage caused to the premises of the adjoining owner by reason of the works in connection with the new buildings. (2) That the sum of £38 10s. 6d. be paid by the building owner to the said adjoining owner in payment of the extra use made of the said wall as a party-wall for the new building in excess of the portion previously used as a party-wall for the old buildings formerly occupying the site of No. 16, Queen-street. (3) That the costs of this award, together with a sum of ten guineas towards the fees of the surveyor to the adjoining owner, and the fees of the third surveyor amounting to eight guineas shall be paid by the building owner, who shall also pay the fees of his surveyor."

On the 22nd of May the appellant took up the award, and after the expiration of fourteen days from that date (within which time either party could have appealed from the award to the county court under section 91, sub-section 2, of the Act, but no appeal was brought) the appellant took out a summons at chambers under section 12 of the Arbitration Act, 1889, for leave to enforce the award. It appeared that the trustees had made a claim upon the respondent in respect of the increased user of the party-wall, but it did not appear when the claim was made.

The master made an order giving leave to enforce the award. The respondent appealed to the judge at chambers from that order, contending that in awarding any sum in respect of item (2) in the award the arbitrators had acted without jurisdiction, and the learned judge was invited by both parties to decide the question whether or not the award was, as to the £38 10s. 6d. in item (2), *ultra vires* and void. There was no dispute as to items (1) and (3) of the award.

Walton, J., held that the arbitrators had no jurisdiction under the Act to award to the appellant a contribution towards the expense of raising the party-wall, where the trustees had not assigned to the appellant their right to recover from the owners of No. 16 a proportion of the expense incurred by them in raising the party-wall—there being nothing, he said, in the Act which made the award binding on the trustees. He accordingly held that the award was *ultra vires* as to the item of £38 10s. 6d., and as the respondent had offered to pay the amounts awarded other than the sum of £38 10s. 6d., he made an order that all proceedings on the award should be stayed upon payment by the respondent to the appellant of the amounts admitted to be due.

Hastie appealed.

July 28.—*E. W. Hansell*, for the appellant.

Clavell Salter, for the respondent.

July 29.—COLLINS, M.R.—This is an appeal from the decision of Walton, J., upon a question arising between two occupiers of adjoining houses with regard to the expenses incident to the operations in connection with a party-wall. The appellant Hastie is tenant for twenty-one years of 17, Queen-street, Mayfair. His lessors, who are trustees, and who are the owners of a long lease of the premises, had before the lease to Hastie made certain alterations in the party-wall separating No. 17 from No. 16. These alterations embraced the raising of the party-wall to a considerable height above its original height. After the lease to Hastie the respondent Stone acquired a long lease of the adjoining house, No. 16, and he began building operations, practically pulling down No. 16 and rebuilding it to a height above its original height. This involved an increased user of the raised party-wall built by Hastie's lessors.

Now there are provisions in the London Building Act, 1894, specifying the rights of the parties as to the user of a party-wall, and those provisions include the case of one owner raising the party-wall for his own benefit alone at a time when the adjoining owner may not contemplate the user of the raised portion of the wall. The Act also contains provisions to meet the case of the adjoining owner subsequently using the portion of the wall so raised, such provisions dealing with the question as to what proportion of the expense of building it up to its increased height shall be borne by the adjoining owner, who is then about to make use of the increased height of the party-wall. In the present case Stone, in carrying out his building operations, had to interfere with and make use of the party-wall, both the old part and the added part. The scheme of the Act seems to me to be to lay down a code as to what the two adjoining owners may do with respect to the party-wall which separate their two houses. There are things which the building owner may do, and there are reciprocal rights conferred upon the adjoining owner, and there are provisions for each giving certain notices, the one of what he proposes to do, and the other of what he claims to have done. Then there are provisions for the settlement of disputes by arbitration. Those are provisions for adjusting the rights of the parties where there is an interference or proposed interference with the party-wall. That is one set of provisions. Another set of provisions deals with the rights of building owners *inter se* where certain works are undertaken for the joint benefit and at the joint expense of both. There are provisions as to each bearing part of the expense, and as to what each may do. Where an owner has for his own benefit added to the height of the party-wall, it is obviously convenient that he should bear the whole of the expense, at any rate, in the first instance, and that, if afterwards the adjoining owner makes use of the increased height of the wall, it is right that he should contribute towards the expense. That is a totally distinct and parallel set of provisions, and those provisions are not covered by the earlier provisions dealing with the case where one owner builds and the other has reciprocal rights conferred upon him.

The question which we have to consider is, what rights these two persons respectively have, in view of the fact that the house of which Hastie is the tenant is next to the house where the building operations are going on. That is provided for by the first set of sections. Notices were given by Stone, and as Hastie did not consent thereto, he must, by section 90, sub-section 7, of the Act, be taken to have dis-

sented therefrom. A dispute thus arose, and the jurisdiction of the arbitrators was let in. They had, however, no jurisdiction to deal with anything beyond what was so submitted to them, and the sections do not contemplate their having any jurisdiction to deal with the initial expense of raising the party-wall. The arbitrators, in their award, have included a claim made by Hastie for a proportion of the expense of building the enhanced party-wall by his lessors, an expense with which he himself had nothing to do. Stone objected to the claim, and contended that it was outside the scope of the reference; that his obligation was, not to Hastie, but to Hastie's lessors; and that, therefore, the arbitrators had no jurisdiction to award any sum in respect thereof. That is the point. Hastie having taken steps to enforce the award, Walton, J., by invitation of the parties, determined the question whether the arbitrators had jurisdiction. The learned judge, in a very clear and careful judgment, held that they had not. Against that decision the present appeal is brought.

I will now shortly go through the material sections of the London Building Act, 1894. Section 87 deals with the rights of owners of adjoining lands respecting the erection of walls on the line of junction. Section 88 deals with the rights of building owners, and section 89 with the rights of adjoining owners. Section 90 specifies the rules as to the exercise of rights by building and adjoining owners. That section deals with the giving of notices and requisitions by the building owner and adjoining owner respectively. Section 91 deals with the settlement of differences between the building and adjoining owners by arbitration, and sub-section 2 provides that the award shall be conclusive and shall not be questioned in any court, with this exception, that either of the parties may appeal therefrom to the county court within fourteen days from the date of the delivery of the award. That provision gives rise to one of the contentions here. It is not necessary to refer particularly to sections 92, 93, and 94. There are next a series of provisions dealing with the case of a party-wall being built or raised by one owner and the other owner not using it at the time, but doing so subsequently. Section 95 is the section which raises the main point. That section provides that if at any time the adjoining owner make use of any party structure or external wall (or any part thereof) raised or underpinned as aforesaid, beyond the use thereof made by him before the alteration, there shall be borne by the adjoining owner from time to time a due proportion of the expenses, having regard to the use that the adjoining owner may make thereof, of raising or underpinning it. Those expenses are, by the terms of the Act, to be borne by the building owner when raising the party-wall, an operation which will give the adjoining owner the opportunity at a future time of making use of that addition to the party-wall, the adjoining owner not being desirous of doing so at the time of the building, and therefore not being called upon at that time to contribute towards the expense. The section gives a right to recoupment in such a case. To whom is the recoupment to be made? Clearly the Act contemplates recoupment to the person who has incurred the expense. There is no provision which, in terms, seems to contemplate that a person who becomes a tenant after the works are completed should recover any part of the expense. There is another section which points in the same direction. Section 99 provides that where the adjoining owner is liable to contribute to the expenses of building any party structure, until such contribution is paid the building owner at whose expense the same was built shall stand possessed of the sole property in the structure. So that the property in the party structure is placed in the building owner who has built it, and his tenant acquires no property in it at all. Obviously the scheme of the Act is to recoup the person at whose expense the party-wall is raised, and not anyone else. It seems to me that the tenant would have as much right to ask to be recouped part of the expense of building the old party-wall as to ask for part of the expense of raising the party-wall. The scheme of the Act is to regulate the rights of adjoining owners at the time when the party-wall is raised, and the Act has narrowed the matters in dispute in the arbitration to the statutory differences, which do not include the claim of the tenant to any part of the expense of raising the height of the party-wall. The arbitrators, therefore, had no jurisdiction to include it, and the learned judge was right in holding that they had no jurisdiction to deal with the matter.

MATHEW, L.J., read the following judgment: I agree in the judgment of the Master of the Rolls. The definition of owner in section 5, sub-sections 29, 32, treats the term as applicable to owner in the ordinary sense and to occupying tenant other than a tenant from year to year or a tenant at will. It is not disputed that under section 90, which refers to occupiers, Hastie is entitled to the sum of £18 which the arbitrators have assessed as compensation for the loss sustained by him by the alterations made by Stone in the party-wall. It is said that Hastie is further entitled to compensation for the additional use of the party-wall. The argument was this: The lessors of Hastie would be, if they were in possession, entitled to claim compensation for the additional burden upon their estate consequent upon the raising of the party-wall. The land upon which half the party-wall stands has more to bear, and for this, which is in the nature of an easement, the owner, it is argued, should be paid by Stone; but as the land is let to Hastie, it is said that he is entitled to share in the compensation, and that the arbitrators have finally fixed what his share in money should be—viz., £38 10s. 6d. Now, it may be questioned whether the trustees are entitled to any compensation from Stone. An examination of the sections as to the rights of building and adjoining owners would seem to show that merely raising a wall may not be provided for. But assuming there would be a right upon user to compensation in the owner, the statute contains no provision transferring the whole or any part of the right to his tenant. It is difficult to see how the value of the tenant's supposed share could be estimated in money. If the party-wall be properly raised, the tenant is in no worse position than if it had not been altered. There is no good reason for supposing that the Legislature intended to recognize any such right in a tenant. According to the argument, this right would be possessed by any tenant who held for more than a year, a result which would seem to be altogether unreasonable. For these reasons, I concur in the judgment of the Master of the Rolls that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Hasties.*

Solicitors for the respondent, *Le Brasseur & Oakley*, for *Stone, King, Stone, & Thomas*, Bath.

From P. D. & Ad. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — July 9, 10, 1903.

"THE CAYO BONITO." (a.)

Ship — Collision — Compulsory pilotage — London district—"Constant trader"—Pilotage Act, 1825 (6 *Geo.* 4, *c.* 125), *s.* 59—*Order in Council,* 18*th of February,* 1854—*Merchant Shipping Act.* 1854 (17 & 18 *Vict. c.* 104), *ss.* 353, 379—*Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *ss.* 603, 625.

The Order in Council of the 18*th of February,* 1854, *extending the exemptions from compulsory pilotage contained in section* 59 *of the Pilotage Act,* 1825, *has not been repealed by the subsequent Merchant Shipping Acts.*

To entitle a vessel to come within the exemptions from compulsory pilotage given by the above Order in Council it is not necessary that she should be a "constant trader" to the ports or countries mentioned therein. In order to constitute a vessel a "constant trader" to ports between Boulogne (inclusive) and the Baltic it is not necessary that she should trade exclusively to ports within those limits.

The defendants, a British steamship company, ran a line of steamers from London viâ *Antwerp to America and back. A new vessel belonging to them was on her second voyage from London* viâ *Antwerp to certain Mexican ports, carrying a general cargo and one passenger, when she came into collision in the estuary of the Thames with a vessel belonging to the plaintiffs. At the time of the collision the defendants' steamer was carrying a duly licensed Trinity House pilot. In an action of damage brought by the plaintiffs against the defendants, in which the latter pleaded compulsory pilotage, their pilot was found alone to blame.*

Held, affirming the decision of Barnes, J. ([1902] P. 216), *that the defendants were liable as their vessel was exempt from compulsory pilotage as she was a "constant trader" within the exemptions contained in section* 59 *of the Pilotage Act,* 1825, *which was supplemented by the above Order in Council and kept alive by section* 353 *of the Merchant Shipping Act,* 1854, *for which is now substituted section* 603 *of the Merchant Shipping Act* 1894.

Earl of Auckland, 10 *W. R.* 124, 15 *Moo. P. C.* 304, *held binding and followed.*

This was an appeal by the defendants against a decision of Barnes, J. ([1902] P. 216), the question raised being the meaning to be attached to the words "constant trader" in the statutory exemptions from compulsory pilotage in the London district.

The action was one of damage by collision.

The plaintiffs were the owners of *The British Prince;* the defendants were the owners of *The Cayo Bonito.*

On the 8th of February, 1902, *The British Prince,* a steamship on a voyage from New York to London and Antwerp, carrying a general cargo, cattle, horses, cattlemen, a crew, and a duly licensed Trinity House pilot, came into collision, when in the estuary of the Thames, with *The Cayo Bonito,* a new steamship belonging to the port of London, and owned by the defendants, who run a line of steamers from London *viâ* Antwerp to America and back.

At the time of the collision *The Cayo Bonito* had already made one voyage from London *viâ* Antwerp to certain Mexican ports, and was then proceeding on a second voyage from London to Coatzocoalcos in Mexico *viâ* Antwerp, Havana, and Vera Cruz with a part cargo of 800 tons, one passenger, and a duly licensed Trinity House pilot.

Both vessels sustained considerable damage. The defendants in their defence to the action pleaded in the alternative that "if the said collision was caused or contributed to by any of those on board *The Cayo Bonito,* which they deny, it was solely caused or contributed to by the neglect or default of a qualified pilot, who was then in charge of *The Cayo Bonito,* and whose employment by the defendants was compulsory by law, and for whose acts, neglects, or defaults the defendants were not liable."

At the trial of the action on the 25th of March, 1902, it was found by Gorell Barnes, J., assisted by two of the Elder Brethren of the Trinity House, that the pilot of *The Cayo Bonito* was alone to blame for the collision, and the question of law whether the pilotage was compulsory was reserved.

On the 19th of June, 1902, after argument and further evidence, the learned judge in a considered judgment held that the defendants were liable as their vessel was exempt from compulsory pilotage, being a "constant trader" between London and ports on the continent north of Brest, within the meaning of the exemption in section 59 of the Pilotage Act, 1825 (6 Geo. 4, c. 125), supplemented by an Order in Council, dated the 18th of February, 1854, and kept alive by section 603 of the Merchant Shipping Act, 1894.

From this decision the defendants now appealed.

The Merchant Shipping Act, 1894, s. 622, provides that "Subject to any alteration to be made by the Trinity House, and the exemptions under this part of this Act, pilotage shall be compulsory within the London district, and the Trinity House outport districts."

The Pilotage Act, 1825, s. 59, provides that "notwithstanding anything in this Act contained, the master of any collier or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers and coming up either by the north channel, but not otherwise), or of any Irish trader using the navigation of the Rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burthen of 60 tons and having a British register, except as hereinafter provided . . . shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same, without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel."

By an Order in Council, dated the 18th of February, 1854, it is provided as follows: "The masters of the undermentioned ships and vessels shall, subject to the provision contained in the fifty-ninth section of the Act of Parliament 6 Geo. 4, c. 125, in respect of the employment of unlicensed persons, be exempted from compulsory pilotage—viz.: Of ships and vessels trading to Norway or to the Cattegat, or Baltic, or round the North Cape, or into the White Sea, when coming up by the south channels; of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the south channels; of ships and vessels passing through the limits of any pilotage district on their voyages from one port to another port, and not being bound to any port or place within such limits nor anchoring therein."

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

By section 603 of the Merchant Shipping Act, 1894, it is provided: "(1) Subject to any alteration to be made by the Board of Trade or by any pilotage authority in pursuance of the powers hereinbefore contained, the employment of pilots shall continue to be compulsory in all districts where it was compulsory immediately before the commencement of this Act, but all exemptions from that compulsory pilotage shall continue to be in force."

Asquith, K.C. (*Laing, K.C.*, and *Balloch* with him), for the appellants.—The decision of the learned judge in the court below is wrong—firstly, because the Order in Council of 1854 is no longer in force; and, secondly, because even if it be assumed that the exemption provided for in that order still exists *The Cayo Bonito* does not come within that exemption. As regards the Order in Council, the whole system of pilotage, as consolidated by the Pilotage Act of 1825, has been replaced by a different system by the Merchant Shipping Act, 1854, which repealed the Act of 1825 together with section 21 of the Pilotage Act of 1853, under the authority of which section the Order in Council was made. *Reg.* v. *Stanton*, 8 E. & B. 445, and *The Earl of Auckland*, 10 W. R. 124, 15 Moo. P. C. 304, which are relied upon as decisions in favour of the contention that the Order in Council is still in force, are wrong. The decision in *Reg.* v. *Stanton* has been distinguished in *The Temora*, Lush 17, where a vessel was held bound to employ a pilot under the Merchant Shipping Act of 1854 whilst carrying passengers from London to Belfast. In that case the statute was rightly interpreted. Section 379 of that Act repealed all previous legislation so far as regards the Trinity House districts, and provided for the exemption of certain vessels, except when carrying passengers. Pilotage in the Trinity House districts was, therefore, clearly compulsory in the case of *The Cayo Bonito*, and, therefore, her owners are not liable. Assuming, however, that the exemption in the Order in Council still exists, nevertheless *The Cayo Bonito* does not fall within that exemption. On the facts of the case it is clear that this vessel does not come within the term "constant trader." This was only her second voyage and her main business was to carry goods to America. She cannot, therefore, be deemed to have been a constant trader to Antwerp. She was not a "constant trader" between Boulogne and the Baltic within the exemption. To be so her termini must be, one in the United Kingdom, and the other a port between Boulogne and the Baltic. *Courtney* v. *Cole*, 36 W. R. 8, 19 Q. B. D. 447, is not applicable to the present case, as in that case the vessel was not carrying passengers. The above case, and that of *The Rutland*, 45 W. R. 38, and on appeal, *ib.* Dig. 154, [1897] A. C. 333, do not determine the question as to what is a "constant trader."

Aspinall, K.C. (*Dawson Millar* with him), for the respondents.—The judgment of the learned judge below is right. The exemptions given by section 59 of the Pilotage Act, 1825, and the Order in Council are still in force. The language of section 353 of the Merchant Shipping Act, 1854, was repeated in section 603 of the Merchant Shipping Act, 1894, thus recognizing the view laid down in *The Earl of Auckland*. That case was decided so long ago as 1862 by the then final appellate tribunal in Admiralty, and this court will not overrule that decision. The Act of 1894 keeps alive all the old exemptions from pilotage, and although the Pilotage Act of 1897 (60 & 61 Vict. c. 61) removed exemptions in certain cases, it affirmed the exemptions under the Pilotage Act of 1825 and the Order in Council. If that Act and Order are still in force, then *The Cayo Bonito* was clearly a ship trading between Boulogne and the Baltic. As regards the question of constant trading, *The Cayo Bonito* was a "constant trader" between London and Antwerp. It cannot be said that a new vessel on a regular line between certain ports is not a "constant trader" because she has only made one voyage. It is clear she was trading between Boulogne and the Baltic. One must look at the particular act of trading and the intention of the owner. It is not necessary to read in the word "constant." *Courtney* v. *Cole* and *The Rutland* cover this case in respect of the meaning to be attached to the word "trading." If, however, it is necessary to bring in the word "constant," then in the language of the learned judge below, *The Cayo Bonito* is included, for these words he says "are used in a business sense of a vessel which is regularly engaged in the trade, but not so absolutely constantly going backwards and forwards that there is never any possible departure from that going backwards and forwards between the Continent and London." The judgment below was right and should be upheld.

Asquith, K.C., replied.

COLLINS, M.R.—This is an appeal from the decision of Gorell Barnes, J., who has held in the case of a collision between *The British Prince* and *The Cayo Bonito* that *The Cayo Bonito* was in charge of a pilot, and that the collision was entirely due to the negligence of the pilot; and that raises a question whether or not the pilotage was compulsory. If pilotage was compulsory the owners are not liable; and, therefore, the question which was argued in the court below, and which is raised again in this appeal, is whether or not pilotage was compulsory. The learned judge, after very careful consideration, and very elaborate examination of the statutes and authorities bearing on the matter, has come to the conclusion that the pilotage was not compulsory, and therefore finds that the owners are liable for the consequences of the collision. Now, the case, on the face of it, turns apparently on an examination of the authorities. The judgment of Gorell Barnes, J., which was one of very great elaboration, has been narrowed down for us by the very able and concise arguments which have been addressed to us on both sides in this case, and I do not propose therefore, for my part, to enter upon a discussion on the many points upon which Gorell Barnes, J., with great advantage and assistance to the court, embarked; because the matter has now been narrowed down, and it would be impertinence on my part, therefore, to go over again much of what Gorell Barnes, J., has already fully examined. There is no doubt whatever that *primâ facie* pilotage is compulsory in these waters. That, as was pointed out by Gorell Barnes, J., is expressly provided by the Merchant Shipping Act, 1894, s. 603, subject to any alteration made by the Board of Trade or any pilotage authority in pursuance of powers conferred upon them. That section provided that "The employment of pilots shall continue to be compulsory in any district where it was compulsory immediately before the commencement of this Act." That brings us to the question whether it was or was not compulsory under the circumstances of this case; and that takes us back to section 59 of the Act of 1825 (6 Geo. 4, c. 125). I do not think I need go behind that Act, which was a consolidating Act. Now, the vessel in question was upon a voyage which is described in the judgment of Gorell Barnes, J., in these words. He says: "She was a vessel of 3,401 tons register, and at the time of the collision was on a voyage from London to Antwerp, and then from Antwerp to Coatzacoalcos, in Mexico, with

about 400 tons of cargo and one passenger, and it was in the course of the voyage from London to Antwerp that the collision between her and *The British Prince* took place." Now, by section 59 of 6 Geo. 4, s. 125, the masters of the following vessels are exempt from compulsory pilotage, namely: "The master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive, and the Baltic (all such ships and vessels having British registers) . . . or any ship or vessel employed in the coasting trade of the kingdom . . . ." After that statute there was another of 1853, and it was in pursuance of that Act, 16 & 17 Vict. c. 129, s. 21, that the Order in Council was made. That Act was one enabling the proper authority, by Order in Council, to enlarge the exemptions at that time existing, and accordingly the Order in Council was made consolidating the regulations for the exemptions from compulsory pilotage then existing under the provisions of section 59 of the 6th Geo. 4, and that order contains two paragraphs. First there is the exemption from compulsory pilotage of ships and vessels trading to Norway and the Cattegat or Baltic, or round the North Cape, or into the White Sea, when going up by either channels. That is an exemption including the south as well as the north channel. The second paragraph extended the exemption to ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward passages, and when coming up by the south passages. Thus were added outward to inward, and south to north channels, and that is the joint result of the statute and the Order in Council. If that exemption exists still, notwithstanding the subsequent legislation, it would cover the case of a vessel which could bring itself within its terms. In this case, subject to questions of fact, the contention is that the voyage was one within the meaning of the terms "vessels trading between Boulogne (inclusive) and the Baltic on their outward passages and when going up the south passages." Now, this vessel was undoubtedly engaged in a passage from London to Antwerp. She proposed to do a great deal more when she got to Antwerp, but the question is whether the exemptions included such a voyage under such conditions as we have here, and, if so, has the exemption granted by the Act of George IV. and the Order in Council been preserved, or has it been annulled? The argument for the defendants here is that the subsequent statute—the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104)—did, in point of fact, abolish that exemption and substitute other enactments in its place. Now that argument, I think, would have been a very powerful one if it had not, as it has, in my opinion, been precluded by authority. It is strongly argued that the exemption is preserved in the 353rd section, in these terms: "Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before this Act comes into operation, and all exemptions from compulsory pilotage then existing within such districts shall also continue in force." That *primâ facie* contains certain exemptions from compulsory pilotage, and it is headed by the words "Compulsory Pilotage: General." But that is followed by another group of sections, 376 to 379, headed "Compulsory Pilotage: Trinity House," and Mr. Asquith, in a very able argument, has pointed out that the 379th section of that statute included, in fact in terms, the very same provisions that are contained in the 59th section of the earlier Act constituting the exemptions; that they are re-enacted, but re-enacted with a difference, and the section limits the exemptions to the cases of ships not carrying passengers, whereas the former exemption in the earlier statute did not contain that condition. He puts to us a very powerful argument as to whether you can in one and the same statute have a provision which puts vessels carrying passengers outside the exemption, and a subsequent provision which re-enacts the provisions then existing. That is a very strong argument, and one very well worthy of consideration if it had not already been discussed and decided, as it seems to me, first of all in the case of *Reg.* v. *Stanton*, which decided that the two were not incompatible, and that the earlier provision of exemption did continue to exist in a vessel that was carrying passengers. That decision was adopted and followed, in a case absolutely on all fours with this one, namely, the case of *The Earl of Auckland* which was confirmed on appeal to the Privy Council. That was as far as back as 1862; and even if that decision of the Privy Council, being as it was then the final Court of Appeal having jurisdiction in Admiralty matters, is not in the strictest sense binding upon us, yet after this interval of time, it being the decision of the very highest authority at the time, I do not think we should be at liberty to depart from it. It seems to me it is, in fact, binding upon us. It is not necessary absolutely to decide whether it is, formally and technically, binding upon us, in the same sense as a decision in the House of Lords would be, though my impression is that it is, and when the position is that the law has been declared by the highest tribunal more than forty years ago, and has been acted upon since, I do not think we should be justified in departing from it. But it does not rest there. The later statute of 1897 has, I think, practically put its imprimatur upon the view taken in those cases—that is to say, it has adopted the view that the earlier exemptions and those in the Order in Council are in existence, and treats them as still in existence, though to a certain extent modified.

Accordingly I think that with regard to the main point of the argument, the authorities, followed by the Legislature, have decided against Mr. Asquith's contention; that is to say, that notwithstanding subsequent legislation, the earlier exemptions and the exemptions of the Order in Council based upon the 59th section of the Act of 1854 still exist, as regards the question, partly of fact and partly of law, whether this particular vessel comes within that exemption. Mr. Asquith, in arguing to the contrary, is obliged to contend that the exemption does not extend to the case unless the ship can be described as a "constant trader," and he says that the exemption referring to that condition was not applicable in this case, because this particular vessel had only made one voyage, and she was beginning the second at the time when she came into collision, and therefore he says it cannot be said that such a vessel was a "constant trader." He also raises other points—whether, for instance, she was a trader at all in the sense of the exemption; but that is the main point, and it rests upon this: In the 59th section of the Act of George IV. are these words: "Notwithstanding anything in this Act contained, the master of any collier, or of any ship or vessel, trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards from the ports between Boulogne inclusive and the Baltic" shall be exempted from compulsory pilotage. Now it is said that that provision in favour of the constant trader is really the same provision which was adopted, with certain

enlargements, in the Order in Council; that in the two paragraphs of the Order in Council ships and vessels constantly trading is meant; and that that meaning is to be imported into the words of this Order in Council, although the words are not in terms expressed in it; and Mr. Asquith bases that contention on the authority of the case of *The Vesta*, 30 W. R. 705, 7 P. D. 240, decided by Sir Robert Phillimore in the Admiralty Court. That case, however, was not decided in respect of these very words, but on the question whether or not foreign vessels were to be considered as embraced in the terms "ships or vessels"; and Sir Robert Phillimore held that in the words "ships or vessels" foreign vessels ought not to be embraced, because they were expressly excluded by section 59 of the statute, and the Order in Council could not be taken by simply omitting the words to have the effect sought to be given to it. Mr. Asquith presses the argument, and he says it is strictly analogous to the point before us. It seems to me that there is a good deal to be said in favour of his view that the *ratio decidendi* is analogous; but I think myself that we are not bound to apply it here, because this is really a different case. The case before Sir Robert Phillimore was certainly a case carrying much larger consequences than are likely to follow upon the decision of such a case as this. It was a matter of large policy, whether foreign vessels should be embraced within the order, thus extending the earlier section, which was specially limited to British vessels. It was thought that to extend the decision of the Legislature in that particular direction simply because it had used the words "ships or vessels," without confining them to British vessels, would be a large and impolitic extension, and one that ought not to be used without more solid grounds. I do not think that the grounds which weighed with Sir Robert Phillimore apply in such a case as this. Whether that be so or not, Barnes, J., has found in this case that if "constant trader" was a condition, that condition has been fulfilled, because, he says—and I agree with him—that you must not measure the question whether the vessel is a constant trader by the particular facts of one particular voyage of that vessel, but you must regard the matter from a business point of view. Take the case of a line of vessels trading constantly between London and New York. A new vessel is put on for the first time. You cannot say that that vessel is not a constant trader simply because it has not made the voyage before. It seems to me clear, as the learned judge in the court below has found, that you must look to what is the purpose for which this vessel was put on, and how it is going to trade, unless something occurs to put an end to it. Possibly it is put on as an instrument for carrying on the same trade then being carried on by other vessels; and if you find there is a line established trading with Antwerp, and that a particular vessel is put on and makes one voyage to and from Antwerp, it seems to me that the inference in respect to that is that it is a constant trader, and is intended to be a constant trader, within the meaning of these words.

That brings me to the last point, and that is whether a vessel which, like this, had gathered its cargo somewhere in the east, and had come with that cargo to London, and had there discharged the greater part of it, and had then gone on from London—taking in no cargo from London—had gone on taking what remained of her cargo to Antwerp—whether that can be said to be a vessel trading between London and Antwerp? I think there is a good deal to be said for the contention that a vessel cannot be said to be trading when it does not take any part—does not carry any trade between London and Antwerp. In this particular case the ship was taking cargo, but not cargo loaded in London for Antwerp; its object was to deliver the residue of the cargo taken on board at some remote point on the voyage. The argument raised here has, however, been concluded by authority. The very point was raised in the case of *Courtney* v. *Cole*, and decided in the first place by Lord Coleridge and A. L. Smith, J., as he then was. It was afterwards raised in another case, *The Rutland*, before Barnes, J., and ultimately went to the House of Lords, where, on facts practically indistinguishable from those in the present case, it was held that the fact that the vessel was not taking cargo out did not affect the question. In point of fact, the result of the two cases seems to be that when a vessel sails out on a particular adventure from London or elsewhere to successive ports, she is then, within the meaning of the words, trading with such ports. The only other point is, does the fact that the voyage to one of these ports is only, as it were, a step in a very much longer cruise make any difference? It seems to me that the authorities cover that as well as the other points, and that the only question which we have to consider is whether she is on a trading venture to one of the ports within the exemption. It seems to me that she was, and, therefore, on all the points raised in this case the judgment in the court below was right, and must be upheld.

MATHEW, L.J.—I am of the same opinion. The points which have been raised are concluded by authority. The first and most important point made by Mr. Asquith was that of exemption. That has been settled adversely to the contention of the appellants by the authorities which have been quoted by the Master of the Rolls. With reference to the question of fact, it seems to me that there was abundant evidence here to justify the conclusion that this vessel was a "constant trader" within the meaning of 6 Geo. 4, c. 125, s. 59, if it were necessary that that should be determined. I am of opinion that constant trading is not necessary, and that trading alone is sufficient here to exempt the vessel from compulsory pilotage. This vessel was in the early part of her career, and it is said that it is vain to contend that she was trading; but the facts established are these: That she was assigned to a line of steamers, her business was to take cargoes from a home port to a Continental port and then to continue her voyage. It seems to me absurd to insist that she must acquire the character of a constant trader by frequent voyages. Is is quite enough that she was intended by her owners to continue in a certain line. That is established here, and the conclusion of the learned judge is perfectly correct. I agree that this appeal must be dismissed.

COZENS-HARDY, L.J.—I agree. The first and main point raised in the case, respecting the effect of the Order in Council regarding the exemptions from compulsory pilotage, was decided not only by the Court of Queen's Bench, but by the Privy Council, in the cases referred to. Now it may be that the decision of the Privy Council has not quite the same effect in an Admiralty appeal as a decision of the House of Lords; but the jurisdiction of the Privy Council in Admiralty appeals is, by section 18, sub-section 5, of the Judicature Act of 1873, transferred to this Court of Appeal, and, putting it at the lowest, it seems to me that a decision of the Privy Council in a matter of this kind should be treated by us with at least the same amount of respect as a decision of the Exchequer Chamber would be in an appeal which had been brought before us from the Revenue. Whether it is technically and absolutely binding on

this court or not, it does seem to me that it would be very wrong, after a lapse of forty years, for this court to attempt to reverse a decision of the Privy Council on a statute of this kind. But the matter really does not rest there, for I can see no answer whatever to the argument founded upon the statute of 1897. I think the declaration therein contained makes it plain that the Legislature regarded the exemptions by the statute of George IV., extended by the Order in Council, as in force at the date of the passing of that Act. That seems to me to be clear. Therefore I think that the main point of Mr. Asquith's argument fails. The second point is, What is trading? That has really been decided by the House of Lords in the cases cited. The third point is as to whether the word "constant" ought to be imported into the Order in Council from the statute of George IV.? It does not really arise here. I agree with what has been said by the Master of the Rolls and Mathew, L.J., that on the facts of the case we have here that which amounts to constant trading. But, further than that, I entirely share the view of Gorell Barnes, J., that there is no ground for importing the word "constant" into the Order in Council. The Order in Council was made in pursuance of an Act expressly authorizing the extension of the exemptions, and there is no reason whatever for holding that it did not extend the exemptions by omitting the word "constant" found in the earlier Act. I was not much impressed by the argument that the Legislature could not have intended this. All I can say is it is not for us to speculate upon the intentions of the Legislature, but simply to interpret as best we can and construe the language of the Acts.

Appeal dismissed.

Solicitors for the appellants, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for the respondents, *Thomas Cooper & Co.*, for *Hill, Dickinson, Dickinson Hill, & Roberts*, Liverpool.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — July 8, 1903.

SMITH *v.* BETTY. (a.)

Solicitor—Costs—Statute of Limitations—Lien—Set-off—Appropriation of payments.

In an action by a solicitor against his client on a bill of costs extending from 1878 to 1899, the defence of the Statute of Limitations was pleaded. At the trial the defence of the statute was held good as to all items before 1893, and the bill of costs was referred for taxation, the taxing-master to take the cash account from 1893, and the plaintiff to give credit for all sums received by him for or on account of the defendant in respect of or which ought to be treated as reducing or discharging, the bill so taxed. In the bill of costs there was an item of £66 3s. 8d. which the plaintiff had received for the defendant in May, 1894, in an action brought by the defendant in that year against a firm of Rigby & Co. Before the judgment in the present action no appropriation of this sum to the statute-barred items in the bill of costs had in fact been made; and no costs were due to the plaintiff in respect of the action against Rigby & Co. The taxing-master held that this sum was not received for or on account of the defendant in respect of, or which ought to be treated as reducing or discharging, the bill of costs; and that it ought to be treated as applied in payment of what was due to the plaintiff in May, 1894, in respect of the statute-barred items.

Held, that neither on the ground of lien, set-off, nor appropriation could this sum be applied in payment of what was due to the plaintiff in May, 1894, in respect of the statute-barred items.

Appeal by the defendant from an order of Wright, J., and a cross-appeal by the plaintiff.

The facts and arguments are sufficiently stated in the judgment.

G. A. Scott, for the defendant.

Le Riche, for the plaintiff.

Cur. adv. vult.

July 8.—STIRLING, L.J., read the following judgment: This action was brought on the 25th of January, 1902, by the executor of the late Charles Thomas Foster, a solicitor, to recover a sum of £260 1s. 4d., claimed to be due in respect of a bill of costs for the period from the 13th of May, 1878, to the 6th of February, 1899, which bill, together with a cash account, was delivered to the defendant on the 2nd of December, 1899. By the defence the Statute of Limitations (21 Jac. 1, c. 16, s. 3) was pleaded. The action came on for trial on the 19th of December, 1902, before Wright, J., who held that the defence of the Statute of Limitations was good as to all items in the bill of costs incurred previously to 1893,* and made an order in the following terms: "That the bill of costs on which this action is brought be referred to the taxing-master for taxation, and to take the cash account from 1893, and that the plaintiff should give credit for all sums of money received by him for or on account of the defendant, in respect of, or which ought to be treated as reducing or discharging, the bill of costs so taxed, and that the plaintiff be at liberty to sign judgment for the amount of the master's certificate in the said taxation." Upon the taxation, the defendant brought in a surcharge for a sum of £66 3s. 8d., consisting of £65 debt and £1 3s. 8d. interest, received by the deceased solicitor from the solicitors for a firm of Rigby & Co. on the 9th of May, 1894, in an action brought by the defendant against Messrs. Rigby & Co. It was admitted by the plaintiff that this surcharge was valid. It was at the same time admitted by the defendant that, although this sum did not appear in the cash account delivered on the 2nd of December, 1899, the omission was not intentional, but was simply due to some inadvertence on the part of the solicitor. The plaintiff claimed that this sum was not one which was received by the solicitor "for or on account of the defendant in respect of, or which ought to be treated as reducing or discharging, the bill of costs," under taxation; and that it ought to be treated as applied in payment of what was due to the solicitor from the defendant on the 9th of May, 1894, in respect of statute-barred items. The taxing-master took this view, and, finding that at this date there was due to the solicitor £36 12s. 8d. on the cash account, and £25 11s. in respect of costs (which he taxed), allowed these sums by way of set-off against the surcharge. From this decision there was an appeal to Wright, J., who affirmed the taxing-master's decision as to the cash balance of £36 12s. 8d., but reversed it as to the costs amounting to £25 11s. Both parties have appealed from the order of Wright, J., the plaintiff seeking to have the taxing-master's decision restored, while the defendant insists that it ought to be reversed as to the cash balance as well as the costs.

The earliest entry in the bill of costs with respect to

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

* There was a break in the bill of costs, there being no items between 1889 and 1893.

the action brought by the defendant against Rigby & Co., occurs on the 24th of November, 1893. The writ was issued on the 29th of January, 1894, and the action proceeded in regular course, and was duly entered for trial. On the 24th of April, 1894, Messrs. Rigby & Co.'s solicitors informed Mr. Foster that they were instructed not to contest the matter any further, and proposed to issue a summons to stay further proceedings on payment of the amount claimed and costs. On the 25th of April, Mr. Foster, by letter informed the defendant of this proposal and stated that it would be about a fortnight before the costs were taxed, and the amount paid. On the 26th of April, the defendant sent a telegram, "Delighted at the good news contained in your letetr." It appeared from the bill of costs, delivered by Mr. Foster, that the debt of Rigby & Co. was paid on the 9th of May, 1894. In a letter written by Mr. Foster to the defendant in 1895 he expressed an intention to send to the defendant an account; but in fact none was sent, except that rendered with the bill of costs on the 2nd of December, 1899. Counsel for the plaintiff contended that the decision of the taxing-master ought in these circumstances to be supported, on the ground either of lien, or set off, or appropriation of payments. It is quite clear that the Statute of Limitations only bars the remedy by action, and does not destroy the debt or affect any remedy by way of lien, whether on a judgment recovered by the exertion of the solicitor: *Higgins* v. *Scott*, 2 B. & Ad. 413; or on papers in his hands: *Curwen* v. *Milburn*, 38 W. R. 49, 42 Ch. D. 424. The lien of a solicitor on a fund recovered is confined to the costs of the action in which it is recovered: *Bozon* v. *Bolland*, 4 My. & Cr. 354; so that the lien on the debt due from Rigby & Co. only extended to the excess of the costs of the action as between solicitor and client over those between party and party, an excess which is stated only to amount to about £5, and is in any event unaffected by the judgment. No question as to a lien on papers arises. I am therefore unable to see that the solicitor had any right of lien which can avail the plaintiff in this action. Neither in my judgment can the plaintiff claim any statutory right of set off; for, as was laid down by Wilde, C.J., in *Francis* v. *Dodsworth*, 4 C. B. 202, p. 220, the judicial construction of the statute of set off "has been that no debts can be used by way of set off. . . . except such as are recoverable by action." Here the debt relied on by the plaintiff has in this very action been held not to be so recoverable; and to give effect to a set off by the plaintiff would be to go behind the judgment.

It was contended, on behalf of the plaintiff, that the solicitor was entitled to appropriate, and must be taken to have appropriated, the sum in question to the cash balance and costs found to have been due to him on the 9th of May, 1894. To this it was answered on behalf of the defendant, first, that in the circumstances no right of appropriation existed; and secondly, that, even if it did exist, it had not been and could not now be exercised. On the first of these points much reliance was placed on *Waller* v. *Lacy*, 1 Man. & Gr. 54, where it was decided that a solicitor had no right to appropriate to a statute-barred debt a sum received by him on behalf of, but without the knowledge of, the client. In the present case the fair inference from the facts appears to be that the sum of £66 3s. 8d. was received and retained by the solicitor with the knowledge of the client, and it may be, and I am willing to assume that on this ground the authority cited does not apply. Still, it is quite clear that previously to the judgment in this action, no effective appropriation was in fact made. In the only account rendered to the defendant this particular item does not appear; and there is no room for the application of the doctrine of *Clayton's case*, 1 Mer. 585; see *The Mecca*, 45 W. R. 667, [1897] A. C. 286. After judgment I do not think it was any longer open to the plaintiff to make an appropriation; for the authorities, although the language used in them varies, appear to show that there is some limit on the exercise by a creditor of an option to appropriate; as, for example, the communication of the appropriation to the debtor: *Simson* v. *Ingham*, 2 B. & C. 65; or the bringing of an action: *Mills* v. *Fowkes*, 5 Bing. N. C. 462; or, as is said by Taunton, J., in *Philpott* v. *Jones*, 2 A. & E. 41, before the case came under the consideration of a jury. In the present case the terms of the judgment seem to me to preclude a subsequent appropriation.

For these reasons I think that the appeal of the defendant ought to succeed, and that the appeal of the plaintiff fails.

COLLINS, M.R., and MATHEW, L.J., concurred.

Appeal of the defendant allowed; appeal of the plaintiff dismissed.

Solicitor for the plaintiff, *Arthur Price.*

Solicitors for the defendant, *Underwood, Son, & Piper.*

High Court of Justice.

Chan. Div.
Buckley, J. } Nov. 5.

In re LOVERIDGE.
PEARCE *v.* MARSH. (*a.*)

Mortgage—Freeholds—Mortgagee in possession—Mortgagor barred after death of mortgagee—Devolution of mortgaged land from person entitled at date of bar—Realty or personalty—Trust for sale.

A mortgagee of freeholds under an instrument, which was in the form of a trust for sale, entered into possession in 1861, *and so remained until his death. He died in* 1864, *leaving all his property to his wife (whom he appointed executrix) for life, but otherwise intestate. His brother was his heir-at-law and sole next-of-kin. His wife entered into possession and so remained until her death in* 1900. *The equity of redemption was barred in* 1879.

Held, that on the death intestate, in 1880, *of the brother, his moiety of the mortgaged premises expectant in reversion on the death of the tenant for life, having become realty in* 1879, *passed to his co-heiresses-at-law.*

This was the further consideration of an originating summons for the administration of the estate of Isaac Loveridge. The question to be decided was whether certain real estate to which he was entitled at his death was to be considered as forming part of his real estate or of his personal estate.

James Loveridge, the mortgagee of certain freehold messuages and hereditaments, entered into possession in 1861 and so remained till his death. He died in 1864, having devised and bequeathed his residuary, real, and personal estate (in which was comprised his interest in the mortgaged premises) to his wife, Jane Mary Loveridge, during her widowhood, and appointed her executrix. Subject as aforesaid, he died intestate, leaving his brother, Isaac Loveridge, his heir-at-law and sole next-of-kin.

Jane Mary Loveridge, who never re-married, re-

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

mained in possession of the mortgaged premises till her death in 1900.

After 1861 neither James Loveridge nor Jane Mary Loveridge ever accounted or made any acknowledgment to the mortgagor, whose interest was stated by the certificate of the master to have become barred on the 1st of January, 1879, by the operation of the Real Property Limitation Act, 1874.

By an order made on the 2nd of August, 1902, in an action for the administration of the estate of James Loveridge (reported in 51 W. R. 232, [1902] 2 Ch. 859), it was declared that the mortgaged premises, at the death of James Loveridge, formed part of his personal estate.

Accordingly, at the death of James Loveridge, the position was that Isaac Loveridge and the widow each took one moiety of the interest of James Loveridge in the mortgaged premises, in reversion expectant on the death or re-marriage of the widow.

Isaac Loveridge, who had been of unsound mind from the date of the death of James Loveridge, died intestate on the 20th of August, 1880.

The question was whether Isaac Loveridge's moiety became on and after the 1st of January, 1879, his real estate and descended on his death intestate to his co-heiresses-at-law (who were also the co-heiresses of James), or whether it remained his personal estate, and belonged as such to his next-of-kin.

A question also arose as to whether the mortgage was by way of trust for sale, or merely contained a power of sale. As this was held to be immaterial, it is thought unnecessary to state the terms of the mortgage.

Astbury, K.C., and *H. Charlton Hawkins*, for some of the next-of-kin of Isaac Loveridge.—It may be assumed that the devise of a life estate to the widow did not pass the legal estate in the mortgaged premises. It therefore descended to Isaac, who held it in trust for the persons entitled to the mortgage debt. The mortgage being by way of trust for sale, the mode by which he ought to have carried out his trust was to sell the property and hold the net proceeds of the sale in trust for the widow for life and after her death for himself and the widow in moieties. The fact that he lived for a year and eight months after the mortgage had become barred did not operate to change the nature of the property. For such change to take place an act of election was required, which he was incapable of performing by reason of his unsound mind. Again, the power of sale of a mortgagee remains operative after he has been in possession for the statutory period: *In re Alison*, 27 W. R. 537, 11 Ch. D. 284, 295. If the power of sale remains operative, the mortgage must remain on foot, even though the mortgagor is barred. A trust for sale, as here, is an *à fortiori* case. Unless the widow elected to give up her beneficial interest in the mortgage debt, which she never did, it was out of the power of Isaac to elect, even if he had been otherwise competent, to change the nature of the mortgaged property from the condition of personal estate in which he found it.

Stone, for the legal personal representative of another of the next-of-kin.—A mortgagee who has been in possession for the statutory period must do something to change the nature of the property: *Attorney-General* v. *Vigor*, 8 Ves. 256, 277, cited in the judgment in *In re Loveridge*. Unless this rule is adopted, it might happen that in the period between the barring of the equity of redemption and the barring of the mortgage debt, the mortgagee might do something which would be analogous to opening a foreclosure. The result would be that during that period it would be impossible to tell whether the mortgaged property was realty or personalty.

A. F. Peterson, for the legal personal representative of another of the next-of-kin.—The mortgagor was not barred in 1879. The statement in the certificate that he was, is merely an inference of law arising from the facts found by the master, and may be disregarded. The mortgagee was not in possession for the period prescribed by section 7 of the Real Property Limitation Act, 1874. The mortgagee is the person able to exercise the powers conferred by the mortgage. Isaac was the mortgagee. The widow may have been in possession as owner of the mortgage debt. She could not have been in possession as agent of Isaac, who was a lunatic and could give no authority. The mortgagor not being barred, the property remains personalty.

Vaughan Hawkins and *Fossett Lock*, for the co-heiresses.—The mortgage was barred. As to this, the certificate is conclusive. In any case the words of the section, "When a mortgagee shall have obtained the possession," are satisfied by James having obtained possession. The statutory period elapsed without the mortgagor taking proceedings. The mere possibility that the mortgagee might have taken proceedings analogous to opening a foreclosure did not prevent his interest from becoming land in 1879. A statutory bar has the effect of a parliamentary conveyance, and prevents the revival of title: *Doe* v. *Sumner*, 14 M. & W. 39, 42. The language of the judgment in *In re Loveridge* (at p. 863) is in our favour. The rights of Isaac and the widow, which up to 1879 were of a personal nature, became enlarged by the bar. At that date Isaac became entitled to the whole fee. What he held he held as land, and as trustee for himself and the widow. No question, therefore, of election can arise. Without admitting that in this mortgage there is anything more than a power of sale, whether it be a trust or a power, it is to be used for the benefit of the mortgagee. *In re Alison* does not decide that the interest of a mortgagee, by reason of the mere existence of such a trust or power, is thereby prevented from becoming realty.

Astbury, K.C., replied.

BUCKLEY, J.—I will deal first with the argument of Mr. Peterson, which is that the mortgagor is not barred. I think he is partly right and partly wrong. He is right when he says that he is not concluded by the certificate. The certificate finds facts and states a conclusion of law arising from those facts. The conclusion of law may be disregarded, if, in the opinion of the court, it is wrong. But I think that the conclusion of law is right. In 1861 James Loveridge obtained the possession or receipt of the profits of the land. More than twelve years had elapsed on the 1st of January, 1879, the date fixed for the coming into operation of the Act of 1874, by which the period of limitation was shortened to that length of time. It results that the right of the mortgagor to bring an action to redeem the mortgage was barred on that date, because more than twelve years had elapsed since James Loveridge had obtained such possession or receipt. I think, therefore, that the mortgagor was barred.

I come next to the point raised by Mr. Stone. He says that, granted that the mortgagor may have become barred and that he cannot recover the land, yet it does not follow that the right of the mortgagee to recover the debt is barred. Let us assume that to be so. A parallel case would be that of a foreclosure, in which the mortgagee does something to open the foreclosure. The contention must be that in every case, be it foreclosure or bar, because something may happen whereby the foreclosure or bar may be re-opened, and because, therefore, it may happen that the land may again become merely a security for the

mortgage debt, the mortgagee must do something to show that he elects to keep the land as land. The answer to this contention, in the present case, is that the event supposed has not happened.

The facts here are that on the 1st of January, 1879, the legal estate in the mortgaged premises was in the heirs-at-law of James Loveridge. The persons beneficially interested were the widow during her life, and the widow and Isaac in moieties in reversion expectant on the death of the widow. As from the moment when the mortgagor was barred, their rights, which previously were to have the payment of money and the possession of the land as a security for such payment, became enlarged. The position was that there no longer existed any right of redemption in the mortgagor, but that the same persons became owners both of the debt and of the security for the debt. It is impossible that a person in that position should have a right against himself. It is not a case in which any election was required; at that moment, without any election on their part, the mortgagees' rights became so enlarged that that which was before personalty became realty. If Isaac had been the only person interested, the matter would have been unarguable. It makes no difference that the parties beneficially interested were several. The rights so enlarged were held by Isaac as a trustee for those persons, that is to say, for himself and the widow.

Does it make any difference that the mortgage was by way of trust for sale? Mr. Vaughan Hawkins said that he would assume that it was so, because he thought the point to be immaterial. Assuming the mortgage to have been in the form of a trust for sale, then the only object of the trust was to give effect to rights which existed by way of security. If the rights by way of security are gone, there is no room for the trust. I think nothing turns on that.

Lastly, is any election necessary? The mortgagee acquires an indefeasible title, not by election, but by the operation of a statutory conveyance I think, therefore, that as from 1st of January, 1879, when the mortgagor became barred, Isaac became entitled to his moiety of the property as real estate. It therefore decends to his co-heiresses.

Solicitors, *Bridgman & Willcocks*, for *Willson & Bond*, Lyme Regis; *Baillie & Sons*, for *Sir R. N. Howard*, Weymouth; *Geare & Pease*, for *Forward & Sons*, Axminster.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Darling, JJ.) Nov. 16.

DOVER *v.* PROSSER. (*a.*)

Election law—Registration—Parliamentary and county council franchise—Head master of school—Occupation of dwelling-house adjoining school premises—Character of occupation—Household or service franchise—Representation of the People Act, 1867 (30 & 31 *Vict*, c. 102), s. 3—*Representation of the People Act* 1884 (48 & 49 *Vict* c. 3), ss. 2, 3—*County Electors Act*, 1888 (51 & 52 *Vict*. c. 10), s. 3.

The appellant, a schoolmaster, had resided during the qualifying period in a dwelling-house attached to the school premises, which dwelling-house he held under an agreement from the school managers. No deduction from his annual salary as schoolmaster was made in respect of his occupation of the dwelling-house, nor did the agreement contain any stipulation requiring the appellant as schoolmaster to reside in the dwelling-house. The appellant claimed to have his name inserted in Division I. of the list of occupation electors in respect of his occupation as tenant of the said dwelling-house.

The revising barrister, although not finding as a fact, either that the appellant as schoolmaster was required to reside in the dwelling-house, or that he might, if he chose, reside elsewhere, disallowed the claim, on the ground that the appellant occupied the dwelling-house by virtue only of his office and services as schoolmaster, and, consequently, was not entitled to be placed in Division I.

Upon appeal, the court reversed the revising barrister, and held, upon the facts, that the case was governed by Marsh *v.* Estcourt, 38 *W. R.* 495, 24 *Q. B. D.* 147, *and that the appellant was entitled to have his name inserted in Division I.*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Case stated by the revising barrister for the Medway Division of Kent.

Arthur John Dover, the appellant, claimed to have his name inserted in Division I. of the list of occupation voters, which contained the names of persons entitled to vote both as parliamentary electors and as county electors of the administrative county, in respect of an occupation qualification. The appellant's name appeared only in Division II. of the list of occupation voters, which contained the names of those entitled to vote as parliamentary electors only, and not as county electors.

The facts were as follows:

The appellant was head master of what was formerly a voluntary school, but had now under the Education Act passed to the Kent County Council as a non-provided school. Attached to the school premises was a dwelling-house at which, under the agreement between the appellant and the managers, the appellant was entitled to reside, without any deduction being made from his annual salary in respect of such residence.

The appellant's claim to have his name inserted in Division I. in respect of his occupation of this house had been duly objected to.

The revising barrister, after hearing evidence in support of, and in opposition to, the claim, disallowed the claim, and found as facts:—(1) That the house occupied by the appellant was occupied by him in virtue of his services as a schoolmaster, and not otherwise; (2) that no deduction from his salary was made in consequence of his residing in the house; and (3) that if a new schoolmaster were to be appointed in the stead of the appellant he would presumably be entitled to reside in the house then occupied by the appellant, and that the latter would be required to vacate the said house.

Due notice of appeal having been given on behalf of the claimant, the revising barrister stated this case for the opinion of the court.

Henry Lynn (*T. A. Organ* with him), for the apellant.—The question turns simply on whether the appellant in this case was merely permitted to reside at the school house, or was obliged to reside there as a condition and as a part of the duties he undertook, when appointed head master. There is no clause in the agreement, under which the appellant entered upon his duties, expressly requiring that he should reside at this house. Therefore, so far as that agreement is concerned, he is free to reside elsewhere; and that freedom to occupy any other residence distinguishes the present case from that class of cases where the occupation of the premises, in respect of which a vote was sought, had been held to confer on the tenant a service franchise only. In *Marsh* v. *Estcourt*, 38 W. R. 495, 24 Q. B. D. 147, Wills, J., points out that the court cannot be blind to the fact that the uniform

tendency of legislation recently has been to increase the privileges of franchise in proportion as the liability is imposed to taxation, and at the close of his judgment in that case said, "Here the labourers were not required to reside in the cottages, but were allowed to reside in them as a privilege"; and it was there held that, as the cottagers did not occupy the cottages as a necessary incident to their employment on the estate, they were in the position of ordinary tenants. An instance of the converse was given by Mellor, J., in the *Petersfield case*, 2 O'Malley & Hardcastle's Election Petitions: see also *Hughes* v. *Overseers of Chatham* 5 M. & G. 54. The revising barrister disallowed the claim on the ground that the claimant occupied this house under a service occupation. But he did not so find that as a fact.

M'Clean v. *Pritchard*, 36 W. R. 508, 20 Q. B. D. 285, and *Smith* v. *Seghill Overseers*, 23 W. R. 745, L. R. 10 Q. B. 422, were also referred to.

The respondent was not represented.

Lord ALVERSTONE, L.C.J.—I think this appeal must be allowed. It seems to me that in every case of this sort the governing test is whether the premises which the claimant did in fact occupy were occupied necessarily for the performance of his services, or whether the person was permitted, but not obliged, to live in the particular house. Where there is permission, but not an obligation, to reside in the house, the occupier is not precluded from claiming to be registered in Division I. I agree with the *dictum* of Wills, J., in *Marsh* v. *Estcourt*, to which our attention was directed during the argument, and I think it would be in the present case almost an abuse of language to call the residence of the head master of this school under such conditions "occupation by virtue of services." In the *Petersfield case* Mellor, J., instanced the case of a gamekeeper who received so much wages and had a house in the centre of a gentleman's preserves; in such a case, clearly the house was occupied by the keeper, not as an ordinary tenant, but as an incident of his services as gamekeeper. These two cases show very clearly the two classes of occupation; and the question we have to decide is within which category the present case falls. The only difficulty arises from the revising barrister not having found as a fact either that the appellant was entitled to reside elsewhere, or that he was obliged to live in this house. Looking at the facts before us, it seems clear to my mind that it can be implied that the appellant might, if he so willed, live elsewhere during the continuance of his office as head master; because the case says that if a new master were appointed in the appellant's stead he would presumably be entitled to reside in the house then occupied by the appellant. There is no finding that a new master would be obliged to reside there, or that on the appointment of a new master the apellant would be compelled to leave the house. We are told, moreover, that there is no clause in the agreement appointing the appellant schoolmaster, compelling him, as a condition of that appointment, to reside in this particular house; and I do not think that the revising barrister meant to find, and I do not think we ought to assume he meant to find, that the appellant was required to reside there, or that the nature of his duties necessitated such residence.

If, as it seems to me, this is the true view of the facts, then the case clearly falls within the authorities showing that the appellant is entitled to have his name inserted in Division I.

KENNEDY and DARLING, JJ., concurred.

Appeal allowed with costs.

Solicitors, *Baker & Nairne.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Darling, JJ.) — Nov. 16.

PEARCE v. MERRIMAN. (a.)

Election law — Registration — Parliament—Occupation franchise—Husband tenant of wife—Evidence of bonâ fide *agreement to pay rent by husband to wife.*

The relationship of husband and wife does not in point of law preclude the existence of the relation of landlord and tenant between the wife and the husband in respect of the house in which they both reside and which is owned by the wife; and, where there is in fact a bonâ fide *tenancy of such house by the husband from the wife, the husband is entitled to be registered under the Registration Acts in respect of his occupation as tenant of such house.*

Hall v. Michelmore, 50 *W. R.* 172, *explained and distinguished.*

Case stated by the revising barrister for the Westbury Division of Wiltshire.

The short point was whether the revising barrister was right in holding that, as a matter of law, a man could not be occupying tenant of a house for the purposes of the franchise, of which house his wife, who lived with him, was the owner, although in fact there was a *bonâ fide* agreement of tenancy, whereby the husband agreed to pay, and did pay, his wife rent for the premises.

The case stated the following facts:

Elizabeth Richman was tenant for life under the will of her husband of several houses, in one of which she resided, another being that in respect of which William Pearce, the appellant, had his name entered on the occupiers' list. The appellant married a daughter of Elizabeth Richman, and he rented No. 25, West-street of his mother-in-law, and he and his wife resided there. The rent was 15s. 10d., payable every four weeks, and for many years up to the death of Elizabeth Richman this rent was paid to her by the appellant, who also paid the rates and whose name was inserted by the overseers on Division I. of the occupiers' list, and was entitled to vote and voted at elections. Upon the death of Elizabeth Richman in November, 1901, the house became the freehold property of the appellant's wife under the terms of her father's will.

The appellant, upon the death of his mother-in-law, and with a view to retaining his right to vote, verbally agreed with his wife to pay to her the same amount of rent that he had previously paid to his mother-in-law for the house. He produced a rent-book showing the first payment of 15s. 10d., due the 28th of December, 1901, and a receipt for the same signed by his wife. The book showed similar payments every four weeks up to September, 1903.

Between these dates the appellant and his wife resided in the house as they had formerly done; he continued to pay the rates, and his name was placed by the overseers on Division I. of the list of occupiers.

The appellant's name was duly objected to, and the notice of objection stated the grounds to be:—(1) "That you have not occupied the qualifying premises as owner or tenant for twelve months immediately preceding July 15th in this year"; (2) "that your wife, being owner of qualifying premises, disqualifies you."

In support of this objection it was urged that the appellant was not the occupier of the house either as owner or tenant, and the case of *Hall* v. *Michelmore*,

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

50 W. R. 172, was cited in support of this view. On the appellant's behalf it was urged that that case did not govern the present one, as in the former there was no evidence of tenancy, whereas in the present case there was evidence of a *bonâ fide* tenancy; and, further, it was argued that the mere transfer of the ownership of the premises from his mother-in-law to his wife did not affect the appellant's right to be retained on Division I. It was also argued that under the Married Women's Property Act, 1881, a married woman, in respect of property acquired after the 1st of January, 1882, was entitled to all the rights of and was in the same position as a *feme sole*, and was therefore in a position to give her husband notice to quit in respect of a tenancy of her property or to obtain possession of her property by means of an ejectment order against her husband, or by an action.

The revising barrister was of opinion that the fact that the appellant was the occupier of the premises when his wife became the owner of them was immaterial; the same question would have arisen if, on the house becoming the property of his wife, the appellant had moved into it from another house and had claimed as occupier in succession from one to the other. He was further of opinion that, though a wife might let to her husband any of her property of which she gave up the occupation to him, the joint occupation by husband and wife of a house belonging to her was inconsistent with the relation of landlord and tenant; the right of a landlord to give notice to quit to, or to eject, a tenant could not, in his opinion, exist in opposition to the marital right of the husband to continue to reside with his wife. He therefore came to the conclusion that the agreement that the husband should be tenant of the house to his wife was, under the circumstances, inoperative to constitute the appellant an occupier as tenant, and held that the objection was valid, and that the appellant's name should accordingly be removed from Division I. of the list of voters.

Due notice of appeal having been given, the revising barrister stated this case.

Lewis Thomas, for the appellant.—The revising barrister has come to an erroneous conclusion in point of law. He appears to have overlooked the fact that the appellant's wife resided in the house simply by reason of her right as wife to share her husband's home. He assumed that because some of the usual incidents of landlord and tenant were wanting—for instance, it would be absurd to suppose that if the rent fell in arrear the wife could eject the husband, and so end the agreement—that the tenancy was inoperative to constitute the husband the occupier in such a sense as to give him a right on that ground to claim a vote. Under the Married Women's Property Acts a wife, in respect of her separate property, stands in an analogous position for many purposes to her husband to that of a stranger; and there is no "joint" occupancy of the premises to be inferred in this case from the mere fact that they both live in the same house, other than a joint occupancy which in one sense exists in every case where a man keeps a housekeeper to look after his house and live there with him. *Hall* v. *Michelmore*, 50 W. R. 172, in fact is an authority in favour of the appellant, for the decision was given on facts the converse of those here. In that case the claim was disallowed because there was no agreement of tenancy by the husband, and the attempt to establish a precedent that a husband by residing in a house with his wife, who was the owner of the house, was thereby entitled to be registered as occupier of the house, very properly failed. Here there is evidence of an agreement of tenancy, and it is not disputed that if the landlord was not the appellant's wife the entry in the list would be good. The wife is in the position of a stranger to her husband, and the tenancy being a *bonâ fide* tenancy, the entry of the appellant's name in the list of voters should not have been struck out.

The respondent did not appear.

Lord ALVERSTONE, L.C.J.—It is much to be regretted that in this case the respondent is not represented by counsel; but after Mr. Lewis Thomas's argument I can entertain no doubt that this appeal should be allowed. I do not think that the case of *Hall* v. *Michelmore* is a decision against that view, because in that case there was no evidence of a tenancy. It was an attempt to show that the mere fact that the wife owned the house in which the husband and wife lived was evidence sufficient of an occupation of the premises by the husband to give him a right to have his name placed on the list of occupiers. The revising barrister there held that such evidence was insufficient, and the court refused to interfere with his decision. There is no suggestion here that the tenancy put forward by the husband was a mere colourable agreement to enable him to vote. If that had been suggested, other and very different considerations would have arisen. It was stated that the matter had been considered by the appellant in order that he might secure his vote, and there appeared to have been a verbal agreement of tenancy sufficient to support the claim. The rent-book was produced, and there appears to have been regular payments of rent by the husband to the wife. The revising barrister found that if the parties had not been husband and wife the husband's claim would have been good; but he held as material, that the relationship of husband and wife necessarily precluded effect being given to that agreement. In my opinion where there is a real tenancy proved it is immaterial whether the tenancy is one existing between husband and wife or two strangers. Here there is no ground for saying that the tenancy is not a real tenancy, and as I do not agree with the view that a man who is tenant of his wife is thereby necessarily unable to claim the franchise on the ground that, for this purpose, such a tenancy in law is inoperative, this appeal, in my opinion, should be allowed.

KENNEDY, J.—I am of the same opinion. The whole question, it seems to me, is whether there is here evidence of a real tenancy. If that is established, then the husband is entitled to a vote, because a wife is now placed in the same position as a stranger to her husband by the provisions of the Married Women's Property Act.

DARLING, J.—I agree. I desire only to point out that in allowing this appeal we are deciding nothing inconsistent with the decision in *Hall* v. *Michelmore*. In that case there was no evidence of a tenancy; in the present case, on the other hand, there is very distinct evidence of one; and the rent-book, which was put in evidence, shows that rent was paid under the agreement. The revising barrister, as it seems to me, has gone wrong in regarding the occupation as a joint occupation. I think the wife let the house to her husband, and gave up the occupation of the premises to him. The wife, under the agreement, was the landlord, and the husband the tenant; the husband lived there under his rights as tenant of the property; but the wife was entitled to live there and did live there under a totally different contract—namely, by virtue of her contract of marriage.

Appeal allowed, with costs.

Solicitors, *Milner & Bickford*, for *Wills & White*, Trowbridge.

House of Lords.

From C. A. (England). Aug. 6, 1903.

TOLHURST v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS (LIMITED).

ASSOCIATED PORTLAND CEMENT MANUFACTURERS (LIMITED) AND IMPERIAL PORTLAND CEMENT CO. (LIMITED) v. TOLHURST. (a.)

Contract — Assignability — New company — Action by assignee.

By a contract between T., the owner of a chalk quarry, and a cement manufacturing company, who were owners and occupiers of neighbouring land, it was agreed that T. should supply so much chalk during a period of fifty years (as therein provided) as the company should require for the manufacture of cement on the said land.

Held, that the company were entitled to assign the benefit of this contract to a new company, who could enforce it against T.

Decision of the Court of Appeal (51 *W. R.* 81, [1902] 2 *K. B.* 660) (Lord Robertson *dissenting*) *affirmed.*

These two appeals from orders of the Court of Appeal (Collins, M.R., Jeune, P., and Cozens-Hardy, L.J.) were consolidated.

In the first action the appellant claimed payment at the rate of 2s per ton for chalk supplied by him since the formation of the Associated Co.

In the second, by the Associated Co. and the Imperial Co against the appellant, they claimed a declaration that a contract, dated the 5th of January, 1898, between the appellant and the Imperial Co., was subsisting, and that they were entitled to be supplied with chalk by the appellant on the terms of the contract.

The facts are set out at length in the court below, and shortly given in Lord Macnaghten's judgment.

Pickford, K.C. (*George Wallace* with him), for the appellant.

Younger, K.C., and *Bremner* (*H. E. Wright* with them), for the respondents.

Pickford, K.C., in reply.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C., said that he was at one time disposed to accede to the arguments of the learned counsel for the appellant, but with some hesitation he concurred with the judgment about to be moved by Lord Macnaghten.

Lord MACNAGHTEN.—I cannot think that any legal principle is involved in this case. The case may be of great importance to the parties. From a legal point of view it is, I think, of no importance at all. The question, as it seems to me depends simply and solely on the true meaning and effect of the contract of the 5th of January, 1898, made between Alfred Tolhurst of the one part and the Imperial Portland Cement Co. (Limited) of the other. Two alternative constructions have been proposed. One follows the letter of the instrument and adheres to it closely; the other favours a more liberal interpretation, supplying, it is said, nothing more than what is required in order to carry out the obvious intention of the parties. The question is, which of these two constructions is to be adopted? When that matter is once determined, there cannot, I think, be any further difficulty. There are contracts, of course, which are not to be performed vicariously, to use an expression of Knight-Bruce, L.J. There may be an element of personal skill or an element of personal confidence to which, for the purposes of the contract, a stranger cannot make any pretensions. But no one, I suppose, would seriously argue that a contract for delivery of chalk from particular quarries for the use of particular cement works cannot be performed by any person for the time being possessed of the quarries, or that it can make the slightest difference to anybody who the proprietors of the cement works or the actual manufacturers may be, provided they are in a position to carry out the terms of the original contract.

Tolhurst was the owner of property at Northfleet, in Kent, containing extensive and valuable chalk quarries. He sold a piece of his land there, known as the Little Dockyard, to the Imperial Co., and that company bought another piece of land from the British White Lead Co., who also derived title from Tolhurst. The main object for which the Imperial Co. was formed was to establish cement works at Northfleet and carry on there the business of Portland cement manufacturers. It was, of course, important for Tolhurst to secure a regular market for his chalk, and it was equally important for the Imperial Co. to secure a regular supply of chalk for their works.

The effect of the contract of January, 1898, may be stated shortly. Tolhurst had made a tramway to the boundary of the land bought by the Imperial Co. from the White Lead Co., and the Imperial Co. was to make a tramway continuing Tolhurst's tramway to a convenient spot on its land in order to enable him to bring chalk to the company's works. On completion of this tramway the contract provided that "the said Alfred Tolhurst will, for a term of fifty years, to be computed from the 25th of December, 1897, or for such shorter period (not being less than thirty-five years) as he shall be possessed of chalk available and suitable for the manufacture of Porland cement, and capable of being quarried and got in the usual manner above water level, supply to the company, and the company will take and buy of the said Alfred Tolhurst at least 750 tons per week, and so much more, if any, as the company shall require for the whole of their manufacture of Portland cement upon their said land." Tolhurst was to provide rolling-stock and traction power, carry the chalk over the company's tramway, and deliver it alongside the company's stores, but he was not to be precluded from supplying other persons. Delivery orders were to be sent in before four o'clock for the next day. The price was to be 1s. 3d. per ton, to be paid in cash monthly. The average monthly payment for any year after 1898 was to be not less than £188. Then there was a clause providing for the case of strikes and unavoidable stoppages, and authorizing the company at its own expense to procure chalk elsewhere in the event of Tolhurst being thereby prevented from supplying the quantity required.

In 1900 the Imperial Co. sold its undertaking to the respondents, the Associated Co., and went into voluntary liquidation. Its affairs are fully wound up, and all its assets have been distributed. Tolhurst brought in no claim in the liquidation. He stood by while the Imperial Co. was in process of dissolution. Tolhurst's case now is that by parting with its undertaking and going into liquidation the Imperial Co. rescinded or put an end to the contract of January, 1898, and that he is not bound under or in accordance with that contract to furnish supplies of chalk to the Associated Co. for the purposes of the works at Northfleet which formerly belonged to the Imperial Co., whether the Associated Co. requires delivery in its own name or in the name of the Imperial Co.

Now, what is the meaning of the contract of

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

January, 1898? I cannot think there is much difficulty about it. It is expressed to be made between Alfred Tolhurst and the Imperial Co. They, and they only, are named as the persons to perform the contract. From beginning to end of the instrument, if the contract be taken literally, there is not one word pointing to the continued existence of the contract in the hands of any other person, either by succession or substitution. The obligations and benefits of the contract on the one side begin and end with Alfred Tolhurst; on the other, they begin and end with the Imperial Co. And yet the contract is to endure for the period of fifty years, or, if the supply of chalk in the quarries does not hold out so long, it is to last for thirty-five years at least.

Now, when it is borne in mind that the Imperial Co. must have been induced to establish its works at Northfleet by the prospect of the advantages flowing from immediate connection with Tolhurst's quarries, and that the contract in substance amounts to a contract for the sale of all the chalk in those quarries by periodical deliveries (less what Tolhurst might sell elsewhere), it is plain that it could not have been within the contemplation of the parties that the company would lose the benefit of the contract if anything happened to Tolhurst, or that Tolhurst would lose the benefit of the market which the contract provided for him at his very door in the event of the company parting with its undertaking, as it was authorized to do by its memorandum. Counsel for the appellant said truly that those powers in the memorandum to which his attention was called placed the company in the position of an individual. That is so. But if the contract had been between two individuals—between Alfred Tolhurst and John Smith—I do not think there would have been any doubt about the matter. It is, I think, the introduction of a company—a body with perpetual succession, defined capital, and specified objects—as one party to the contract, that really creates or suggests the difficulty—that, and the use of the words "their," "their manufacture," "upon their land." But the word "their" in the case of the company must not be taken too literally any more than the word "his" in the case of Tolhurst where the contract speaks of "his" land. Something more is comprehended than the particular company and the individual Tolhurst. It seems to me to me that the contract is to be read and construed as if it contained an interpretation clause saying that the expression "Tolhurst" should include Tolhurst and his heirs, executors, administrators, and assigns, owners and occupiers of the Northfleet quarries; that the expression "the company" should include the company and its successors and assigns, owners and occupiers of the Northfleet Cement Works; and that the words "his" and "their" should have a corresponding meaning. That, I think, was the plain intention of the parties. The contract is a contract for the mutual benefit and accommodation of the chalk quarries and the cement works, and of Tolhurst and the company as the owners and occupiers of those two properties. Construed fairly, the provision in clause 2, about which there was so much argument, means, I think, nothing more than this—that the Imperial Co. was to take the whole of the supply of chalk required for the Northfleet works, guaranteed not to be less than 750 tons per week, from Tolhurst's chalk quarries, and from no other source whatever. As long as that is done, how can it matter who is carrying on the works? There is nothing in the contract to restrict the development of the works on the land which formerly belonged to the Imperial Co., or to check the expansion and improvement, in the ordinary course of things, of the process of manufacture there.

If the view I have expressed be correct, all difficulty vanishes. It is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee. The assignor ought in ordinary circumstances to be made a party. But I cannot think that this is necessary when the assignor is a mere name, as the Imperial Co. is in the present case, without any means and without any executive or board of directors, if indeed it has now any corporate existence. I am not aware of any authority for this proposition, but it seems to me to be in accordance with the practice in equity, and it is supported by what was said by James, V.C., in *Castellan* v. *Hobson*, L. R. 10 Eq. 47.

The result is that Tolhurst's action fails, because, as regards the chalk which has been supplied to the Associated Co., the company is entitled to have it at the stipulated price of 1s. 3d. per ton. The second action succeeds, but I think the Imperial Co. was not a necessary or proper party. If the requirements of sections 142 and 143 of the Companies Act, 1862, have been complied with the company is "deemed to be dissolved," and therefore I should suggest that in lieu of the declaration in the order pronounced by the Court of Appeal there should be inserted a declaration to the effect that the Associated Co. is entitled to the benefit of the contract of the 5th of January, 1898, they undertaking to pay as provided by the contract for all chalk supplied to them in accordance with the contract.

With this variation I think the orders under appeal should be affirmed, and the appeal dismissed with costs.

Lord Shand, who is unable to be present to-day, has asked me to express his concurrence in this opinion.

Lord ROBERTSON.—I can explain in a few sentences what I find an insuperable objection to the judgment appealed against. It seems to me that the demand of the respondents is that the appellant should supply them with something different to that which he bound himself to give. The subject-matter of the contract is expressed to be the supply of 750 tons and so much more chalk, if any, as should be required for the business of a particular company, while the demand of the respondents is that the appellant shall supply 750 tons and so much more chalk as is required for the business of another and a different company. The appellant's point is, therefore, not the bare one, that the contract is not transmissible, but it is that the thing which the assign is asking for is something which the appellant never bound himself to give.

Now, first of all, about the facts. It is true, or at least I assume it to be true that the original company still exists in such sense that it can sue. But it is still more certain that it has finally ceased business; and it exists and comes into court solely in order to enforce this contract (if it can) in favour of the new company. And the crucial fact (in my view) is that the original company is, as a manufacturer, dead and done with, and has no requirements, large or small. The requirements which the appellant is now called on to meet are not the requirements of the old company, but the requirements of the new.

It seems to me no answer to this to say that the old company might have increased its capital and its operations, so that its requirements would have been as onerous as those of the new company. This is merely the old and often-rejected argument that a man can be forced to do something which he never agreed to merely because it is very like and no more onerous than something which he did agree to.

I have only to add that I should find it impossible to split up the subject of the contract, and to hold

that, even if the appellant is not bound to meet the requirements of the new company, he is bound to give them the 750 tons. In a commercial contract like this, the benefit of the more elastic provisions belongs to both parties, and neither the person who supplies nor the person who takes can be held to the one part of the contract when the opposite party has, by his own act, rendered the other part of the contract impossible of fulfilment.

Lord LINDLEY.—In January, 1898, Mr. Tolhurst, who was the owner of some chalk land in Northfleet, sold part of that land to the Imperial Portland Cement Co., and by an agreement dated the 5th of January, 1898, he agreed that they should have for fifty years from his adjoining chalk quarries all such chalk as they should require for their cement works on the land they had bought. They were to pay 1s. 3d. a ton. for all they wanted, and they bound themselves to take at least 750 tons a week. The company were not to come on to Tolhurst's land and get the chalk themselves. He was to get it and deliver it to them, and they were to pay him monthly for what was so delivered. Tolhurst was at liberty to sell chalk to other persons, and provision was made for the possible event of all his chalk being worked out before the expiration of the fifty years.

The nature of the agreement and the time it was to last negative the idea that it was confined to the parties to it. The word "assigns" does not occur in the agreement. But this does not shew that the benefit of the contract is not assignable. An agreement for a lease, and even an option to require a lease or a renewal of a lease, is assignable in equity even although there is no mention of executors, administrators, or assigns: see *Buckland* v. *Papillon*, 15 W. R. 92, L. R. 2 Ch. 67.

If the above agreement had been with an ordinary individual his interest would, on his death, have passed to his executors or administrators; or if he had become bankrupt his trustees could have claimed it and have sold it for the benefit of his creditors. It follows that on the same supposition he could have assigned such interest in his lifetime. The Imperial Co. could, in my opinion, have done the same thing; they could have assigned their interest themselves before winding-up proceedings commenced, and their liquidators could have assigned it as part of their assets afterwards. But it is necessary to look a little further and see what limit is set to the right conferred by the agreement. The Imperial Co. were not entitled to an unlimited supply of chalk, but only to so much as they might want for making cement on their own piece of land. I do not think their right to have chalk from Tolhurst's quarries could be assigned apart from their own land and cement works. The Imperial Co. could not by alienation or otherwise increase the burdens which Tolhurst undertook to bear. But this is the only limit which I can find in the present case.

Mathew, J., thought that the mere fact that the Imperial Co. was a comparatively small company and that the Associated Co. was much larger, and would or might want more chalk than the other, involved a material increase in the burden thrown on Tolhurst. But the learned judge apparently overlooked the fact that the Imperial Co. could have increased its capital to any extent; and could have increased its cement works to any extent which the land they had bought from Tolhurst could carry. The limit of the burden thrown on Tolhurst is in any case measured by this consideration, and this limit can no more be passed by the Associated Co. than by the Imperial Co.

But then counsel for the appellant relied on the words "as the company shall require for the whole of their manufacture of Portland cement upon their said land." By throwing a strong emphasis on the words "the company" and "their," the impression may be produced that these words, which plainly refer to the Imperial Co., were purposely used to exclude all other persons. But I cannot think that these expressions indicate any such intention. There is no question here of any personal confidence or personal skill. There is no reason whatever for supposing that any personal element entered into the mind of either of the parties to the agreement, and I cannot find anything in it to prevent the Imperial Co. from assigning the benefit of it to any other company or to any individual. By so assigning it the Imperial Co. would not get rid of their obligations to Tolhurst; but the contract is one the benefit of which is assignable in equity quite independently of the Judicature Acts.

The Judicature Act, 1873, s. 25, clause 6, has not made contracts assignable which were not assignable in equity before, but it has enabled assigns of assignable contracts to sue upon them in their own names without joining the assignor. I cannot agree with the Court of Appeal in thinking that the Associated Co. could not sue Tolhurst on this contract without joining the Imperial Co. as co-plaintiffs. The supposed necessity of making them parties or of postponing their dissolution to enable the Associated Co. to sue as their assignees has, I think, obscured the true position of the parties. I see no such necessity. But the joinder of the Imperial Co., although unnecessary, has not increased the costs, and need not be further noticed. If Tolhurst has any provable claim against the Imperial Co., if he is not too late, he can prove against it, and the liquidators can, if necessary, obtain the means of paying him from the Associated Co. under their indemnity.

In conclusion, I will only add that the *British Wagon Co.* v. *Lea*, 28 W. R. 349, 5 Q. B. D. 149, was, in my opinion, rightly decided, and is an authority very much in point for the Associated Co. The contract there was held assignable, although the word "assigns" did not occur.

The appeal fails, and the order of the Court of Appeal should be affirmed with costs; but the formal order of the Court of Appeal will, I think, be improved if amended as suggested by Lord Macnaghten.

Appeal dismissed.

Solicitors for the appellant, *Sismey & Cooke*, for *Tolhurst, Lovell, & Clinch*, Gravesend.

Solicitors for the respondents, *Ashurst, Morris, Crisp, & Co.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew, L.J.) — Nov. 30.

RASCH & CO. (*Appellants*) *v.* WULFERT (*Respondent*). (*a.*)

Practice—Service out of the jurisdiction—Summons to enforce award—Submission to jurisdiction—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 12—*R. S. C.*, 1883, *ord.* 11.

A contract between the appellants, who were foreigners carrying on business abroad, and the respondent contained an arbitration clause. The respondent instituted arbitration proceedings against the appellants, and

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

appointed an arbitrator. The appellants did not appoint an arbitrator, and the hearing of the arbitration took place without any appearance on the part of the appellants before the sole arbitrator, who made an award in favour of the respondent. The respondent applied for leave to serve on the appellants out of the jurisdiction a summons to enforce the award under section 12 *of the Arbitration Act*, 1889.

Held, that the court had no power to allow service out of the jurisdiction of such a summons.

Appeal from an order of Ridley, J., at chambers, allowing service out of the jurisdiction of a summons to enforce an award.

By an agreement in writing dated London, the 4th of March, 1902, Rasch & Co., who were foreigners carrying on business as wall paper manufacturers at Bramsche, in the Empire of Germany, appointed Ernest Wulfert and another to be the sole agents for the sale of their goods in the United Kingdom for the period of three years.

The agreement contained the following clause: "In the event of any dispute between the parties hereto in any way arising out of this agreement the same shall be submitted to two arbitrators, one to be appointed by each party according and subject to the provisions of the Arbitration Act of 1889."

Wulfert instituted arbitration proceedings against Rasch & Co., on the ground that a dispute arising out of the agreement had occurred, and appointed an arbitrator. Rasch & Co. did not appoint an arbitrator. The hearing of the arbitration took place without any appearance on the part of Rasch & Co. before the arbitrator appointed by Wulfert acting as sole arbitrator. On the 24th of August, 1903, he made an award in favour of Wulfert for £2,000.

Wulfert, having given Rasch & Co. notice of the award and understanding that they proposed to ignore it, proceeded to take steps to enforce it under section 12 of the Arbitration Act, 1889. He applied at chambers for an order that he might be at liberty to issue a summons in the arbitration for leave to enforce the award in the same manner as a judgment or order to the same effect; and he also asked that service of a copy of the summons by sending the same by a prepaid post letter addressed to Rasch & Co. at Bramsche, Germany, and leaving a copy of the same with a named solicitor in London might be good and sufficient service of the summons.

The master, on the hearing of the application *ex parte*, ordered that a summons should issue returnable in fourteen days, and also made an order for substituted service of the summons by service on the solicitor in London and by post letter to Rasch & Co. at Bramsche, Germany.

Substituted service having been effected in accordance with the master's order, Rasch & Co. appeared to the summons under protest. The master dismissed the summons, being of opinion, on consideration, that the order for substituted service had been made without jurisdiction.

Wulfert having appealed, Ridley, J., allowed the appeal as to service of the summons, and ordered that the matter should be remitted to the master.

Rasch & Co. appealed to the Court of Appeal.

Montague Lush, K.C., and *Frank Gover*, for the appellants.—The learned judge acted on the assumption that the appellants had submitted to the jurisdiction of the court, and he thought there was power to enforce the award, and for that purpose to order service of the summons out of the jurisdiction, under section 12 of the Arbitration Act, 1889. That section is as follows: "An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect." The appellants, however, have not submitted to the jurisdiction of the court. They are foreigners residing abroad, and the award was obtained in their absence. They cannot be brought within the jurisdiction by any process of the court except under the provisions of order 11. That order, by its terms, only applies to writs. In the case of *In re Busfield, Whaley* v. *Busfield*, 34 W. R. 372, 32 Ch. D. 123, it was held that the court has no power to serve an originating summons out of the jurisdiction. A summons to enforce an award is an originating summons: *Ex parte Caucasian Trading Corporation (Limited)*, 44 W. R. 439, [1896] 1 Q. B. 368. As an originating summons cannot be served out of the jurisdiction, there is no power to allow substituted service of it within the jurisdiction; you cannot do indirectly what you cannot do directly: *Townend* v. *Brandenburg*, 39 SOLICITORS' JOURNAL, 151. The learned judge was of opinion that this summons was not an originating summons, as not coming within the definition of "originating summons" in ord. 71, r. 1*a*, viz.,—"every summons other than a summons in a pending cause or matter." But that definition does not exclude this summons; for an arbitration is not a cause or matter: *In re An Arbitration between Shaw and Ronaldson*, [1892] 1 Q. B. 91.

J. R. Atkin, for the respondent.—This summons is not an originating summons. An originating summons must originate proceedings. Here proceedings had already commenced before the summons was applied for. The appellants were parties to those proceedings. Their agreement to the abitration clause contained in the original contract amounted to a submission to reference. By section 1 of the Arbitration Act, 1889, a submission shall have the same effect in all respects as if it had been made an order of court. The appellants, therefore, by their submission to reference submitted to the jurisdiction of the court. In every case of an arbitration between an Englishman and a foreigner, the foreigner by submitting to the reference brings himself within the jurisdiction of the court. Section 12 of the Arbitration Act confers on the court the power to enforce an award in the same manner as a judgment or order. This is done by summons, and where the award is against a foreigner who has submitted to the jurisdiction of the court, no objection can be taken to service of the summons on him on the ground that he is out of the jurisdiction.

COLLINS, M.R.—I am of opinion that this appeal must be allowed. The application was made by the respondent, who said that he obtained an award against foreigners resident abroad, and asked leave to serve a summons out of the jurisdiction on the persons against whom he had got the award for the purpose of enforcing the award by execution here. The master, in the first instance, thought that he had power to allow substituted service of the summons out of the jurisdiction, but he finally decided that there was no power to serve such a summons out of the jurisdiction. Ridley, J., on appeal, held that service out of the jurisdiction might be allowed. The question, therefore, is whether the court has jurisdiction to allow service out of the jurisdiction of such a summons as this.

It is admitted that there is no power to allow service out of the jurisdiction except such as is conferred by statute. The statutory rules dealing with service out of the jurisdiction—viz., the rules of order 11—by their terms only apply to writs of summons, and it has been expressly held that they do not cover an originating summons, which is the nearest approach to a writ. Counsel for the respondent

admits that he cannot get over the authority to that effect, but he argues that it is a mistake to say that the inhibition against serving summonses other than writs out of the jurisdiction applies to this case. He says that he has obtained an award, and, that award being a valid award, there is a presumption that the parties to it have submitted to the jurisdiction of the court, and therefore may be supposed to be within the jurisdiction, so that what he is now seeking to do is to serve this summons, not on someone who is out of the jurisdiction, but on someone who is within it. His argument rests on this: that the foreigners, the appellants, were within the jurisdiction before he took out the summons. But were they? And how? He obtained an award against them, but that is not enough. His argument requires that he should further show that this amounts to a presumption that they were within the jurisdiction. But the fact of an award having been made against a man is clearly no evidence that he has submitted to the jurisdiction of the arbitrator, and in my opinion it does not give rise to any presumption that he has made a submission. A general agreement to refer in certain circumstances does not amount to a submission. Until a man has submitted a particular dispute to arbitration he has not brought himself within the jurisdiction of the arbitrator at all. The basis of the respondent's argument therefore fails. He must resort to some other procedure which enables the English court to extend its jurisdiction over foreigners resident abroad. He is not proceeding by writ, but by summons, and this summons is not even an originating summons. He cannot be in a better position, so far as regards service out of the jurisdiction, than if he were proceeding by originating summons.

MATHEW, L.J.—I am of the same opinion. The cases in which service abroad is allowed are precisely stated in the rules of order 11. We ought not to depart from those rules by allowing service abroad in any other case unless we find a clear indication elsewhere that we have authority to do so. It is said that such authority is to be found in the Arbitration Act, and that every foreigner who is a party to a submission must be taken to be within the jurisdiction. I cannot find any provision to that effect, and I decline to lay down that the English courts have authority to allow service abroad in such a case as the present.

Appeal allowed.

Solicitor for the appellants, *W. Sanders Fiske.*

Solicitors for the respondent, *Swepstone & Stone.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Nov. 20.

FRASER v. FRASER. (a.)

Practice—Appeal—Court of Appeal—Action referred by consent of parties to master—Judgment entered by master—Right of appeal to Court of Appeal—Rules of Supreme Court, ord. 14, r. 7.

When in an action in the High Court the whole action has been referred, under ord. 14, r. 7, to a master, and judgment has been entered in pursuance of his direction, an appeal from the judgment does not lie to the Court of Appeal.

This was an application by the defendant for judgment or a new trial in an action tried before Master Lord Dunboyne, under the provisions of ord. 14, r. 7.

The point raised was whether an appeal lies to the Court of Appeal from a judgment of a master under the above rule.

The plaintiff on the 29th of April, 1903, obtained from the said master an order giving him leave, under ord. 14, r. 1, to sign final judgment against the defendant.

Upon the 5th of May, 1903, Phillimore, J., in chambers discharged the above order, and ordered that the defendant be at liberty to defend the action, and it was, by consent, under ord. 14, r. 7, further ordered that the action be referred to be tried by a master without pleadings.

The action was thereupon tried by the master, who gave his certificate finding the plaintiff entitled to a sum of £925, and directing judgment to be entered for him in accordance with the certificate. Judgment was accordingly so entered for the plaintiff with costs.

The master, although doubting whether an appeal lay from his decision, gave the defendant leave to appeal.

Ord. 14, r. 7, provides as follows: "Upon the hearing of the application"—that is, the application of the plaintiff for summary judgment—"with the consent of the parties, an order may be made referring the action to a master, or the action may be finally disposed of without appeal in a summary manner."

Trevor Lloyd, for the respondent, took the preliminary objection that no appeal lay from the decision of a master under ord. 14, r. 7, or if it did, it lay to the Divisional Court, and not to the Court of Appeal, as the master was acting as an arbitrator.

He cited *Wynne-Finch* v. *Chaytor*, 52 W. R. 24, [1903] 2 Ch. 475.

Hume Williams, K.C. (*J. W. McCarthy* with him), for the appellant.—An appeal lies from the decision of a master under rule 7 to this court, as the decision of the master is equivalent to the judgment of the High Court. The true basis of this rule, and what the learned framers must have had in their minds, is this, that there is a very convenient mode now in existence, and was at the time this rule was made, of dealing with applications under order 14. In certain classes of cases the judge, instead of deciding one way or other upon the hearing before him, sends them into the short causes list. There is a class of case that cannot be so conveniently disposed of in the short causes list as by some form of more elaborate inquiry, and rule 7 provides that in such case the judge shall substitute either for his own summary decision on the spot or for disposition of the case by putting it in the short causes list, a more elaborate investigation—namely, that which is mentioned in this rule, and in so appointing a master, what was intended was that the master should simply be the delegate of the judge, doing instead of the judge that which would be done by the judge himself if he dealt with it on the application under order 14 or by another judge if he decided it in the short cause list, and in either view retaining for the litigants the right of appeal which they would have had if that had been done. The court ought to assume that this third mode of disposing of it is also subject to the right of appeal which would have existed had either of the other methods been adopted. If the master was merely acting as an arbitrator there is no necessity for rule 7, as before this rule was made the court had power under the Arbitration Act and the other rules to refer a case to a master.

COLLINS, M.R.—This is an appeal from the decision of a master upon a matter referred to him under ord. 14, r. 7. The master entertained the reference

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

and gave his decision, and it is against that decision that this appeal is now brought in this court. I have come to the conclusion that an appeal in this case does not lie to the Court of Appeal. The question turns upon the wording of rule 7: "Upon the hearing of the application with the consent of the parties an order may be made referring the action to a master, or the action may be finally disposed of without appeal in a summary manner."

Now, in this case there has been, in some form or other, a reference to a master. An order may be made referring the action to a master, and it is made with the consent of the parties. Assuming that it is a reference, it would seem *primâ facie* to be either a reference at common law, in which case there would be no appeal, or a reference under the Judicature Act and the Arbitration Act, in which case, if there is an appeal, it would be to the Divisional Court, but in neither view is there an appeal to the Court of Appeal. Now, it is not necessary for us to decide the question whether there is any right of appeal at all from a decision under rule 7. If we did decide that question our decision would not be binding, because that question is not directly raised before us in this case, and I am very far from laying it down that an appeal does or does not lie to any court. The question before us is whether an appeal lies to this court, and what I do decide is that, if an appeal lies, it does not lie to this court. There is a great deal to be said for the view that the learned persons who are responsible for framing this rule did not intend that there should be an appeal at all, but, on the other hand, if that be the true result of this rule as framed, I regret to say that they have not used that clearness of expression which I should have expected from them. It may be that the words "without appeal" are the words governing the whole rule, and it may be said in favour of the view that it was intended to negative the right of appeal that the consent of the parties was made a term of the order of reference, and that by basing the order upon consent it was intended to give something more to its effect than if it were made without consent. However, as I have said, I am not prepared to give any opinion upon the rule whether or not it does cut off altogether the right of appeal.

Rule 7 certainly does seem to me to provide for a reference—"An order may be made referring the action"—and, if a reference, it seems to fall within one of two categories—a reference at common law, which carries with it no right of appeal, or a reference under the Acts which I have referred to, which, if they do give a right of appeal, give it to the Divisional Court only. Counsel for the appellant has not been able to convince me that there is any third alternative possible.

It is enough for my present purpose to say that I find here an intention to refer actions to some one, either to some arbitrator who takes his rights under the common law, or to some arbitrator whose rights are measured by the legislation applying to that class of litigation. In either view there is no right of appeal direct to this court. For the reasons I have given I think it is not only not open to us, but would be undesirable that we should decide a matter that is not strictly raised before us—that is to say, whether there is or is not any possibility of appeal from the decision. It is enough for us to say that certainly there is no appeal to this court and that if an appeal exists at all it exists elsewhere.

On these grounds I hold this appeal ought to be dismissed.

MATHEW, L.J.—I am of the same opinion. I do not think it is possible to adopt the construction that Mr. Hume Williams has contended for, without in substance altering the language of the rule. The rule now reads, "On the hearing of the application, with the consent of the parties, an order may be made referring the action to a master." The learned counsel proposes in effect to insert there the words "who shall have all the functions of the judge in dealing with the case." I see no ground whatever for supposing that that was the intention of the persons who framed the rule. If it were so, this result would follow: that on a reference to a master under this rule, in every case there would be an appeal to the Court of Appeal on questions of law and questions of fact, which would be a most extraordinary departure from an established procedure. It appears to me the functions of the master are determined by the words "refer the action to a master." He is an arbitrator, and an arbitrator only. His functions are complete and final except in the few cases in which the decision of an arbitrator can be questioned. His decision is the decision of an arbitrator. Then there is a further alternative. If it be that the master is to be treated as an officer of the court, although there is no repetition here of the various provisions of the Arbitration Act relating to official referees, his position is analogous to the position of an official referee, and his decision subject to the same revision and review. If that be the true position of the master in this case, and if that be the true construction of the rule, it is obvious that the appeal is not to us, but to the Divisional Court. Therefore I agree that this appeal must be dismissed.

COZENS-HARDY, L.J.—I agree. Rule 7 of order 14 contains words which I think are almost solely applicable to the reference of actions. They are words appropriate not to the trial of an action by the judge or master sitting as the deputy of the judge, but by a person who is an arbitrator or in the nature of an arbitrator. I can see nothing in the rule justifying an appeal to the Court of Appeal. Whether there is or is not an appeal to the Divisional Court it is not for us to say, and I desire to express no opinion whatever on that point.

Appeal dismissed.

Solicitors for the appellant, *Williams & Neville.*

Solicitors for the respondent, *Harratt & Pollock.*

From K. B. Div.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Nov. 2.

CHARLES BRIGHT & CO. (LIMITED) v. SELLAR. (a.)

Practice—Action of review—Charging order—Error in law apparent on face of order.

The High Court has no jurisdiction, by means of an independent action, to review its own order on the ground that the order is erroneous in law upon its face.

Appeal from a decision of Wright, J., upon a point of law set down for hearing under ord. 25, r. 2.

On the 28th of November, 1901, the defendant recovered judgment in the King's Bench Division against the plaintiff for £2,537 10s. 2d. The debt remaining unpaid, the defendant on the 2nd of December, 1901, obtained a charging order *nisi* by which the plaintiffs' interest in certain shares in Bright's Light and Power Co. (Limited), standing in the name of one Bennett on behalf of the plaintiffs,

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

and a sum of £623 8s. 9d. in cash held on behalf of the plaintiffs by Bennett, were charged with the payment of the amount due on the judgment debt. On the 20th of December this charging order* was made absolute. On the 14th of July, 1902, the present action was brought to have the charging order reviewed upon the ground that it was erroneous in law upon its face so far as it purported to create a charge upon the sum of £623 8s. 9d. cash in the hands of Bennett, and to have it discharged so far as it purported to create the above charge. The defendant pleaded that the statement of claim disclosed no cause of action. It was ordered that the point of law so raised should be set down for hearing forthwith.

Wright, J., held that, assuming that the charging order was erroneous in law upon its face, as an appeal could have been brought against it, an action to review it would not lie; and, further, that an action to review only lay in the case of a judgment finally determining the rights of the parties, and that a charging order was not such a judgment. He accordingly held that the action was not maintainable and gave judgment for the defendant.

The plaintiffs appealed.

C. A. Bennett, for the plaintiffs.—The old jurisdiction of the Court of Chancery to review its own orders still exists, and is now transferred to the High Court: *Falcke* v. *Scottish Imperial Insurance Co.*, 35 W. R. 794; *Scott* v. *Alvarez*, [1895] 1 Ch. 596; 43 W. R. Dig. 185; Seaton on Decrees (6th ed.), p. 853. Leave to bring the action is not now necessary: *Boswell* v. *Coaks*, 6 The Rep. 167. A bill of review was maintainable where either (1) the order or decree is erroneous on the face of it; or (2) fresh facts have been discovered which could not have been used in the former suit; or (3) the former order or decree was obtained by fraud. An action to review an order will lie. The statement in 2 Daniell's Chancery Practice (7th ed.), p. 1287, that "an action of review is only proper where a judgment has been given finally determining the rights of the parties," is not correct, the case of *Noble* v. *Stow*, 7 W. R. 709, 29 Beav. 409, upon which it is founded, not bearing it out. Even if there must be an order finally determining the rights of the parties, this charging order does so. [He also referred upon this point to *Green* v. *Jenkins*, 8 W. R. 380, 1 De G. F. & J. 454; *Flower* v. *Lloyd*, 25 W. R. 793, 6 Ch. D. 297; 2 Smith's Chancery Practice, p. 44.] Secondly, this charging order is erroneous in law upon its face, inasmuch as there is no power under 1 & 2 Vict. c. 110, s. 14, amended by 3 & 4 Vict. c. 82, s. 1, to make a charging order on cash: *Robinson* v. *Peace*, 7 Dowl. P. C. 93; *Brereton* v. *Edwards*, 37 W. R. 47, 21 Q. B. D. 488.

Alan Macpherson, for the defendant.—Since the Judicature Act there is no jurisdiction to review a judgment or order of the High Court, at any rate upon the ground that it is erroneous in law upon the face of it. The High Court has no power to rehear it own judgments or orders: *In re St. Nazaire Co.*, 27 W. R. 854, 12 Ch. D. 88. The decision of Kekewich, J., in *Scott* v. *Alvarez* was wrong. It went upon the admission of counsel that the jurisdiction still existed, and also upon the observations of Kay, J., in *Falcke* v. *Scottish Imperial Insurance Co.*, which was merely *obiter*. [He also cited *Perry* v. *Phelips*, 17 Ves. 173.] Secondly, if the jurisdiction still exists there is no error of law apparent on the face of this charging order.

* The order *nisi* also purported to charge certain debentures in the company, but the reference to the debentures was omitted in the order absolute.

C. A. Bennett replied.

Cur. adv. vult.

Nov. 2.—COZENS-HARDY, L.J., read the judgment of the court as follows: This appeal raises a curious and important question as to the jurisdiction of a judge of the High Court to review and discharge an order of the High Court. On the 28th of November, 1901, the defendant Sellar recovered judgment against the plaintiff company in an action in the King's Bench Division for £2,537 10s. 2d., and he obtained a charging order in that action by which the company's interest in certain shares standing in the name of one Bennett on behalf of the company in Bright's Light and Power Co. (Limited), and a sum of £623 8s. 9d. held on behalf of the company by Bennett, were charged with the payment of the amount due on the judgment. The order *nisi* also purported to charge certain debentures, but the word "debentures" was omitted in the order absolute, with which alone it is necessary to deal. This action was commenced on the 14th of July, 1902, and the claim alleges that the order is erroneous in law in so far as it purports to create a charge upon the cash in the hands of Bennett, and it asks that the order may be reviewed and discharged to that extent. It is argued that the charge on the cash was not authorized by the Judgments Act, 1838, as amended by the Judgments Act, 1840, and that the error is of such a nature as would have supported a bill of review in the old Court of Chancery, and that the relief which might have been obtained by means of such a bill ought now to be given by action. Wright, J., has held that the action cannot be maintained, and from his decision this appeal is brought. It may be assumed for the present purpose, but without deciding it, that the charging order was not justified by the statutes, and that the error is apparent on the face of the order. It is important to remember that in the Court of Chancery, until comparatively modern times—that is to say, until the reign of Charles II.—there was no appeal from the Lord Chancellor to any higher tribunal, but an opportunity was afforded of correcting decisions by means of a rehearing, which might be before the same or any other judge. This right of rehearing could, however, only be exercised before a decree or order had been enrolled, up to which time it was not considered to be, in the full sense of the term, a record of the court. If an enrolled order was bad on the face of it, a means existed for correcting such an order by a bill of review. It will be sufficient to refer to one of Lord Bacon's orders in Chancery dealing with this subject-matter. "No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review, and no bill of review shall be admitted except it contain either error in law appearing in the body of the decree, without further examination of matters of fact, or some new matter which hath arisen in time after the decree, and not any new proof which might have been used when the decree was made; nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special licence of the court and not otherwise": see Beames's Chancery Orders, 1. It was, however, well settled that, if there was error apparent on a decree or order which was not enrolled, neither a bill of review nor a supplemental bill in the nature of a bill of review could be maintained, but the investigation of the matter must be brought on by a petition of rehearing: see Mitford on Pleading (3rd ed.), p. 71. Now, in the present case, the order absolute has not been enrolled. The procedure by bill of review, therefore, could not have been applied under the old system. A petition of rehearing might

have been presented, but that would have been the only remedy. Now, it has been held that since the Judicature Act no judge of the High Court has jurisdiction to rehear, such jurisdiction being essentially appellate: *In re St. Nazaire Co.* It seems to follow logically from what has been said that the High Court has now no jurisdiction to review its own order on the ground of apparent error by means of an independent action, and that the party complaining must come to the Court of Appeal. The convenience of this view is obvious. If an appeal is presented within the reasonably short time allowed by the general orders no question will arise. If, as in the present case, the party complaining allows the time limited to pass by, the Court of Appeal has still full power to enlarge the time: see ord. 58, r. 15. Subject to proper conditions and under special circumstances, the Court of Appeal would extend the time. But in considering an application for extension regard would be had to any *laches* or delay on the part of the applicant, and to what, if anything, had been done under or in reliance upon the order sought to be discharged. There is no authority binding the court opposed to the above view. Doubtless there is ample jurisdiction now to deal by fresh action with some matters which were formerly the subject of a bill of review or of a supplemental bill in the nature of a bill of review. For instance, where a judgment has been obtained by fraud (*Birch* v. *Birch*, 50 W. R. 437, [1902] P. 130); or where fresh material evidence has been obtained since the judgment which could not have been previously procured (*Boswell* v. *Coaks*) an action may be maintained. Actions of this nature do not invite the High Court to rehear upon the old materials. Fresh facts are brought forward, and the litigation may be well regarded as new and not appellate in its nature, because not involving any decision contrary to the previous decision of the High Court. Reliance was naturally placed upon the observations of Kay, J., in *Falcke* v. *Scottish Imperial Insurance Co.*, to the effect that the old jurisdiction of the Court of Chancery to allow a bill of review is not affected by the Judicature Act. The learned judge was dealing with an application for leave to bring a fresh action on the ground of the discovery of a new and material document. It was a case falling within the second branch of Lord Bacon's order. His decision that such an action may be maintained was quite correct, though it can scarcely be contended, since the judgment of the House of Lords in *Boswell* v. *Coaks* that the leave of the court is now necessary. If, however, the *dictum* is taken as an assertion that all the old jurisdiction of the Court of Chancery with respect to bills of review, including the jurisdiction to discharge an order on the ground of error apparent on the face of the order, is now vested in the High Court, we think it cannot be supported. It follows that in our opinion this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the plaintiffs, *Bennett & Chance.*

Solicitor for the defendant, *W. J. Hunter.*

High Court of Justice.

Chan. Div. Byrne, J. } Dec. 16.

In re JORDAN.
HAYWARD *v.* HAMILTON. (*a.*)

Practice—Parties—Trustee—Breach of trust—Claim for replacement of property—Executors of trustee—Representatives of trust estate.

In an action by a cestui que trust *against the executors of a deceased trustee (who was not the last surviving trustee) for the replacement of trust property alleged to have been lost by breaches of trust, the representatives of the trust estate must be made parties to the action. If there are no such representatives, and there is a power of appointing new trustees, that power must be exercised and the new trustees joined as parties.*

This was an action by a beneficiary under a marriage settlement dated the 11th of December, 1869, and made between L. N. Hayward of the first part, Jane Jordan of the second part, and C. Jordan and D. Ludlow of the third part.

The plaintiff sued the defendants as executors and trustees of the said C. Jordan for replacement by them out the estate of the said C. Jordan of a sum equal in value to certain of the trust properties comprised in the settlement and alleged to have been lost by breaches of trust on the part of the said C. Jordan.

It was alleged by the statement of the claim that C. Jordan and D. Ludlow, the trustees of the settlement, committed breaches of trust causing a loss to the trust estate of about £1,600; that C. Jordan died in 1882, and that the defendants were his executors; that D. Ludlow died in 1886; that no new trustees of the settlement had been appointed; that L. N. Hayward died in 1885; and that his widow, Jane Hayward had in 1901 appointed the trust properties in favour of the plaintiff, subject to her own life interest.

The plaintiff claimed that defendants, as C. Jordan's executors, were liable to make good the settlement moneys lost by C. Jordan's breaches of trust; that a sum equivalent to those moneys should be set aside and invested, as the court might direct, to answer that loss; and that if necessary an account of those moneys should be taken, and administration of the real and personal estate of C. Jordan granted.

A preliminary objection was taken at the trial that the trustees of the settlement ought to be represented by adding as defendants either the representatives of D. Ludlow or persons to be appointed as new trustees.

Norton, K.C., and *Bailhache*, for the plaintiffs.

Rowden, K.C., and *T. L. Williamson*, for the defendants.

BYRNE, J.—In this case an action is brought by a beneficiary under a settlement dated in 1869 asking for a declaration that the defendants, who are executors of a deceased trustee, are liable as such executors to make good a loss which has occurred to the settlement funds. The only parties who are defendants are the representatives of a trustee who was not the last surviving trustee. Therefore there is nobody before the court representing the trust estate. The person who has the right to recover moneys belonging to the settlement is, if there be such a person in existence, the representative of the last surviving trustee. The *cestuis que trust* can come into

(*a.*) Reported by PERCY WINFIELD, Esq., Barrister-at-Law.

court to recover money which was lost, joining the person in whom the right to recover it is legally vested, by reason of the power of the court to execute trusts and to allow beneficiaries to sue in their own names, if a sufficient case be shown. Cases have been cited, of which *In re Harrison*, [1891] 2 Ch. 349, 39 W. R. Dig. 167, is the chief example, where it was held that, an action having been brought against a surviving executor and trustee, it was not necessary to make the representative of a deceased trustee a party. In that case, in an action for a general account against a surviving executor and trustee, it was held that it was not, in the absence of special circumstances, necessary for the plaintiff to make the representative of a deceased trustee or executor a party. If the defendant require such representative to be added, and the circumstances of the case rendered it advisable that he should be so added, the R. S. C., 1883, ord. 16, rr. 11 and 48 provide the machinery for that purpose. Chitty, J., gave his reasons for saying the action might be brought in that form. He says (at p. 354), "Many judgments have been made without any opposition against a surviving executor and trustee, without joining the representatives of others who had died before the action was commenced, where there were no special circumstances in the case rendering it necessary that they should be parties. The order goes in the well-known form." But no authority has been cited showing that judgment could be given in an action of this kind, which in fact involves something in the nature of a partial execution of the trusts, without having the persons representing the trust estate before the court. It may be that there is no present trustee, as there may be no representative of the last surviving trustee, or, if there be one, that he has refused to accept the trusts of this settlement. But, in the present case, there is a person entitled to appoint new trustees of the settlement, and, if there be no trustees, such an appointment ought to be made, and there is no reason why the existing trustees, if any, or such new trustees, should not be brought before the court.

It is argued that this action is not asking for execution of the trusts, but is only brought for a declaration that the estate of the deceased trustee is liable for breaches of trust. The plaintiff is not really entitled to be paid any money found due, and it would be difficult to make such an order except in the presence of the parties entitled to be paid, though, of course, in a proper case, possibly somebody might be appointed to represent the capital of the trust. But it does not rest there. The plaintiff's estate wants an order founded on it—the investment of a sum to answer the loss. The case is of some importance, for there is no authority which covers it, and I do not say that there may not be cases in which the court might entertain such an action as the present, in a case where it is impossible to get representatives before the court. But when it is possible to do so some person should be appointed to represent the estate. The case must stand over to enable the present trustees to be joined, or, if there are none, to enable new trustees to be appointed and added as defendants.

Solicitors for the plaintiff, *Kinch*, for *Lyndon, Moore, & Co.*

Solicitors for the defendant, *W. R. Smith & Smyth*, for *Gardners*.

Chan. Div. Buckley, J. — Oct. 28.

MONTEFIORE *v.* GUEDALLA. (*a.*)

Trustee—Will—Construction—Power to appoint new trustees—Donee of power appointing himself—Sanction of court.

The fiduciary character of a power to appoint new trustees renders it improper for the donee of the power to appoint himself, save in exceptional circumstances; it does not in itself exclude him from the class of persons capable of being appointed. Accordingly, where it is beneficial to the trust that he should be appointed, and provided that he is not excluded by the language of the instrument creating the power, it is competent for the donee to appoint himself and for the court to confirm the appointment so made.

Tempest *v.* Lord Camoys, 58 *L. T. N. S.* 221, 36 *W. R. Dig.* 207, *followed.*

In re Skeats' Settlement, 42 *Ch. D.* 522, 38 *W. R. Dig.* 202, *and* In re Newen, [1894] 2 *Ch.* 297, *explained.*

This was a summons taken out by Edmund Sebag Montefiore, Cecil Sebag Montefiore, Sir Samuel Montagu, and Richard Dawes, the executors of Sir Joseph Sebag Montefiore, who was the last surviving trustee of the will of Judah Guedalla, that they might be at liberty as such executors to appoint the said Cecil Sebag Montefiore, Isidore Spielmann, and Samuel Isaac Cohen trustees of the said will.

By his will Judah Guedalla, after appointing certain persons his trustees and bequeathing divers legacies and declaring certain trusts concerning his residuary estate, declared that on the death, refusal, or incapacity to act of any of the trustees therein before named or of any trustee or trustees to be appointed in their or any of their places, or if any or either of such trustees should be desirous of retiring from his trusteeship, it should be lawful for the acting trustee or trustees for the time being of his will or the executors or administrators of the last acting trustee to appoint a new trustee or trustees in the place of such trustee so dying, refusing, or becoming incapable to act or wishing to retire as aforesaid.

The estate of Judah Guedalla was being administered by the court, and its sanction was therefore necessary for the appointment of new trustees.

Cecil Sebag Montefiore was not beneficially interested under the will of Judah Guedalla, and circumstances rendered it desirable that he should be one of the new trustees.

The beneficiaries supported the present application.

A. H. Jessel, for the applicants.—The only difficulty arises from the fact that Cecil Sebag Montefiore, one of the proposed new trustees, is himself one of the persons having the power to appoint. In *In re Skeats' Settlement* it was held that a power of appointing new trustees being fiduciary, the donee of such a power cannot appoint himself. That case was followed in *In re Newen*. My contention is that such an appointment is not void, but only voidable. The donee ought to appoint himself only under exceptional circumstances. That was the view taken by Chitty, J., in *Tempest* v. *Lord Camoys*, which was cited in *In re Skeats' Settlement*: see also Farwell on Powers (2nd ed.), p. 654. In the present case the circumstances are exceptional, and there is nothing in the wording of the power to prevent the donee appointing himself. The court can, therefore, sanction the appointment.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

G. S. Alexander, for the beneficiaries.

BUCKLEY, J.—This is a question arising out of an application for the sanction of the court to the appointment of new trustees. There were certain trustees, of whom Sir Joseph Montefiore was the survivor. He died, having made a will appointing four executors, and Cecil Sebag Montefiore is one of those executors. The four executors are desirous of exercising their power of appointing new trustees of the will of Judah Guedalla, and wish to appoint three trustees, of whom Cecil Sebag Montefiore is one. The only question I have to decide is whether it is competent for them to make such an appointment and for me to approve of the appointment so made. Mr. Jessel has cited a number of cases bearing upon the point, and I have considered them in order to investigate whether the court has ever laid it down as a principle that the donee of a power of appointing new trustees cannot appoint himself, I say emphatically cannot, for the question is not whether it is improper for him to do so, but whether it is impossible in the sense that he is outside the class of persons who are capable of being appointed. I do not think that the court has ever laid down such a rule. The first step is to examine the language of the power. Where you find that the power is to appoint some other person, the question may arise whether the donee of the power is not excluded from the class of persons capable of being appointed, and must, therefore, appoint some person other than himself. In the present case the word "other" does not appear. The words of the power are simply "to appoint a new trustee or trustees"; so that by the language of the instrument the appointers are not excluded from the class. I am of opinion that the cases have laid down the principle, not that an appointer is outside the class who can be appointed, but that, save in exceptional cases, the appointer should not appoint himself. The principal case is *In re Skeats' Settlement*, decided by Kay, J., in 1881. The headnote there is "that a power of appointing new trustees being fiduciary, the donee of such a power cannot appoint himself." That is not strictly accurate, for the judgment is that he can, but ought not to appoint himself, unless the circumstances are exceptional. I need not read the judgment, but it is plain that if he had meant the opposite to what I have said, he must have considered and differed from the decision of Chitty, J., in *Tempest* v. *Lord Camoys*, which had been decided the year before and was cited to him; for in that case Chitty, J., held that it was competent for the donee of such a power to appoint himself. If Kay, J., had intended to differ from that decision he would have referred to it in his judgment. The other case referred to was that of *In re Newen*, decided by Kekewich, J. There it is plain what the learned judge meant. The circumstances were that one of the persons having the power to appoint new trustees, was herself appointed a new trustee. The application was that the court should hand over the trust funds to the trustees. It declined to do so so long as she remained a trustee. Kekewich, J., said that she ought to retire from the trust by a proper deed, that is to say, that she ought to retire from an office which he held that she had improperly retained for herself.

The effect of the cases, therefore, is that persons having a power of appointment of new trustees can, when the language of the instrument creating the power allows them to do so, appoint one of themselves, but that such an appointment ought only to be made in exceptional circumstances.

In the present case there is an administration action, and the sanction of the court is required for the appointment. I hold that the appointment of Cecil Sebag Montefiore is within the language of the power, and that in the present case it will not be an improper exercise of the power. I therefore give the executors leave to make the appointment.

Solicitors, *Emmanuel & Simmonds.*

Chan. Div.
Swinfen Eady, J. } Dec. 11.

TADDY & CO. v. STERIOUS & CO., ET AL. (a.)

Sale of goods—Contract to sell at minimum price—principal and agent—Contract—Who is agent.

A retail dealer of merchandise is not bound by conditions as to its retail price that were imposed upon its wholesale dealer by its manufacturer, in the absence of an express contract in respect thereto made with the wholesale dealer. A wholesale dealer who, having bought goods, resells them for his own profit, is not an agent of his vendor; and he is not made so, because the contract between them provides that he shall be deemed an agent in the event of a sale by him to a retail dealer.

Action.

In this case the plaintiffs, who were manufacturers, asked that the defendants should be restrained from selling the plaintiffs' manufactures unless they sold at those prices and under the conditions that were particularized in invoices issued by the plaintiffs, and in notices affixed to the boxes containing such manufactures.

The facts were as follows: The defendant Netten was a wholesale dealer in the goods manufactured by the plaintiffs, and the defendants, Sterious & Co., were retailers of such goods. For a long time the invoices of the sale of the goods had borne an endorsement as to the lowest price at which the goods should be retailed. The same price appeared on the box, which contained the goods and which also showed that the goods were sold by the manufacturers upon the express condition that retail dealers did not sell the goods below the prices previously named; and that acceptance of the goods would be deemed a contract between the purchaser and the manufacturers that the former would observe such condition; and that where a retail dealer bought through a wholesale dealer, the latter would be deemed the agent of the manufacturers. The defendants, Sterious & Co., had cognizance of the above conditions, but asserted a right to sell at a price lower than that fixed by the plaintiffs, and did so. There was, in the course of the trial, a dismissal as to the defendant Netten.

Macnaghten, K.C., and *H. B. Howard*, for the plaintiffs.—Sterious & Co. bought the manufactures from Taddy & Co., through their agent Netten. Where personal property is disposed of with notice of a prior contract, for its use in a particular manner, entered into by the person disposing of it, the person taking it with such notice may be restrained from using it otherwise; *De Mattos* v. *Gibson*, 4 De G. and J. 276; *Incandescent Gas Light Co.* v. *Cantelo*, 12 Rev. Pat. Cas. 262; *Elliman et al* v. *Carrington*, 49 W. R. 532, [1901] 2 Ch. 275; *Watkins* v. *Rymill*, 31 W. R. 337, 10 Q. B. D. 178.

Micklem, K.C., and *L. Mossop*; *Vernon R. Smith*, K.C., and *R. J. Parker*, for defendants.—The condition as to price did not bind Sterious & Co. With respect to them the condition was one which was in

(a.) Reported by H. STEPHEN, Esq., Barrister-at-Law.

restraint of trade, and therefore void: *Hilton* v. *Eckersley*, 4 W. R. 326, 6 E. & B. 47; *Urmston* v. *Whitelegg*, 63 L. T. 455; *Mitchel* v. *Reynolds*, 1 P. Wms. 181.

SWINFEN EADY, J.—The plaintiffs claim a contract through an agent, Netten, with the defendants Sterious and Co., who were bound by the conditions under which the goods were sold, even if the agent had sold them without a reference thereto. Such conditions, however, are in restraint of trade, and cannot be enforced upon subsequent purchasers. There was no direct contract with the defendants. The plaintiffs sold their manufactures to a wholesale dealer who, for his own profit, resold them; and obviously was not an agent. The defendants contended that the language of the condition, "in the case of a purchase by a retail dealer through a wholesale dealer the latter shall be deemed the agent of" the plaintiffs, referred to the case of a wholesale dealer who was an agent of the plaintiffs; and was not applicable to a case where a wholesale dealer bought and resold, but in such case the wholesale dealer was not an agent of the manufacturer; and the fact that the condition declared that he should "be deemed an agent" did not convert him into one if in fact he was not one. There was no privity of contract between Taddy & Co. and Sterious & Co., and the action would be dismissed.

Solicitors, *Rivington & Son; Westbury.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Darling, JJ.) Nov. 16.

VICKERS *v.* SELWYN. (*a.*)

Election law—Registration—Parliamentary franchise—Ownership qualification—Freehold benefice—Pew-rents—Interest in land—8 Hen. 6, c. 7.

Where the right to receive for his own benefit the pew-rents of a church is vested in the vicar by virtue of his office, even though such right arise merely by implication from the terms of the licence of the bishop when appointing the vicar, the pew-rents may, in such circumstances, constitute an equitable freehold interest in land within the meaning of the Registration Act, 8 Hen. 6, c. 7.

Quære whether the mere actual receipt of pew-rents by the vicar for his own use would of itself be sufficient to constitute an interest in land.

Ex parte Arrowsmith, 26 *W. R.* 600, 8 *Ch. D.* 96, *discussed.*

Case stated by the revising barrister for the Romford Division of the county of Essex.

The respondent the Reverend H. E. Selwyn had duly claimed to have his name inserted in the ownership portion of the register of the said county; the nature of his qualification, as stated in his claim, being "freehold benefice," and the description of the qualifying property being "St. Matthew's Church, Stratford.

Due notice of objection to the claim had been given by the appellant Vickers; the ground of objection being that the respondent had not a freehold interest in land of the clear yearly value of not less than forty shillings.

At the Revision Court the following facts were proved or admitted:

The respondent Selwyn had been appointed to the office of vicar of the church of St. Matthew, at Stratford, in 1901, by licence from the bishop of that diocese, and the licence authorized the vicar to receive and enjoy the stipends and profits belonging to his office, which stipends consisted of (*inter alia*) the annual pew rents paid by parishioners and others for pews and sittings in the church.

Apart from this licence, there was, however, no assignment by deed or writing, of the pew rents to the vicar.

It was admitted that the pew rents were collected by the churchwardens, and that they were, in fact, handed over to, and received by, the vicar for his own use and benefit.

The revising barrister found as facts: (*a*) that the vicar was possessed of a freehold office and beneficially entitled to the freehold of the church; (*b*) that the pew rents amounted to a sum of not less than £190 per annum; (*c*) that the pew rents were collected by the churchwardens "as agents for, and on behalf of, the vicar," and were received by him, by virtue of his office, for his own absolute use and benefit; and upon these facts he held that by reason of the pew rents, the freehold benefice of the vicar was of the clear yearly value of not less than forty shillings.

He according allowed the vicar's claim.

Due notice of appeal was given by the objector, and the barrister accordingly stated this case for the opinion of the court.

Roskill, K.C. (*C. G. Palmer*, with him), for the objector, the appellant.—The revising barrister has come to an erroneous decision. The vicar's claim is based on the ground that he has a freehold interest of the value of not less than forty shillings a year. But the vicar must shew, which he has failed to do, that the receipt by him of pew rents gives him an interest in land such as is contemplated in the statute creating the franchise. Although the right to receive the rents after collection by the churchwardens is not in dispute, it is clearly an interest of a limited character, and does not confer on him the right to sue the pew renters, nor give him any of the ordinary rights of a freeholder. His right is merely that of a person who has the enjoyment of a yearly sum arising out of a licence which was acquired in his freehold property by someone else. Although the freehold of the site of the church and the fabric of the church belongs to the vicar, he does not thereby acquire any interest in the pews which belong to the parishioner, although they are attached to the freehold. The pew rents vest in the churchwardens, and it is the churchwardens who have the right to collect and, if needs be, sue for the rent of the pews and sittings. The revising barrister stated in the case that the churchwardens collected the pew rents "as agents for the vicar." He does not, however, state any ground for that finding. But assuming that is correct, and that there is authority to be found for it in the licence of the bishop, that does not affect the argument that the only beneficial right to receive the rents the vicar has is limited to his right to require the churchwardens to hand over the rents that are in their hands. *Kirton* v. *Dear*, 18 W. R. 144, 5 C. P. 217, is a decision in my favour. [DARLING, J.—But you cannot detach a pew from the freehold of the church, and if the vicar, though by a roundabout process, takes the pew rents he gets a money value out of freehold, which in this case is more than 40s.] [KENNEDY, J.—In Roger's Ecclesiastical Law, at p. 173, the whole question is discussed. It seems that the right to a pew is a right to stand, sit, or kneel at a particular part of the church during divine service, and by custom, if not by statute, the vicar has a right to charge a parishioner for that privilege.] The right to a pew is but an

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

easement; and the right to take money from a person who has acquired an easement is a right that falls short of a freehold interest: see *Hinde* v. *Charlton*, 15 W. R. 226, L. R. 2 C. P. 104. The question is considered *obiter* by Bovill, C.J., in *Berwick* v. *Alker*, 21 W. R. 72, L. R. 8 C. P., at p. 267. The statutes that deal with the question are 8 Hen. 6, c. 7; 13 Eliz. c. 20; 18 Geo. 2, c. 18, s. 6; the "Church Building Act, 1818 (58 Geo. 3, c. 45); and the "New Parishes Act," 1856 (19 & 20 Vict. c. 104). In *Ex parte Arrowsmith*, 26 W. R. 600, 8 Ch. D. 96, the vicar attempted to charge or mortgage his pew rents and it was held that he could not do so under 13 Eliz. c. 20. The words of 8 Hen. 6, c. 7 creating the franchise are "free land or tenement of the value of 40s. above all charges," and therefore the freehold to found such a qualification must be an interest in land capable of being charged. [KENNEDY, J.—But that case also decided that the interest which the vicar desired to mortgage was a substantial interest, not a mere easement.]

Daldy, for the claimant, the respondent.—The revising barrister has found that the pew rents are collected by the churchwardens as agents for the vicar; and the provisions of section 10 of 19 & 20 Vict. c. 104 show clearly that the vicar has a right to receive these pew rents subject in certain cases to deductions for repairs to the church which are not material here. I rely also on section 4 of the New Parishes Act, 1884 (47 & 48 Vict. c. 65), as showing that where there is no deed of assignment the vicar is entitled to the pew rents *quâ* his status as freeholder. In *Beswick* v. *Alker* the phrase occurs "under the sentence of consecration" and a similar expression was in that case made use of by the revising barrister. The right to the rent of a pew is analogous to the right to receive rent from glebe land or the tithe property, and it is attached to the office of vicar: see *Ex parte Arrowsmith*. Therefore, for the appellant to succeed here, he must show that the value of the pew rents is less than 40s. a year, and there is an express finding by the revising barrister that the pew rents are far above that value.

Roskill, K.C., in reply, cited *Simey* v. *Marshall*, 21 W. R. 123, L. R. 8 C. P. 269.

Lord ALVERSTONE, L.C.J.—I think we cannot interfere in this case. I think, in fact, that the revising barrister stated his case in a way in which it is impossible for the point we have been discussing to be properly raised. He found that the freehold of the living was in the vicar, and then goes on to state that the pew rents were collected each half year by the churchwardens as his agents, and were handed to him by the churchwardens for his own absolute use and benefit, and that the pew rents were above the value of 40s. In the case of *Beswick* v. *Alker* the report of the judgments shows that the judges recognized that there might be such an interest in the pew rents payable to the vicar as would give him a right to registration. Brett, J., clearly considered, although not called upon to decide the question, that the ownership of the freehold of a church was a freehold interest that created a freehold right in the pew rents. That is the view taken by the revising barrister here. We have no materials upon which we can say that he is wrong, and it is not denied that if his finding on this point is right that the interest is over 40s. In *Arrowsmith's case* James, L.J., pointed out that the vicar's interest in a pew rent was of the same kind as a toll which the lord of a manor receives for stallage in a market. It is, he said, "a profit arising from the use of the freehold." The other judges agreed with that view, and that decision seems to show that an equitable freehold interest in land may exist from the fact of a parson receiving pew rents. I cannot bring myself to hold, therefore, that on the facts before us we ought to disturb the decision of the revising barrister in this particular case. I think we are bound by the finding as to the agency of the churchwardens, and that our judgment must be limited to the facts found here, leaving open the general question whether a freehold interest in land is created by virtue of the mere receipt of pew rents by a vicar.

KENNEDY and DARLING, JJ., gave judgment to the same effect.

Appeal dismissed with costs; leave to appeal granted.

Solicitors, *Russell Cooke & Co.; Ayrton, Biscoe, & Barclay.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) June 30, 1903.

RUTHER v. RUTHER. (a.)

Justices—Married woman—Order for maintenance—Act of adultery—Discharge of order—Committal for non-payment of arrears—Appeal to Divisional Court—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 7, 9, 11.

An order for a weekly payment by a husband towards his wife's maintenance, under the Summary Jurisdiction (Married Women) Act, 1895, *is* ipso facto *discharged upon proof before a court of summary jurisdiction that the wife has subsequently committed adultery, even if the husband has been guilty of conduct conducing to the adultery, and even if no formal order of discharge be made by the court.*

The order of the court of summary jurisdiction committing a husband to prison for non-payment of arrears alleged to be due to the wife is not an order in respect of which an appeal lies to the Probate Court, but an appeal lies by way of case stated to the King's Bench Division.

Case stated by the stipendiary magistrates at Merthyr Tydvil.

The facts of the case are as follows:

On the 16th of November, 1898, an order was made by two justices, sitting as a court of summary jurisdiction at Abergavenny, under the Summary Jurisdiction (Married Women) Act, 1895, that the appellant should pay to the respondent, his wife, the weekly sum of 10s.

On the 4th of December, 1901, the appellant applied to the court of summary jurisdiction at Abergavenny for the discharge of the said order, on the ground that the respondent had, subsequently to the date of the order—namely, on the 27th of September, 1901—committed an act of adultery.

The adjudication of the court on this order was that the respondent had committed adultery on the date alleged, and that the appellant, by his wilful neglect, had condoned such act of adultery.

On the 29th of January, 1902, the appellant was, by order of the court of summary jurisdiction in Abergavenny, committed to gaol in default of his paying certain arrears under the said order, amounting to £55 10s., being the arrears of the weekly payment for the period of two years seven weeks—viz., from the 7th of August, 1899, to the 25th of September, 1901—and the appellant was imprisoned accordingly. The period of imprisonment terminated on the 29th of April, 1902.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

On the 3rd of December, 1902, an information was preferred by the respondent before the stipendiary magistrate of Merthyr Tydvil, alleging that the payments under the order of the 16th of November, 1898, were in arrear to the amount of £18.

A warrant was issued by the magistrate for the apprehension of the appellant, and the appellant was brought before him on the 5th of January, 1903. It was admitted that no payment had been made by the appellant after the 25th of September, 1901, but it was not proved in what way the sum of £18 was arrived at.

It was admitted, on behalf of the appellant, that he was liable to pay, and he was in fact prepared to pay arrears as between the 25th of September, 1901, and the 4th of December, 1901 (the date of the above indorsement on the order), and costs, if the £18 included any part of those arrears.

It was admitted by the respondent that she had committed adultery since the appellant had been committed to prison on the 29th of January, 1902.

It was contended by the appellant that, upon proof of the adultery of the respondent on the 27th of September, 1901, section 7 of the Summary Jurisdiction (Married Women) Act, 1895, operated to discharge the order of the 16th of November, 1898, as from the 4th of December, 1901; and, in the alternative, that it was the absolute duty of the court of summary jurisdiction at Abergavenny to discharge the order, and by the indorsement on the order the court must be taken as having done so, and that the order was therefore in law discharged, and that the stipendiary magistrate had no jurisdiction in the matter of the respondent's information in respect of arrears after the 4th of December, 1901.

For the respondent it was contended that the order was still in force.

The magistrate held that the order had not been, and could not be, discharged without an order of the Abergavenny justices or of the Probate, Divorce, and Admiralty Division, and he committed the appellant to prison for one month unless the sum of £18 and costs should be sooner paid.

The question for the opinion of the court was whether this decision was right in law.

By the Summary Jurisdiction (Married Women) Act, 1895, s. 6, it is provided that no order shall be made under the Act if it be proved that the married woman who is applying has committed an act of adultery, provided that the husband has not condoned, connived at, or by his wilful neglect or misconduct conduced to, such act of adultery; and, by section 7, if a married woman upon whose application an order has been made commits an act of adultery, such order shall, upon proof thereof, be discharged.

By section 9 the payment of any sum directed to be made under the Act may be enforced in the same way as the payment of money is enforced under an order of affiliation; and, by section 11 an appeal lies from any order, or the refusal of any order, to the Probate, Divorce, and Admiralty Division of the High Court.

Rowsell (*Warburton* with him), for the respondent.—There is a preliminary objection to the hearing of this case. The appeal should have been to the Probate Division: *Manders* v. *Manders*, [1897] 1 Q. B. 474.

[Lord ALVERSTONE, L.C.J.—We will hear the case before giving our decision on the preliminary objection.]

S. G. Lushington, for the appellant.—The magistrate had no power to commit the appellant. The language of section 7 is imperative, and as the act of adultery on the 27th of September, 1901, was proved, the justices must be taken to have discharged the order

Rowsell, for the respondent.—The magistrate was right. Until the order is discharged it remains in force, and the appellant was, therefore, liable to make the payments. The proviso in section 6 must be read into section 7.

Lushington replied.

Lord ALVERSTONE, L.C.J.—With regard to the preliminary point I am clearly of opinion that in the circumstances of this case an appeal by way of case stated lies to this division of the High Court. The Act of 1895 provided a new and amended procedure for making orders for the maintenance of wives, and by section 9 it is enacted that the payment of any sum of money directed to be paid by an order under the Act may be enforced in the same way as the payment of money is enforced under an order of affiliation. The procedure for enforcing payment is therefore regulated by section 4 of the Bastardy Laws Amendment Act, 1872, which empowers magistrates, where an order for payment has not been made, and no sufficient distress can be had, to commit the defendant to prison for any term not exceeding three months. For the respondent, reliance is placed on *Manders* v. *Manders*, and it was argued the appeal ought to be to the Probate Division, but *Manders* v. *Manders* was a case of an appeal from an order on a husband for a weekly payment made under the Act of 1895, whereas in this case the appellant is not appealing against the original order, but from the warrant of the magistrate committing him to prison for non-payment, which is issued under the Bastardy Act, and is not an order such as is referred to in section 11 of the Act of 1895. It is, moreover, quite clear that if the question involved in this case had been raised by *certiorari*, there would have been no objection to the proceedings. For these reasons the preliminary objection fails.

With regard to the substantial question raised by the case, it appears that in 1898 an order was made under section 4 of the Act of 1895 for the payment by the appellant to the respondent of a weekly sum of 10s. In 1901 the appellant had got into arrears with his payments, and a sum of £55 was owing by him. He ascertained that the respondent had committed an act of adultery, and he applied to the justices that the order might be discharged in accordance with section 7 of the Act. The justices found that the adultery was proved, and, in my opinion, it then became their duty, under section 7, to discharge the order. What they did was to make an indorsement upon the order in the terms set out in the case. I do not know what was intended to be the effect of that indorsement. It may be the reason of it was that the justices desired to make it clear that the wife's remedy was to be kept alive as to arrears of payment which had accrued due before that date. But, however that may be, I am of opinion that after the adultery had been proved on the 4th of December, 1901, the order ought to have been discharged, and from that date it ceased to be an effective order. The appellant was committed to prison for non-payment in respect of the period before the date of the adultery, and then the present proceedings, in which a sum of £18 was claimed, were instituted, and a committal order was made. The appellant offered to pay so much of that sum as represented the arrears up to the 4th of December, 1901, the date of the adjudication as to the wife's adultery, and in my opinion he was not liable to pay anything after that date. The magistrate had, therefore, no power to send him to prison for non-payment of the £18, and this appeal must be allowed.

WILLS, J.—I am of the same opinion. With regard to the preliminary objection the matter stands thus: Orders for payment made under the Act of 1895 are,

by section 9, to be enforced in the same way as affiliation orders, and on looking at section 4 of the Bastardy Laws Amendment Act, 1872, one sees what the procedure is. Therefore, an order of committal for non-payment is not an order made under the Act of 1895, and is not one to which section 11 of that Act applies. It stands on the same footing as an order of committal made in an ordinary affiliation case. That order is, of course, subject to the Summary Jurisdiction Act, 1857, s. 2, and the Summary Jurisdiction Act, 1879, s. 33, which give justices power to state a case after the determination of any information or complaint. The provisions are by section 54 of the latter Act made specifically applicable to sums due on affiliation orders or on orders enforceable as affiliation orders. The magistrate had, therefore, jurisdiction to state this case.

As to the main question it is clear there is no power to order a committal for non-payment of the weekly sum after adultery on the part of the wife has been proved. I do not mean to say the respondent was not entitled to recover arrears in respect of the period between the date when the adultery was committed, and the date when the order ought to have been discharged, but the sum of £18, for the recovery of which these proceedings were instituted, covered more than that period, and the magistrate, therefore, had no power, in the circumstances of this case, to send the appellant to prison for non-payment of the sum of £18. If the case had come before the court on application for *certiorari*, there can be no question but that the warrant of committal would have been quashed.

CHANNELL, J.—I agree. The only point of substance which has been raised on behalf of the respondent is whether conduct by a husband conducing to his wife's adultery has the effect of preventing the husband from obtaining the discharge of the order, in the same way as such conduct before an order prevents the husband from relying on the adultery as a reason why an order should not be made. In my opinion it would be impossible to adopt such a construction of section 7. The proviso in section 6 cannot be read into section 7. That being so, the appellant ceased to be liable to continue the payment after the adultery was proved. The other questions are simply matters of form.

Appeal allowed.

Solicitors for the appellant, *Bell, Brodrick, & Gray*, for *C. & W. Kenshole*, Aberdare.

Solicitor for the respondent, *H. A. Sims*, for *Powell & Hughes*, Brynmawr.

IN BANKRUPTCY.

K. B. Div. (Wright, J.) July 14, 20, 27, 1903.

In re SLOBODINSKY.
Ex parte MOORE (TRUSTEE). (*a.*)

Bankruptcy—Transfer by the bankrupt of his own and another business to a limited company—Relation back of trustee's title—Rights of debenture-holders—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (b); *ss.* 43, 44, 49—13 *Eliz. c.* 5.

The bankrupt transferred all his own assets and a business which he had agreed to purchase from another trader named Melinsky, within three months of his bankruptcy, to a limited company in consideration of shares and debentures, leaving himself saddled with debts amounting to over £13,000 and no means of paying for them.

Held, that the transfer was void as an act of bankruptcy, and that the trustee was entitled to the assets of the company, subject to the rights (if any) of the debenture-holders.

The debentures in the company had, by direction of the bankrupt, been allotted as follows: 18 *to the debtor;* 30 *to one Nevill, who had assisted the bankrupt in transferring his assets to the company;* 30 *to Melinsky, in payment for his business;* 7 *to Brodsky, a creditor; and* 15 *to Zisselman, another creditor of the bankrupt. After the bankruptcy the two last debenture-holders sold their debentures to Bernstein and Levartofsky for sums far below their face value. Bernstein and Levartofsky knew of the bankruptcy, but made no inquiries.*

Held, that Melinsky's debentures were a charge upon the property of the company now vested in the trustee, but that Nevill was not entitled to any charge because he had notice of the bankrupt's fraud, nor Bernstein and Levartofsky, because, knowing what they did, they ought not to have purchased their debentures at an undervalue without inquiry.

Motion by the trustee to set aside the transfer of the debtor's business to a limited company.

The bankrupt, J. L. Slobodinsky, carried on business as a tobacconist at 68, High-street, Whitechapel, and other premises.

In October, 1902, he formed the plan of turning his business into a limited company, and from that time onward to the middle of December he bought unusually large quantities of stock on credit. He also, on the 27th of October, entered into an agreement to buy the business of another tobacconist named Melinsky for £4,400 in cash or bills, the contract to be completed on the 1st of December. Another tobacconist named Nevill agreed to act as the bankrupt's agent in carrying out the transfer to the proposed company.

On the 16th of December the company was registered as the J. L. S. Tobacco Co. (Limited), with a capital of £25,000 in one pound shares, the registered offices being at 68, High-street, Whitechapel.

The first meeting was held upon the 22nd of December, when the bankrupt, Nevill, Melinsky, and two nominees of the bankrupt, Fowler and Felgate, were appointed directors, and the bankrupt was elected chairman. The bankrupt's contract to buy Melinsky's business was read and approved, as were also two agreements, one being for the sale of the bankrupt's business and the benefit of the contract to buy Melinsky's business to Nevill, the other for the sale by Nevill of the same assets to the company.

The purchase price was fixed at £32,539, payable £400 in cash, £10,000 in debentures to be allotted to the bankrupt and his nominees, and 22,139 fully paid-up shares to be allotted to the bankrupt.

A meeting of the directors was held later on in the same day, when Nevill's contract with the company was sealed, also the assignment of the bankrupt's book debts and business to the company, and a contract between the company and Nevill for the issue of the agreed shares. A series of 100 debentures of £100 each was also created.

On the 23rd of December, 22,139 shares were issued as fully-paid to the debtor, and the 100 debentures were issued as follows:—

7	to Brodsky
15	to Zisselman
30	to Nevill
30	to Melinsky
18	to the bankrupt
100	

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Brodsky and Zisselman were creditors of the bankrupt, Nevill got his debentures as payment for the services he was alleged to have rendered, and Melinsky's debentures were in part payment for his business. About 665 shares in the company were privately subscribed and paid for in cash.

The result of the transactions above narrated was that the bankrupt, having transferred everything he possessed to the company, was left without any means of paying his trade or private debts, which amounted together to over £13,000. Accordingly he called a meeting of his creditors on the 29th of December, thus committing an act of bankruptcy, upon which a receiving order was made on the 20th of February. On the 9th of March Zisselman sold his fifteen debentures to Bernstein for £500, and Brodsky sold his seven debentures to Levartofsky for £300. The present motion by the trustee was against the J. L. S. Tobacco Co. (Limited), Nevill, Melinsky, Bernstein, and Levartofsky, and claimed all the assets transferred by the bankrupt and Nevill to the company, free from any incumbrance by virtue of the debentures.

Reed, K.C., and *Wace*, for the trustee.—The transfer to the company was clearly a fraud on creditors; the debtor got rid of all his assets and retained all his debts. In such a case the transferees have to show that they were purchasers in good faith. *Ex parte Schulte, In re Mataulé*, 22 W. R. 462, L. R. 9 Ch. 409; *In re Jukes*, 50 W. R. 560, [1902] 2 K. B. 58. In this case the company was not dealing in good faith with the bankrupt; it was a mere sham created by the bankrupt, and the principle of *In re Hirth, Ex parte The Official Receiver*, 47 W. R. 243, [1899] 1 Q. B. 612, and *Wheatley's Trustee* v. *Wheatley (Limited)*, 85 L. T. 491, 50 W. R. Dig. 12, applies.

Macnaghten, K.C., and *Kenyon Parker*, for the company.—This is not a sham company like that in *In re Hirth*. This is a real company formed by the amalgamation of two businesses, and there are forty-seven members of the public holding 665 shares in the company. Nor is there any evidence that the company had notice that the debtor contemplated any fraud. The fact of one or two directors having notice is not enough: *In re Marseilles & Co.*, L. R. 9 Ch. 161. The debentures were not gifts, but were allotted as payments for services rendered or other obligations incurred by the bankrupt.

M. Lush, K.C., and *Carrington*, for Melinsky.—It is clear that Melinsky's debentures ought not to be swept away, he transferred a valuable business to the bankrupt which the company now has and got his debentures in payment for it. There is no suggestion that he had notice of or was party to any fraud.

Danckwerts, K.C., and *Ward Coldridge*, for Nevill.

Muir Mackenzie, for Bernstein.

E. Clayton, for Levartofsky.

Reed, K.C., in reply.

WRIGHT, J.—I think it clear that a fraud both legal and moral has been committed by the bankrupt, who formed the design to buy large quantities of stock on credit with the object of forming a company. That was a fraud, for the debentures and shares of the company were no equivalent to the creditors for the book debts and stock of the business which have been assigned to the company. But I am not prepared to hold that the company is in all respects a sham company, because there are some *bonâ fide* shareholders holding some 600 shares, and it also seems to me that Melinsky's business was a *bonâ fide* business and was sold in good faith to the company. I am sure that I ought not to hold the transaction void under the statute of Elizabeth, but I am not asked to deal with the case upon that footing, and I think the trustee is entitled to succeed under the bankruptcy laws. The transfer of the bankrupt's entire business and assets to the company on the 22nd of December was a fraudulent act of bankruptcy, and the trustee's title relates back to that date. Then can the company be said to have had notice of the fraud? I have come to the conclusion that the company in its inception and first formation was Slobodinsky, and was brought into existence by him with the sole object of committing the fraud. The first two directors were, in my opinion, his nominees, and Mark Nevill was his agent. He held nearly all the share capital and debentures of the company, and at the first meeting of the two directors on the 22nd of December they acted as his nominees and were entirely in his interest. If that does not amount to notice to the company I do not know what does. Further, I think that they knew that, under the agreements, all the assets of the bankrupt were being taken over by the company, leaving him with all his debts unprovided for, and I think that put them on some inquiry as to whether he had any means of meeting these debts. The transaction as between the trustee and the company must be set aside without prejudice and subject to the rights, if any, of the debenture-holders. That point is left open for future argument and I express no opinion upon it. The company must pay the trustee's costs.

July 20.—The motion was further heard. Bernstein and Levartofsky admitted under cross-examination that Slobodinsky had transferred all his assets to the company, and that he was bankrupt, and that they bought the debentures without making any inquiries.

The same counsel appeared and argued as on the former hearing.

Judgment was reserved.

July 27.—WRIGHT, J., after stating the facts, continued: I have already declared the transfer of this business to the J. L. S. Co. (Limited) to be fraudulent, and consequently void against the trustee. It now remains for me to decide the claims of the debenture-holders, and as to all of them except Melinsky, it might be enough to say that the debentures, being merely a general charge over the assets of this company, would not attach to any property which turns out not to have been the property of the company. As to Melinsky, there was no imputation of *mala fides* against him, and he undoubtedly transferred a valuable business to the company. He originally contracted to sell the business to the bankrupt on the 27th of October, 1902, before any act of bankruptcy had been committed, and before the period of relation back. The consideration originally agreed was £4,400 in cash or bills, which was afterwards altered to £400 in cash and debentures in the company of the nominal value of £3,000. He completed the transfer upon the 22nd of December without notice of any act of bankruptcy, and I hold that he is entitled to the protection afforded by section 49 of the Bankruptcy Act, 1883. He has therefore a charge on the proceeds, but of course he cannot get back both his estate and the price; he is entitled either to get back from the trustee the estate which he transferred to the company or, if he gives up his estate, to rank on his debentures against the bankrupt's estate for any deficiency which he is unable to recover from the company's assets, and the trustee's title must be declared to be subject to his charge from that deficiency, if any, if the sale to the company is affirmed. As to Nevill, I hold that he is not entitled to his debentures; he gave no real consideration for them and never rendered any serious or valuable

services for them. He must also be regarded as having taken them with full knowledge of Slobodinsky's position, and could not in any case be entitled to the protection of section 49.

The remaining debenture-holders, Bernstein and Levartofsky, purchased their debentures from nominees of the bankrupt for much below their face value, and with the knowledge that the debentures purported to cover Slobodinsky's estate, and that he was a bankrupt. The knowledge of these facts should have put them upon inquiry, they are not the kind of purchasers that a court of equity would assist. It is admitted that they are not within the terms of section 49 as they did not take from Slobodinsky, but it is said that an exception from the trustee's title by relation back must be allowed on general principles to purchasers for value whether immediate or secondary. The facts which I have stated appear to be enough to dispose of any contention of that kind in this case. It may be that although section 49 in its terms protects only those alienees who have taken immediately from the debtor, some degree of protection may be supplied on grounds of equity even to secondary alienees. In case of settlements avoided under the statute of Elizabeth, or under section 47 of the Bankruptcy Act of 1883, it has been found possible even at law to protect persons who, before the occasion for avoiding a settlement has arisen, have become purchasers or incumbrancers for value without notice of grounds for avoidance. There is much greater difficulty in cases like those which are now in question, where the trustee's title is established by relation back and the statute contains no applicable exception. It is indeed sufficient to refer to cases like *Copland* v. *Stein*, 8 T. R. 199, and *Nunes* v. *Carter*, L. R. 1 P. C. 342. 349, in order to show that an alienee however innocent was not aided at law except in the cases specified by the statutes for the time being in force. Equity, however, did not altogether refuse relief: see *Abery* v. *Williams*, 1 Vern. 27; *Collett* v. *De Gols*, Cas. t. Talb. 65; *Latouche* v. *Lord Dunsany*, 1 Sch. & Lef. 137, 152; *Wilkes* v. *Bodington*, 2 Vern. 509; and it may be that at the present day it would be right to apply or even extend the equitable doctrine. That, however, could only be done in favour of a purchaser whose title is without stain, and certainly not in cases like those which are now in question; nor in any case could the purchaser be protected on equitable grounds to an extent beyond the real value of what he paid or gave as the consideraaion of his purchase: see the cases last cited.

Melinsky will add his costs to any security he may have. Each of the other respondents Nevill, Bernstein, and Levartofsky, will pay the costs of his own part of this further hearing of the motion.

Solicitors for the trustee, *Trower, Still, & Co.*

Solicitors for the respondents, *Ralph Raphael & Co.; Swestland & Greenhill; W. H. Lane; Hyman, Isaacs. & Lewis.*

House of Lords.

From C. A. (England). } Aug. 7, 1903.

CITY OF LONDON ELECTRIC LIGHTING CO. v. LONDON CORPORATION. (a)

Metropolis—Contract between members of the corporation and a company—Interest of a member as shareholder —"Interested or concerned in any company"—City of London Sewers Act, 1848 (11 & 12 *Vict. c. clxiii.*), *s.* 42—*City of London Sewers Act*, 1851, *s.* 53.

The 42nd section of the City of London Sewers Act, 1848, *provides that any contract entered into [by any commissioner of sewers or member of the corporation, by or on behalf of the commissioners, who is "directly or indirectly interested or concerned" therein shall be void. The prohibition of such contracts extends to the case where members of the corporation are shareholders in a company at the time when the contract with the City Corporation is entered into, but does not apply where members subsequently become shareholders in a company to which the contract is transferred.*

Decision of the Court of Appeal (49 *W. R.* 306, [1901] 1 *Ch.* 602) *affirmed.*

Cross-appeals from orders of the Court of Appeal (Rigby, Vaughan Williams, and Stirling, L.JJ.).

The whole question turned on the construction of the 42nd section of the City of London Sewers Act, 1848.

In this action the appellants claimed a declaration that three several agreements—(1) dated the 19th of May, 1890, and made between the Brush Electrical Engineering Co. (Limited) (hereinafter called the "Brush Co."), of the one part, and the Commissioners of Sewers of the City of London (hereinafter called the "Commissioners of Sewers") of the other part; (2) dated the 28th of May, 1890, and made between the Laing Wharton and Down Construction Syndicate (Limited) (hereinafter called the "Laing Syndicate"), of the one part, and the Commissioners of Sewers of the other part; and (3) dated the 5th of February, 1891, and made between the Brush Co. of the one part, and the Commissioners of Sewers of the other part—were valid and subsisting, and that the defendants were bound by the same.

The facts of the case are given in the report below, and shortly in the judgments, where the 42nd section is set out.

Cripps, K.C., and *Roskill, K.C.*, for the company.

Lawson Walton, K.C., and *Danckwerts, K.C.* (*A. J. Walter* with them), for the corporation.

Earl of HALSBURY, L.C.—In this case a declaration is sought to establish the validity of three contracts, entered into between the City of London Electric Lighting Co. (Limited) and the mayor and commonalty and citizens of the City of London, and the question sought to be raised by the parties is whether or not the contracts, or any of them, entered into between them are valid and binding on the defendants. The defendants have repudiated them, not, as I understand, that they have any objection to the substance of the contracts, but being advised by counsel that the contracts were invalid they felt bound to test that question in a court of law. Farwell, J., before whom the question came, was of opinion that they were valid. The Court of Appeal has declared two of them to be invalid, allowing the third to stand.

The whole question turns upon section 42 of the

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

London Sewers Act, 1848, which provides "that no person being a commissioner or a member of the court of aldermen or of the common council of the city, shall be directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of the commissioners, for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour of for any other matter or thing whatsoever, upon pain that every such contract shall be null and void, and that the person who, being a commissioner or a member of the said court of aldermen or of the common council, shall be so interested or concerned therein, shall for every such offence forfeit and pay the sum of £100 to any person who shall sue for the same, to be recovered in any of the superior courts, by action of debt or on the case."

At the date of the contract there were shareholders among the commissioners, aldermen, and common councilmen in the plaintiff company; and I so far agree with Farwell, J., that I think the first thing to see is whether the Act of Parliament is clear or is fairly susceptible of two constructions; but I regret to have to add that I think it is clear and is not fairly susceptible of two constructions. In a very ingenious and elaborate judgment the learned judge decides in favour of the validity of the contracts in question upon the ground that they are not what he calls "construction" contracts; but I am unable to concur with the view that the section is only applicable to construction contracts. If such a distinction can at all be made, the disqualification under the statute which I have quoted does not apply.

The mayor and corporation of the city are now (since 1897) in the place of those who at the date of the contract were the Commissioners of Sewers of the City. By the Act of 1897 all their duties and liabilities are now vested in the city itself. That the aldermen, commissioners, and common councilmen have a disqualifying interest in the contracting companies cannot be denied unless the distinction insisted on by the learned judge can be made out. In respect of two of the three contracts it is admitted that a common councilman, a commissioner of sewers, and a Lord Mayor for the time being, in that character both an alderman and *ex officio*-commissioner, were shareholders; and in respect of those two contracts, heartily as I regret the conclusion at which I am forced to come, I cannot doubt that these contracts by reason thereof are invalid. I have striven to escape the stringency of the language, since I think that no one will doubt that the contracts were fairly and properly made with a due regard to the public interest; but I cannot escape from the language of the statute. It is, to my mind, too clear to enable me to adopt the subtle reasoning of the learned judge below. The distinction which the learned judge has discovered may justly be made in this respect—that some of the contracts undoubtedly are construction contracts, and some of them are not; but the defect of the reasoning I think consists in this—that the distinction which the learned judge has discovered is one not made by the statute. The words are "directly or indirectly interested or connected in any contract which shall be made or entered into by or on behalf of the commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour or for any other matter or thing whatsoever." I am unable to interpose any qualification. Looking at the language of the statute and the object and the policy which apparently dictated it, I cannot doubt that it meant what I think it has said in plain terms. It seems to me that the contracts are contracts, interest in which is prohibited by the contracting parties; among other things it is a contract made or entered into by or on behalf of the commissioners for any matter or thing whatsoever, and in addition to contracts for the execution of works or for furnishing materials. I am unable to get over the stringency of these words, and I must hold them to be applicable to the two contracts in respect of which Farwell, J., held them to be valid.

With respect to the third contract, I agree with Stirling, L.J., that a different question arises where at the time of the making of the contract no commissioner, alderman, or common councilman was a shareholder; and I agree with him that under the circumstances stated in detail by the learned judge the contract has not become invalid because, at a subsequent date, several commissioners, aldermen, and common councilmen became shareholders. The result is that I think the judgment of the Court of Appeal is right, and that this appeal ought to be dismissed with costs, and I move your lordships accordingly.

Lord DAVEY.—The judgment of Farwell, J., in this case is based on the division which he thought was to be found in the Act of 1848 of the contracts authorized by that Act into two classes or categories. One class of contracts he called "construction contracts," and he considered that the provisions of section 42 related only to contracts of that character. The phrase "construction contracts," as used by the learned judge, has a very elastic meaning, for it includes contracts for supply of materials or labour. The distinction, as stated by him, was between contracts for the execution of works or supply of materials to the city which will become their own property, and contracts for supply of such things as water, gas, or other illuminants by persons owning the works from which the supply is derived; and these contracts he calls "contracts of supply." I must confess that, in my opinion, this division of contracts is not warranted by anything in the Act of 1848, and is purely fanciful and arbitrary, and in fact there is no real difference for legal purposes between the two classes of contracts. Gas, electricity, and water are all of them, it is true, *res quæ ipso usu consummuntur*, but so are materials for road-making or paving, although the rate of consumption is somewhat slower.

Following out his theory of two classes of contracts, the learned judge holds that section 33 applies only to what he calls construction contracts, and that the words "or for any other matters or things whatsoever necessary for enabling them to carry the purposes of this Act into full and complete effect" are to be read as *ejusdem generis* with the preceding words. The words which follow requiring every contract to be in writing, and to specify the works to be done and the material or labour to be furnished, and the prices to be paid for the same, do, I think, lend some support to the view—if it were possible (which, in my opinion, it is not) to find a *genus* which would embrace contracts for the supply of paving-stones and road material and exclude contracts for the supply of gas, electricity, or water. I think, however, that it is quite inadmissible to cut down or restrict the generality of the very large words which I have quoted. I agree with Rigby, L.J., that one can hardly imagine words better calculated to exclude any *ejusdem generis* construction. Farwell, J., thought that section 116 alone gave the power to make contracts for lighting the streets. I do not so read the Act. I think the power to contract is conferred on the commissioners by section 20, and the meaning of section 116 is that, instead of doing the work of lighting the streets themselves, they may contract

with gas companies and other persons to do it for them.

Having arrived at the conclusion that section 33 applies only to "construction contracts," he holds that section 42 also applies only to the same class of contracts. But if the *ejusdem generis* construction could be applied to section 33, I can find no reason for applying it to section 42, in which the words are "any contract which shall be made or entered into by or on behalf of the commissioners for the execution of any work directed or authorized to be done or executed, or for furnishing materials or labour or for any other matter or thing whatsoever." It is easy to say that, if the words were intended to apply to all contracts, the words specifying particular kinds of contract are unnecessary. But that is not a very strong argument when applied to the language of Acts of Parliament. The enumeration may show the kind of contract the draftsman had immediately present to his mind, but the latter words equally show that he intended the enactment to apply to all contracts of every kind. If you took at the intervening section, I think it clear that section 34, which is the only section in the Act defining the mode and form in which contracts by the commissioners are to be executed, and section 41 are general sections applicable to all contracts for any of the purposes of the Act. If section 34 is general, section 33 must be so also; and if section 41 is general, I think that section 42 also must apply to every contract.

Another argument put forward by the appellants is based on section 53 of the Act of 1851. I have had some difficulty in appreciating the argument. A section in the latter Act cannot be used for the purpose of construing an earlier enactment, though it may repeal or vary it. There is certainly no express repeal, and there is no repugnancy between the two sections from which the repeal of the earlier one might be implied. Section 42 of the Act of 1848 imposes a penalty on parties interested in any contract made by the commissioners and avoids a contract in which any of the specified parties are interested. Section 53 of the Act of 1851 deals with a different subject-matter rather than with the same subject in a different way. It makes any of the specified persons ineligible to sit or vote as a commissioner while the contracting with any company in which he is interested or the promotion or carrying out of any work, undertaking, or speculation is under the discussion of the commissioners. A person may be a commissioner when the negotiation for the contract is being conducted and resign his seat (as he would probably do) before the contract is actually made, or he may have become a commissioner after the contract is made, and in that case he is prohibited from sitting or voting while the carrying out of it is under discussion. In neither of these cases would the earlier enactment apply, but the latter one would apply to both.

I fully appreciate the stringency and drastic character of the enactment in section 42 of the Act of 1848. It applies to any common councillor, whether he is a commissioner or not, and the remotest interest in the contract will not only expose the interested person to a penalty of £100, but will also avoid the contract. But the stringency of the section is not a reason for a court of law to decline to give effect to it or construe it otherwise than according to the plain meaning of the words. I cannot, therefore, but agree with the judgment of my learned and lamented friend Rigby, L.J., in holding the contracts relating to the Western and Central districts void.

The complicated history of the contract for the Eastern district has been very carefully analyzed and stated by Stirling, L.J. It appears that no person within the jurisdiction was interested in the Laing Wharton and Down Syndicate, with whom the contract was made, but certain persons were shareholders in the company to which the contract was afterwards transferred. I am certainly not disposed to extend the operation of section 42 beyond what the words require, and I do not think that a contract which was valid in its inception is avoided by a person within the prohibition subsequently acquiring an interest in it. The Lord Justice also finds that there was no novation so as to place the appellant company in the position of contractors directly with the corporation. It is true that the appellant company has become the undertaker within the meaning of the provisional order, and is now the only company able to exercise the powers thereby conferred. That, however, will not itself place them in a contractual relation with the corporation. I agree with the Lord Justice that in giving their consent to the transfer of the undertaking to the appellants the corporation carefully preserved their rights under the original contract, and have not discharged the original contractors from liability for its performance. I think, therefore, with him that there has been no new contract made between the appellant company and the corporation as regards the Western district. I am therefore of opinion that both appeals should be dismissed with costs.

Lord ROBERTSON.—On the cross-appeal I am unable to discover a contract entered into between the commissioners and the London Electric Co. That the London Electric Co. are, with the consent of the commissioners (and their successors the corporation), doing the work of the original contractors does not prove that the commissioners have contracted with them. The commisioners could only contract in the manner prescribed by the statutes creating their powers, and there is no such contract. This being so, the London company not standing in a contractual relation to the commissioners, there is no room for any argument about a supervening nullity in a contract originally valid, and we have no occasion to deal with that argument.

Turning then to the two contracts with a company in which one at least of the commissioners was a shareholder at the time of their execution, the question is whether they are not hit by section 42. It cannot be disputed that the general words which express the third category in section 42 are so wide as to comprehend all contracts, unless there be something outside those words to restrain their latitude. That restraint is found by the appellants in the theory (for it is no more) that section 42 is coterminous with section 33, and that section 33 is limited to a certain class of contracts. Now, on section 33 there is a great deal to be said, and it has been well said, for the view that the generality of the third category is taken away by the concluding words of the section. But then those concluding words do not (and could not from the subject-matter) occur in section 42, and accordingly the general words of the third category, as they stand in section 42, are left without any qualification of their generality, and must have their natural effect.

But I do not think that the argument in favour of their full latitude ends here. Section 42 is introduced by the words "Provided always and be it enacted," and section 42 is thus to be read as a qualification of the preceding section 41. So read it is the condition of an indemnity which is necessarily and admittedly applicable to contracts of every description, and is therefore itself naturally and necessarily universal. In this light the two sections mean this:

the commissioners shall not be personally liable for any of their contracts, provided that in none shall they have a personal interest, and that any contract so tainted shall be null. So viewed, section 42 treats of a subject to which the suggested distinction among contracts (as construction contracts and other contracts) is irrelevant. It is true that in section 42 the system of enumeration adopted in section 33 is again used, although no enumeration was necessary, and words of absolute generality without any antecedent enumeration would have been more appropriate. This, however, is only criticism of the drafting; and the phraseology adopted ends just where danger to the generality would have begun. I therefore think that the context and subject-matter of section 42 entirely justify the literal interpretation of its terms. And the relation between section 41 and section 42 seems to me specially important, because it breaks the connection between sections 33 and 42, which is at the root of the appellants' argument. On the scope of section 42, moreover, I think that the respondents succeeded in showing that in at least two other instances besides section 116 the commissioners are authorized to enter into contracts which do not fall under section 33, and which it is difficult to conceive to have been intended to escape the application of section 42.

Section 53 of the Act of 1851 seemed at first to carry the appellants some way; but a closer examination greatly reduces its importance. That section mixes up a number of persons, things, and times, and applies general words to them all. It is only by picking out the shareholder and applying him to one of the things at one of the stages that the appellants' argument arises; and when it does arise it does not present a repugnancy with the wide interpretation of section 42 of the Act of 1848, but rather a superfluity. The explanation of the Court of Appeal seems to me to be adequate to satisfy the language even when minutely examined. The section does not, in my judgment, raise any implication sufficient to overcome the considerations to which I have already adverted.

It is quite true, as the appellants have pointed out, that the complicated questions arising out of shareholding in limited companies are very crudely dealt with by the provisions of statutes passed before that system had been established. But the Acts of 1848 and 1851 both deal with the case of commissioners being shareholders in companies, and it is impossible to deny that a shareholder in a limited company comes under section 42. This is enough for the decision of the present case.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellants, *Ashurst, Morris, Crisp, & Co.*

Solicitor for the respondents, *Sir Homewood Crawford.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Dec. 7, 8.

LONDON COUNTY COUNCIL *v.* SOUTH METROPOLITAN GAS CO. (*a.*)

Gas company—Local government—Testing of gas—"Daily"—Inclusive of Sunday—Practice—Parties—Appeal—Jurisdiction—Gas Light and Coke Co.'s Act, 1880 (43 & 44 *Vict.* c. 181), *s.* 7—*Gasworks Clauses Act,* 1871 (34 & 35 *Vict.* c. 41), *s.* 34—*Metropolis Gas Act,* 1860 (23 & 24 *Vict.* c. 125), *s.* 55—*Sunday Observance Act,* 1677 (29 *Car.* 2, c. 7).

By the South Metropolitan Gas Co.'s special Acts of 1869 *and* 1876, *provision was made for the public testing of the quality of the gas supplied by them to consumers. The mode of testing and the locus and number of testing-places which were to be provided by the company, and to be under the control of the Metropolitan Board of Works, were to be prescribed by gas referees appointed by the Board of Trade, and "daily" testings were to be made by gas examiners appointed by the Metropolitan Board. Similar provisions were contained in the special Acts of the other metropolitan gas companies. By the Gas Companies Act of* 1880, *which was applicable to all the metropolitan gas companies, the provisions as to daily testing were (in effect) re-enacted; and by section* 7 *of that Act it was enacted that a gas examiner should at each testing-place make "daily" such number of testings as the gas referees should prescribe.*

There was also a provision in the Special Act of 1869 *which was to be read with the Act of* 1880 *defining "day" as twenty-four hours, beginning at* 9 *o'clock in the forenoon of one day and ending at* 9 *o'clock in the forenoon of the next. Under these Acts the practice had been to test on week-days only. In an action brought by the London County Council (the representatives of the Metropolitan Board of Works) against the gas company, claiming a declaration that the gas examiners appointed by the council were entitled to test the gas on Sundays, and an injunction to restrain the defendant gas company from preventing the gas examiners having access to the testing-places on Sundays,*

Held, that the true meaning of "daily" in the Act of 1880 *read with the Act of* 1869, *with reference to the South Metropolitan Gas Co., was "every day," including Sundays, taking the day as commencing at* 9 *o'clock in the forenoon; that the practice of not testing on Sundays prevailing under similar provisions in previous Acts of Parliament from* 1869 *to* 1880 *was not sufficient to justify the court to construe the word "daily" in section* 7 *of the Act of* 1880 *with reference to that practice; and that the plaintiff council were entitled to the relief claimed by their action.*

Held, also, that the London County Council, as the "controlling authority" under the Acts, was entitled to bring the action in its own name as plaintiff.

Held, further, that although section 34 *of the Gasworks Clauses Act,* 1871, *imposed a penalty recoverable in a court of summary jurisdiction for a refusal by the gas company to give proper access to the testing stations, yet the jurisdiction of the superior courts to deal with the matter was preserved by virtue of section* 55 *of the Metropolis Gas Act,* 1860.

Decision of Joyce, J. (ante, *p.* 45, [1903] 2 *Ch.* 532), *affirmed.*

This was an appeal by the defendant company from a decision of Joyce, J. (reported *ante*, p. 45, [1903] 2 Ch. 532).

The facts were as follows: The action was brought by the London County Council to obtain a declaration that the gas examiners appointed by them under the powers vested in the council by the South Metropolitan Gas Light and Coke Co.'s Act, 1876 (39 & 40 Vict. c. 229), and the Local Government Act, 1888 (51 & 52 Vict. c. 41), were entitled at each appointed testing-place to make daily (including Sundays) such number of tests as the gas referees should prescribe for ascertaining whether during the whole of each day the illuminating power and purity of the gas supplied at such testing-place by the defendant company were such as were respectively prescribed under the company's special Act; and

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

further for an injunction to restrain the gas company from preventing, obstructing, or hindering the council's gas examiners from making the tests prescribed by the gas referees at each of the appointed testing stations of the defendant company on Sundays. The action was in short to establish the principle that the word "daily" in the Act was for the purposes of gas testing, inclusive of Sunday.

For the purpose of gas testing in the Metropolis there are three classes of officials *videlicet* — gas referees appointed by the Board of Trade, a chief examiner appointed by the Board of Trade, and gas examiners appointed by the "controlling authorities," who in the city were the Corporation of London, and for the rest of the Metropolis, were the plaintiffs. The council having passed a resolution that the gas supplied by, amongst other companies, the defendant company should be tested on Sundays, the gas examiners attended at the various gas testing stations of the defendants for this purpose on Sunday, the 2nd of November, 1902, but were refused admittance by the caretakers in charge, acting on the instructions of the defendant company, and this refusal was continued on subsequent successive Sundays. Accordingly a writ was issued aginst the company on the 16th of December, 1902, for the purpose of testing the question whether the word "daily" included Sunday.

The Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 22, enacts: "The gas company shall well and effectually light all public lamps in all streets which they are required by the local authority to light, and shall, according to the terms of their contract, supply to the local authority so much gas as they require for their public lamps. . . ." And by section 24, "Every gas company shall, unless prevented by necessary repairs or unavoidable accident, at all times keep all their branch or service pipes fully charged with gas. . . ."

By the South Metropolitan Gas Light and Coke Co.'s Act, 1869 (32 & 33 Vict. c. 130), s. 3, the term "day" (subject to an exception not material) is defined as meaning "twenty-four hours, reckoned from 9 o'clock in the forenoon of one day to 9 o'clock in the forenoon of the next following day, so much of each day as is before 9 o'clock in the forenoon being reckoned as part of the immediately preceding day of the month or week." The gas referees are appointed by the Board of Trade under section 15 of the same Act, and they prescribe the mode and times for testing the illuminating power and purity of the gas supplied by the company, which testing-places and apparatus were to be under the control and management of the Metropolitan Board of Works, who were the predecessors of the plaintiff council.

The Act further provided for the appointment by the Board of Works of gas examiners, whose duty it was at each testing-place daily to test the illuminating power and purity of the gas supplied. The provisions of the Act of 1869 as to testing and the appointment of gas examiners were repealed and re-enacted with certain modifications by the South Metropolitan Gas Light and Coke Co.'s Act, 1876 (39 & 40 Vict. c. 229), under section 35 of which the gas referees are to prescribe the places or stations at which the tests are to be made, and the gas company are to provide and maintain the testing-places and the apparatus and materials therefor prescribed by the gas referees; and under section 36 the prescribed testing-places, materials, and apparatus provided by the company are to be under the control and management of the Metropolitan Board of Works. Section 37 provides that the company may also have a separate testing-place in the same building under their own control and management; by section 39 the gas examiners are appointed by the council. Between 1869 and 1876 similar provisions were enacted with respect to the other metropolitan gas companies. The provisions of the Metropolitan Gas Act, 1860, relating to the testing of gas, were repealed by section 4 of the company's special Act of 1869 (32 & 33 Vict. c. 130).

By section 40, sub-section 8, of the Local Government (England and Wales) Act, 1888 (51 & 52 Vict. c. 41), the powers, authorities and liabilities of the Metropolitan Board of Works were transferred to the plaintiffs, and are now vested in them. In the year 1879 the name of the defendant company was changed from the South Metropolitan Gas Light and Coke Co. to the South Metropolitan Gas Co. Certain of the provisions of the Act of 1869 relative to testing were repealed by the company's Act of 1876, and the like provisions of this Act were in turn repealed by the Gas Light and Coke and other Companies Act, 1880 (43 & 44 Vict. c. 181), which now regulates the testing of gas supplied by, amongst others, the defendant company. By section 4 of that Act it was provided that the Act should apply to the metropolitan gas companies therein enumerated (which included the defendant company); and that the special Act of such company as amended by this Act, should be construed together as one Act. Section 7 provides as follows: "A gas examiner shall at each testing-place make daily such number of tests as the gas referees may prescribe for ascertaining whether during the whole of each day the illuminating power and purity of the gas supplied at such testing-place by the company are such as are respectively prescribed under the special Act provided that the tests for illuminating shall be taken at intervals of not less than one hour." Section 8 provides as follows "The average of all the testings at any testing-place on each day of the illuminating power of the gas supplied by the company at such testing-place shall be deemed to represent the illuminating power of such gas on that day at such testing-place."

The defendants in their defence denied that testings had ever been made on Sundays, that since 1869 or thereabouts Sunday had always been treated as a '*dies non*' by the defendants, otherwise it would give unnecessary and extra labour to their caretakers and workmen; they also relied on the Sunday Observance Act, 1677 (29 Car. 2, c. 1), and contended that the word "daily" in section 7 of the Act of 1880 must be taken in the sense of only meaning week day—that is, working days.

Joyce, J., held, that *primâ facie* the word "daily" meant every day; that notwithstanding the practice of not testing on Sunday, such practice could not alter the words of an Act of Parliament; and he accordingly granted the injunction claimed by the plaintiff council.

From this decision the defendant company appealed.

Two new points were raised by the defendant company upon the appeal. First, that the London County Council were not the proper plaintiffs in the action, and that the Attorney-General should have been joined as co-plaintiff; and secondly, that the jurisdiction of the High Court was excluded by the provisions of section 34 of the Gas Works Clauses Act, 1871 (34 & 35 Vict. c. 41), which Act was incorporated with the South Metropolitan Gas Act, 1881 (44 & 45 Vict. c. 172), s. 3, and thereby applied to the company's undertaking; the argument on this point being that section 34 of the Act of 1871 imposed a penalty, recoverable in a court of summary jurisdiction, for a refusal by the gas company to allow proper access to the testing stations, and consequently that the jurisdiction of the High Court was thereby excluded.

Warmington, K.C., Lord Robert Cecil, K.C., and *L. Rostron*, for the appellants.—The word "day" is defined by section 3 of the Act of 1869, and by section 42 of the Act of 1876. Sunday is a *dies non*. This court is not dealing with an Act passed for the first time, but with the latest edition of what has been the subject of enactment since 1869. There has arisen a practice of the local authority and their successors whereby the word "daily," which *primâ facie* includes Sunday, was understood to exclude that day. Where a new offence has been created or a new liability imposed, and a statute has imposed a special penalty, that remedy only is to be pursued. Section 34 of the Act of 1871 gives a special remedy, and the plaintiffs should have applied to some court of summary jurisdiction to punish the offence; they cannot claim a declaration or injunction: *Mayor of Devonport* v. *Tozer, ante*, p. 6, [1903] 1 Ch. 259; *Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347; *Barraclough* v. *Brown*, [1897] A. C. 615, 46 W. R. Dig. 64. The Act of 1871 applies to the defendants. The Act of 1860 incorporates the Act of 1847, and the Act of 1871 is to be read by section 1 thereof as one with the Act of 1847; and the Acts of 1871 and 1880 are to be construed as one: *South Metropolitan Gas Light and Coke Co.* v. *Noakes*, 61 L. T. N. S. 556, 38 W. R. Dig. 83; *Dudley Gas Works Co.* v. *Warmington*, 29 W. R. 680; *Attorney-General* v. *The Corporation of Leeds*, 19 W. R. 19, 5 Ch. App. 583; *Attorney-General* v. *The Great Eastern Railway Co.*, 22 W. R. 281, L. R. 6 H. L. 367; *Canada Southern Railway Co.* v. *The International Bridge Co.*, 8 App. Cas. 723. The plaintiffs are not entitled to fix the day for testing, the examiners must. They are there in an independent and judicial capacity, and they should have sued. The statutes restricting Sunday trading apply: 5 & 6 Ed. 6, 29 Car. 2, c. 7, 3 & 4 Will. 4, c. 42, s. 43.

They also referred to the following cases: *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, 40 W. R. Dig. 217; and *Yewens* v. *Noakes*, 28 W. R. 562, 50 L. J. Q. B. 132.

Hughes, K.C., and *T. T. Methold*, for the respondents.—Having regard to the interpretation section of the Act, two days would be excluded if Sunday was excluded. The Act of 1880 cannot be read so as to exclude Sunday: *Peacock* v. *Reg.*, 4 C. B. N. S. 264; *Rawlins* v. *West Derby Overseers*, 2 C. B. 72; *Ex parte Simpkin*, 2 E. & E. 392; *Calder and Hebble Navigation Co.* v. *Pilling*, 14 M. & W. 76; *Wolverhampton New Waterworks Co.* v. *Hawkesford*, 7 W. R. 244, 6 C. B. N. S. 336, at p. 356. Here is an obligation without a penalty attached to it. There is a penalty imposed for not keeping up the standard of illumination and purity, but none for not giving access to the testing stations. The imposition of a penalty by a subsequent Act, even if commensurate with the whole of the preceding Act, could not take away a remedy existing at common law. Taking section 3 of the Act of 1871 it cannot affect the gas company. The South Metropolitan Gas Act of 1881, s. 2, enacts that the Act of 1871 should apply to an undertaking as if authorized, therefore the Legislature considered that the Act of 1871 did not apply to the company at all, and had no application to the Act of 1880. [VAUGHAN WILLIAMS, L.J.—The Gas Works Act of 1845 if incorporated applies]. The defendants say the Act of 1847 is to be construed with the Act of 1881 as one Act, and that in the Metropolis Gas Act of 1860 the Act of 1847 is incorporated, therefore you must read the Acts of 1847, 1860, and 1881 all as one Act: *Commercial Gas Co.* v. *Scott*, 23 W. R. 874, L. R. 10 Q. B. 400. With regard to the jurisdiction, section 55 of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125) provides "That no special remedy or provision for giving relief to any person given by this Act shall prejudice or diminish the general jurisdiction of any of her Majesty's superior courts of law or equity over or with respect to the acts or defaults in respect of which the special remedies or provisions are so given." The persons whose duty it is to see that the examiners under the London County Council do their duty, and the modes in which they do their testing, have nothing to do with the council, that is for the referees but their duty to test is under the jurisdiction of the council. The council are under the Act the "controlling authority" (see section 2 of the Act of 1880), and their duty is to see that the examiners test, and by section 5, the testing-places are under the authority of the "controlling authority." The statement of claim is perfectly correct. The defendants do not say that the testing involves on their servants any additional Sunday labour. From 1869 to 1880 they used to make gas on Sundays. The obligation on the company is to supply gas of fourteen candle power, but a forfeiture is not incurred provided that average is kept up. The council are bound to get access on Sundays for their examiners.

Warmington, K.C., in reply.—The defendants have no direction from the gas referees to test on Sundays; the county council certainly have special powers under section 6; but as to each day, the gas referees are the only authority who can prescribe the number of tests to be given. The practice pursued by the local authority must be taken into consideration in construing the last of a series of Acts of Parliament. The defendants admit the force of section 55 of the Act of 1860.

VAUGHAN WILLIAMS, L.J.—We in this court have nothing to do with the question of whether the practice of having no gas tests on Sunday was a convenient practice, or a practice which was advantageous to the public. That is not for us. The practice of having no tests on Sunday has existed for a long time, but that is not a reason why we should violate the plain construction of the Act of Parliament unless the practice has been of such a nature that we ought to impute to the Legislature the knowledge of it when it passed the subsequent Acts which have been referred to. In my judgment the present case is not such a case. We merely have to construe the words of section 7, which is: "A gas examiner shall at each testing-place make daily such a number of tests as the gas referees may prescribe for ascertaining whether during the whole of each day the illuminating power and purity of the gas supplied at such testing place by the company are such as are respectively prescribed under the special Act; provided that the tests for illuminating shall be taken at intervals of not less than one hour." Now, I cannot doubt that according to their natural meaning and their *primâ facie* meaning the words "make daily such number of tests" mean every day, inclusive of Sunday. I am not at all saying that you might not have an Act of Parliament in which those words were used which might admit of being differently construed, either by reason of the subject-matter of the Act of Parliament, or by reason of the contents of the Act of Parliament taken as a whole. That is not the case here. Both under the general Act of 1847 and the Act of 1881, and also under the special Acts of this company, and of each company, the obligation to supply gas of the proper illuminating power, and of the proper quality, is a continuing obligation, which has to be performed on every day; and in the nature of things, there is just as much necessity for having

the illuminating power and quality of the gas tested on a Sunday as there is upon any other day of the week. Under those circumstances, having regard to the continuing nature of the obligation on every day, including Sundays, I cannot doubt myself that "to make daily such number of tests," &c., are words which apply to Sundays as well as to any other day of the week. That being so, the only question is whether one ought to construe these words differently by reason of the practice which has, as a fact, been maintained during all these years since, at all events, 1869, and, it may be, for aught I know, since 1847. Cases have been cited to show that sometimes you are not only entitled, but bound, where you have Acts of Parliament passed in reference to a matter on which there has been a continuity of Acts of Parliament in succession, running on the same lines, to take into consideration the previous practice. The strongest case, probably, of all those which were cited is the case, of *Yewens* v. *Noakes*, in which there is a judgment, amongst others, of Thesiger, L.J., in which he says, speaking of a case in which there was living in a house, occupying it, not only the caretaker himself, but his wife and children, and the question was whether the occupation came within the exemption to the statute: "Whilst it is true that we ought not to construe an Act itself by looking at the practice which has taken place in carrying the Act out, it is equally true that we are entitled to construe a subsequent Act, not only with regard to the actual words used, but also with regard to the practice which has grown up and existed at the time when the subsequent Act was passed."

That undoubtedly is a strong authority for saying that such practice may, in the case that he has described, be taken into consideration in construing the Act of Parliament, and I do not propose to depart from or whittle down that proposition in any degree. But what does the lord justice mean? Does he mean every practice by persons who had a statutory duty thrown upon them, and who throughout a considerable number of years, or a long period, have neglected to perform that which, according to the natural construction of the words, would be their duty? I think not. I do not think that he means to say that one is always to impute to the Legislature a knowledge of that neglected duty by those who had a statutory obligation thrown upon them. If it is not always that this imputation is to be made, when is it to be made? I think it is to be made in those cases in which it is reasonable to impute such a knowledge to the Legislature. A case in which it very usually has been done is this: very often in the antecedent or earlier Acts in similar frame, upon the same subject-matter, the very question of the interpretation of a particular section or of particular words in the Act of Parliament has come into court for decision, and the court has put a construction upon the words in the earlier Act of Parliament; then, when you come to the later Act of Parliament, the Legislature uses identical words. It could not, in such a case at all events, be supposed, however doubtful the construction of those words might be, that the Legislature passed the subsequent statute without knowledge of the previous decision upon the same words in similar Acts of Parliament. Then, again, take the case which was the actual case before the court in *Yewens* v. *Noakes*. That was a case in which the knowledge which was sought to be imputed to the Legislature was the practice of a public department in respect of inhabited house duty. One can quite understand that the practice of public departments might be supposed to be within the knowledge of the Legislature, but I do not think we ought to carry that so far as to say that the Legislature must have had within their knowledge and view the practice of the examiners as to holding no tests upon Sundays.

In these circumstances, it seems to me, there is no choice but to affirm Joyce, J.'s, decision, and to hold that these words "make daily" include every day of the week, Sunday inclusive.

Other points have been raised which it is not necessary to go into now, because matters were called to our attention this morning by Mr. Hughes which dispose of those points. I am not sure myself that the pleading is so drawn as to really cover the case which is now made on behalf of the county council; but even if in form it is not correct, I think we ought to disregard that, because Mr. Hughes has stated, without any contradiction from the other side, that the question which both parties intended to have decided, and wished to have decided here, was whether or not those testings could and ought to be held under the section on Sundays. That being so, we shall make any necessary alterations in the form of the prayer of the statement of claim. I think we are bound to hold that the testings ought to be made, and must be made, under the terms of the statute, on Sundays as well as on week-days.

ROMER, L.J.—I also am of opinion that this appeal fails. Upon what I may call the main question it appears to me to be clear that the decision of Joyce, J., is correct. Whether you look at the defendant company's special Act of 1869, or at the Act of 1876, or at the Act of 1880, it appears to me to be clear on the construction of those Acts that the word "daily" means what it says, and does not exclude any day in particular, like Sunday. On the Acts themselves, if there was nothing but the Acts to construe, I do not really think that any substantial argument on behalf of the appellants could be, or has been, addressed to us. The gas has to be supplied on a Sunday as well as on any other day, and there is just as much reason why the gas should be good on a Sunday and of proper quality, and so forth, on that day as on any other day. Why should it not be tested on that day as well as on any other day? Nor can I see why, under these Acts, any distinction should be attempted to be drawn between a day in the week, say, from Tuesday morning at 9 o'clock to the following Wednesday at 9 o'clock, or between Saturday at 9 o'clock to Sunday at 9 o'clock, or from Sunday at 9 to Monday at 9. I take the hour of 9 because, under the Acts, the days are defined with reference to 9 o'clock on one day to 9 o'clock on the following day. The only question is—and that forms really the basis of the argument of the appellants on this head—can the plain meaning of the Acts of Parliament be departed from as to the later Acts, because a practice has grown up of not taking the tests on Sundays, or because, as I understand, a police magistrate may have decided a case which implied that a testing on Sunday was not, in his opinion, obligatory under the Act? I think clearly not. There is nothing arising from the fact of that practice and that decision which would justify us in saying that when the Legislature passed the Acts of 1876 and 1880 it did not intend to enact what it had previously enacted in 1869—that the word "daily," as used in those subsequent Acts, was used exactly in the same sense as it was used in the Act of 1869.

With regard to the other two points, which were for the first time taken on this appeal, I can only say that, to my mind, with regard to one of them, which is as to whether the county council are entitled to sue, I clearly think they are. It was suggested that they had no sufficient interest in the subject-matter of this action to justify them in being the plaintiffs in this

action. But the county council is the controlling authority under the Acts, and in particular it has the control and management of the testing stations committed to it; and why has it had committed to it the control and management of the testing stations? Clearly to enable it to carry out the duties and obligations cast upon it as a controlling authority.

Now, it appeared to the county council that gas being delivered on a Sunday, it ought to be tested on a Sunday according to the wording of the Act; but they find that the gas examiners, the testing operators, are not allowed by the defendant company to go to the testing stations which are under the control and authority of the county council. The county council, having the control, find that, but for the interference of the defendants the testing would go on, because the testers are quite willing and ready to go there, in fact, according to their duty; but the county council, as the controllers of the testing station, are prevented from allowing the testers to go there because the defendant company choose to say that no tests shall be made on the Sunday, and that no person except they themselves shall have any access to the testing stations on Sundays.

It appears to me that the county council have sufficient interest, obligations, and rights to justify them in coming to this court and seeking for an injunction to restrain the defendants from excluding, practically, the county council and the testers from the testing stations. And that, in substance, is what this action is for, the real question behind it being that which I have previously indicated, and which we have decided—namely, as to whether, under the Acts of Parliament, the testings ought to go on at all on a Sunday.

With regard to the other technical point taken on behalf of the appellants, that seemed to me to have something of substance in it until it was disposed of by the reference to section 55 of the Act of 1860, which destroyed whatever other validity the argument might have had. It appears to me, therefore, that the appeal wholly fails, and should be dismissed.

STIRLING, L.J.—I am of the same opinion. I agree with what has been said by Joyce, J., in the court below, and by my brethren here upon the main question which is raised by this action, namely, whether the word "daily" includes Sunday, and I do not think I can usefully add to what has been said by them.

With regard to the points which have been raised for the first time in this court, the one of most substance is that which would exclude the jurisdiction of the court by reason of the penalty being attached by the Gas Works Clauses Act of 1871 to a refusal on the part of the gas company to give proper access to the testing stations and so forth. But when the Act of 1860 of this particular company is referred to, it is found that the jurisdiction of the superior court is preserved; and it really has been admitted by Mr. Warmington that that section affords an answer to the argument which was based on the Act of 1871.

The other question is as to whether the London County Council is the proper plaintiff in the present action. Now I agree with what has been said by Vaughan Williams, L.J., that that is not an objection to which effect ought to be given, regard being had to what took place in the court below at the hearing of this action. I also agree with what has been said by Romer, L.J., and if it were necessary to decide it, I should be of opinion that the London County Council were proper plaintiffs. To them, by the Act of 1876, are entrusted the control and management of the testing places, materials and apparatus provided by the company, and it seems to me that so far from the company being entitled to control those places, the view taken by the Acts, particularly the Act of 1880, is that everything which is necessary to be done for carrying into effect the directions of the Act with respect to testing shall be dealt with by the "controlling authority"—namely, the London County Council—and not by the company. That is, to my mind, made very strong in particular by section 10 of the Act of 1880, which, whilst it gives the company the power, if they think fit, to be represented by an officer at each testing, provides that "the controlling authority shall state at what time it is proposed to make such testings on any particular day upon receiving a request in writing from the company in the forenoon of the previous day." That seems to me to show that it is for the company to apply to the controlling authority—the London County Council—for the purpose of giving effect to this portion of the Act, and that they—the company—have not the power of excluding the controlling authority and the persons authorized by them from the testing-stations which have been established under the Act. It seems to me that in this case there was a clear interference by the defendants with the control and management which is by statute vested in the London County Council. I think, therefore, the appeal fails, and ought to be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Hicklin, Washington, & Pasmore.*

Solicitors for the respondents, *W. A. Blaxland.*

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) } July 2, 3, 4; Aug. 11, 1903.

GLAMORGANSHIRE COAL CO. (LIMITED) AND OTHERS v. SOUTH WALES MINERS' FEDERATION AND OTHERS. (a.)

*Trade union—Master and workman—Procuring breach of contract of service—Malice—*Bonâ fide *advice—Just cause.*

Interference with contractual relations known to law is a violation of legal rights, which is actionable unless there is sufficient justification for what was done. In deciding what will constitute sufficient justification, regard must be had to the circumstances of each case. Where a third person has procured a breach of contract between master and servant, he is not justified of necessity merely by showing that he had no personal animus *against the master or that it was to the advantage of the servant that the contract should be broken.*

In 1901 *the South Wales Miners' Federation issued a manifesto ordering the men to stop work on certain days known as "stop days." This action occasioned great loss to the employers, but was induced by a* bonâ fide *belief that the workmen would be benefited by reason of the rise in the price of coal thereby caused. In an action by the employers for damages,*

Held (by Romer *and* Stirling, L.JJ.; Vaughan Williams, L.J., dissentiente), *that the action would lie, although there was no malicious intention on the part of the federation to injure the employers, and the federation* bonâ fide *believed that they were bound to act as they did in the interest of the men.*

Decision of Bigham, J. (51 *W. R.* 59), *reversed.*

This was an appeal from the decision of Bigham, J. (reported 51 W. R. 59, [1903] 1 K. B. 118).

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The action was brought by the Glamorgan Coal Co. (Limited) and seventy-three other plaintiffs against the South Wales Miners' Federation, its trustees, its officers, and a number of members of its executive council, to recover damages for wrongfully and maliciously procuring and inducing the workmen in the plaintiffs' collieries to break their contracts of service with the plaintiffs. In the alternative the plaintiffs also sued the defendants for wrongfully, unlawfully, and maliciously conspiring together to do the acts complained of.

The plaintiffs claimed both damages and an injunction.

The defence consisted of denials of the material allegations in the statement of claim, and of a plea that the acts complained of were done, if at all, with reasonable justification and excuse.

The case came on to be tried before Bigham, J., with a special jury on the 22nd of July, 1902, but after the trial had lasted three days the jury was discharged, and all questions of law and fact, as well as the ascertainment of the damages, if any, were by consent left to be dealt with by the learned judge.

The facts, as found by his lordship in his considered judgment, were as follows: "The plaintiffs are seventy-four limited liability companies associated together for the protection of their own interests under the style of the Monmouthshire and South Wales Coal Owners' Association. They work upwards of 200 collieries in the South Wales district, and in these collieries they employ about 100,000 men. The defendants are, first, the men's federation, a body registered under the Friendly Societies Acts, secondly the trustees of the federation, thirdly Mr. Brace (vice-president), Mr. Onions (the treasurer), and Mr. Richards (the secretary of the federation), and lastly six men who are members of the executive council of the federation, and who are also members of the workmen's half of a body known as the Joint Sliding Scale Committee. The trustees were joined as defendants merely in order to enable the plaintiffs to reach the funds of the federation in the event of a judgment being recovered for damages against that body. It appeared that for the last twenty or twenty-five years the masters and the men in the South Wales colliery district had worked together under an agreement, called the sliding-scale agreement, by which the rate of wages paid to the men was made to depend on the price for the time being of a certain agreed class of coal—that is to say, as the price of such coal rose or fell so the rate of wages moved up or down. It was thus to the interest, not only of the masters, but also of the men, to keep up the price of coal; but, at the same time, not to drive it up to such a point as would unduly interfere with the demand. Against the producers of coal there were always arrayed a number of coal dealers, known as merchants or middlemen, who buy coal to be shipped to foreign ports, or for resale in the South Wales market. The interest of those men was, of course, to keep down prices, so that they might buy as cheaply as possible. They frequently sold large quantities of coal for forward delivery at prices below those current for immediate delivery, trusting to supply themselves later on by purchases from one or other of the many collieries at prices which would make their bargains remunerative. This had the effect of depressing the market, and on more than one occasion, and particularly in the years 1896 and 1897, the masters and men had tried together to devise some scheme to so regulate the output of the mines, by means of stop days or otherwise, as to counteract this effect. There had, however, always been a difficulty in getting a sufficient number of the colliery proprietors to fall in with any scheme having for its object the restriction of output, and thus nothing had been done. On the 1st of April, 1898, a strike broke out in the South Wales district, and the collieries were closed from that date to the 31st of August. On the 1st of September work was resumed throughout the district. At the collieries of forty-seven of the plaintiff companies it was resumed under an agreement which embodied the old sliding scale. By this agreement it was provided that a joint committee of masters and men should be formed, which should be called the Joint Sliding Scale Committee; and that it should be comprised of twelve masters, representing the forty-seven firms, and of twelve men elected by the colliers in the employment of those firms. Each half of the committee was to have its own secretary, elected from its own twelve members, and it was contemplated that each half might from time to time meet separately to discuss matters affecting its own interests. One of the principal objects of the joint committee was to ascertain, by audits of the sales of the forty-seven firms, the average price of coal, for the purpose of regulating wages thereby. The agreement contained many other provisions, in addition to the provisions for the formation of the joint committee. The important clause of the embodied sliding-scale agreement was clause 23, which was as follows: "It is hereby agreed that all notices to terminate contracts on the part of the employers, as well as employed, shall be given only on the first day of any calendar month, and to terminate on the last day of the same month." Although only forty-seven of the plaintiffs were parties to that agreement, and were alone to be represented on the Joint Sliding Scale Committee, the men employed by the other twenty-seven plaintiffs went back to work on the same terms, both as to wages and notice, as those contained in the agreement. On the 11th of October, 1898, the defendant federation was formed, and practically all the miners in the South Wales district became members of it. They numbered about 128,000, and they included all, or very nearly all, the men who worked for the plaintiffs. The members at once proceeded to elect a president, a vice-president, a treasurer, and a secretary. They also elected an executive council, consisting of twenty-five men, who were to manage the affairs of the federation. The federation was subsequently—viz., in February, 1899—registered under the Friendly Societies Acts. By its rules its objects are declared to be—to provide funds to carry on the business of the federation; to take into consideration the question of trade and wages; to protect workmen generally; regulate the relations between them and employers; and to call conferences to deal with questions affecting the workmen of a trade and legislative character. On the 5th of November, 1898, the executive council met and resolved: "That this council in its entirety shall from time to time transact the whole of the business arising out of the sliding-scale agreement, notwithstanding that only twelve of the said council can appear before the employers to deal with the Sliding Scale Joint Committee," and, having passed this resolution, they then proceeded to elect twelve of their own body to serve on the joint committee. The forty-seven plaintiff companies objected to that election upon the ground that the council represented all the miners in South Wales, whereas the joint committee was to be composed only of the representatives of the forty-seven firms, and of the men who worked for those firms. Thereupon another election was held, at which only the men in the collieries of the forty-seven firms voted. They, however, chose the same twelve men as had been chosen by the executive council, so that the masters took nothing by their objection. The effect of this was, in his lordship's opinion, that the twelve work-

ing-men who formed the working men's half of the Joint Sliding Scale Committee became the mere mouthpiece of the federation, and took their instructions from the council of the federation, of which, as already stated, they were all members. The federation prospered greatly, so that by the end of 1900 it found itself in the possession of funds amounting to £100,000. The price of coals also rose, and with it the rate of wages. But in October or November, 1900, the council of the federation seemed to have felt some apprehension that this prosperity was being threatened by the merchant and the middleman. That being the season of the year at which foreign governments and others make their contracts for forward delivery of coal, the prices at which these contracts were being effected alarmed the council, and foreshadowed a fall in prices. Whether the fear was well-founded or not, his lordship could not say, but he was satisfied by the evidence that it was honestly felt. On the 3rd of November, 1900, Mr. Abraham, M.P., the president, made a speech at a meeting of the council of the federation, in which he said: "There is an attempt being made by middlemen and merchants to bring about an undue reduction in the price of coal; 80 per cent. of the employers are trying to counteract this movement, but three or four large firms appear to desire that it should be successful. I therefore suggest that steps be taken to bring about a stop-day throughout the coalfield as a protest against this action." Thereupon a resolution of the council was passed ordering a stop-day for Friday, the 9th of November, and a further resolution was passed that a general conference of the federation should be convened for the 12th of November. In the meanwhile the following manifesto was ordered to be circulated: "Fellow Workmen,—Your council, having seriously considered the present condition of the coal trade, are strongly of opinion that an organized attempt is being made to unduly interfere with trade and prices to such an extent as will prejudice the interest of the members of the federation. With a view of preventing the industry being exploited by merchants and middlemen, we have unanimously resolved that a general holiday be taken throughout the coalfield by all colliery workmen on Friday next, the 9th of November, 1900. We also request you upon that day to hold general meetings for the purpose of appointing delegates to attend a conference at the Cory Memorial Hall on Monday next, the 12th of November, 1900, to consider and determine our future policy, as embodied in the following resolution That the conference hereby authorizes the council to declare a general holiday at any time they think it necessary for the protection of your wages and the industry generally.—W. A. ABRAHAM." This manifesto had the desired effect, and on the 9th of November all the colliers in the coalfield, including the men working in the plaintiff's collieries, stopped work. No notice of any kind was served on the masters, and they knew nothing of the matter until they saw a report of Mr. Abraham's speech in the newspapers of the 6th of November. This stoppage on the 9th of November is the first matter of which the plaintiffs complained in this action. On the 12th of November, 1900, the conference which had been convened for that day was held, and at it a resolution was passed authorizing the council of the federation to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally. Having regard to what happened twelve months later, and to the present contentions of the federation, this resolution, which was passed by the conference in compliance with the request of the executive council in their manifesto, was, his lordship thought, of considerable importance. The representatives of the masters on the Joint Sliding Scale Committee were annoyed at the course which the executive council had adopted, and on the 13th of November, 1900, they held a meeting at which the working men's representatives on the committee were present. The latter assured the masters that the action of the council had not been taken with a view to injuring the owners, or to interfering with the relations between owners and workmen, but only to show middlemen that they were not to be allowed to do with the markets what they had done in the past. This assurance the masters accepted, recording their acceptance in a memorandum in the minute-book of the Joint Sliding Scale Committee. The memorandum was as follows: "That, whilst accepting the assurances of the workmen's representatives that they thought they were acting for the good of the coal trade in having ordered a general stoppage of work at the collieries on Friday last, the owners' representatives are unanimously of opinion that the principle involved in such a stoppage is unsound, and the action is illegal, and will not achieve the object which the workmen's representatives apparently had in mind, and the owners' representatives protest against the course followed, for, so far from assisting the trade, such action is calculated to damage it, both temporarily and permanently. And, further, the owners' representatives are of opinion that, the stoppage having been in contravention of all established customs at the collieries, and so far-reaching in its effects, the general body of the associated owners will have to be consulted upon the course which the workmen have seen fit to adopt." On the 28th of November the associated owners met, and, after negativing the expediency of prosecuting the men, resolved as follows: "That the owners' side of the sliding scale committee point out to the workmen's representatives that a resolution has been passed by the association that, if the men make any future illegal stoppage, the owner will take proceedings against the men." Thus this incident was closed; and, if nothing further had happened, his lordship was satisfied that it would have been forgotten. He thought the masters were right in accepting the assurances of the men. He was quite satisfied that in ordering the stop-day the federation acted, as they thought, in the interests of the men, and without any intention, malicious or otherwise, of injuring the plaintiffs. His lordship's judgment next dealt with the events which led up to the ordering of the other stop-days in October and November, 1901, of which the plaintiffs complain. It was necessary to consider them with some care, inasmuch as the federation, by their counsel alleged that they did not order these stop days, and that they could not therefore be held responsible for them. In this connection it was to be remembered that on the 22nd of July, 1901, the House of Lords had decided in the *Taff Vale case* that a friendly society could be sued, and its funds reached, to answer any damages that might be recovered against it. On the 12th of October, 1901, the defendant Brace, the vice-president of the federation, made a speech to the miners, in which, after congratulating them on the flourishing position of the federation finances, he insisted that unless some steps were taken to prevent the depression of prices, which was likely to result from what he called the cut-throat competition in the trade, the workmen's wages would be seriously diminished; and in this connection he referred to the low prices at which contracts for coal had recently been made. He concluded by saying that "if there was the slightest tendency to a slump in prices brought about by

unfair competition the executive council of the federation, in whom power was invested by the whole of the workmen, according to the conference resolution, would immediately declare a series of stoppages, with a view to regulating the supply according to the demand." Four days later, on the 16th of October, 1901, Brace made another speech, in which, referring to his speech of the 12th of October, he intimated that if a stop was ordered it would not be by the federation, but by the workmen themselves. On the 19th of October Mr. Richards, the secretary of the federation, made a speech to a body of miners, in which, replying to the possibility of a stop day being ordered, he said that the executive council would have to move carefully, in view of the decision of the House of Lords in the *Taff Vale case*, and that, if any notice of a stop was found necessary for the purpose of keeping up wages, it would come from the Sliding Scale Committee. About the same time, on the 18th of October, 1901, Mr. Onions, the treasurer of the federation, made a speech, in which, after observing upon the comparatively low prices at which some large contracts for coal had recently been made, he stated that some general action would have to be resorted to by the workmen to protect themselves, and that, in the face of the recent decision in the *Taff Vale case*, they would have to exercise great care. He added: "It would be better to take some action to save themselves now than to be compelled later on, when wages had been reduced to starvation point, to take drastic measures." Those speeches preceded a meeting of the executive council of the federation, which was held on the 23rd of October, 1901, and they foreshadowed what was to be done at the meeting. The federation, or its officers, obviously desired that one or more stop days should be declared, but, having regard to the decision of the *Taff Vale case*, they desired that the order for the stop days should be issued by some other body than their own, by some body which had no funds with which to answer any judgment that might be recovered in the event of the order turning out to constitute an actionable wrong. At the meeting of the executive council held on the 23rd of October, 1901, there were twenty-two members present, ten of them being also members of the working men's division of the Joint Sliding Scale Committee. The vice-president, Mr. Brace, and the treasurer, Mr. Onions, were there. Mr. Brace appeared to have called attention to several contracts for forward delivery of coal which had been made at many shillings below the average price as ascertained at the last sliding scale audit, and thereupon a discussion ensued as to whether the federation should take steps to counteract the bad effect of the contracts. Then it seemed to have been moved that the executive council should not take upon itself the responsibility of declaring any stop day; and to that an amendment was proposed that, if any stop days were to be ordered, the orders should be issued by the executive council of the federation, no other body having authority to do so. The amendment being put, only three voted for it, while nineteen voted for the original motion. Thus it stood recorded on the minute-book of the federation that the council of the federation should take no responsibility for ordering stop days. Immediately after this vote had been taken all the members of the council who were not members of the Sliding Scale Committee left the room; and the remainder, by some process not explained, resolved themselves into the working-men's half of the Sliding Joint Scale Committee and proceeded in that capacity to declare two stop days—the 25th and 26th of October, 1901—and thereupon the following manifesto was published: "To the workmen employed at the South Wales and Monmouthshire Collieries. It having come to the knowledge of your representatives upon the Sliding Scale Committee that large contracts have already been made at considerably lower prices than the average price declared by the last sliding scale audit, and fearing the result of those contracts upon annual and other contracts about to be made, which must of necessity mean a heavy reduction in wages, it was unanimously resolved that the workmen shall observe as general holidays Friday and Saturday next. (Signed) W. BRACE, ALFRED ONIONS, ENOCH MOREL, THOMAS EVANS, D. WATTS MORGAN, C. B. STANTON, THOMAS THOMAS, D. D. BEYNON, DARONWY ISAAC, EVAN THOMAS, THOMAS RICHARDS." Telegrams were then sent to all the collieries in South Wales, notifying the fact that the stop days had been declared. It was, said his lordship, of importance to observe that with many of these collieries the Sliding Scale Committee, as a committee, had no concern; for that committee only represented the forty-seven firms before mentioned, and the working men's representatives on this committee were elected only by the men working in the collieries of those firms. Yet the committee took upon themselves to do that which the federation alone had authority to do—namely, to order stop days in all the collieries in South Wales. There was one other fact. The cost of printing the manifesto and of sending out the telegrams was paid out of the funds of the federation, and the organization of the federation was used for the purpose of making the stop days known to the men throughout the district. Subsequently two other stop days were ordered, one for the 31st of October and one for the 6th of November. They were also declared at meetings of what was called the working men's half of the Sliding Scale Committee; but, as before, communications to the men were distributed by means of the organization of the federation, and the cost was defrayed out of the federation funds. The result of all this was that the men stayed away from work on the four days, and so broke their contracts with their masters. It was argued on behalf of the federation that they, the federation, could not be held responsible for the consequences of stop days, for the reason that the federation had expressly refused to meddle in the matter, as appeared by the resolution of the 23rd of October. His lordship did not, however, think this argument well founded. It was true that the hand of the working men's representation on the Sliding Scale Committee was made to appear as directing these stop days, but he could not doubt that the hand was guided and controlled by the federation itself. In truth, it was the federation who were acting, the name of the Sliding Scale Committee being used as a blind, a very transparent blind, to conceal what was being done. The writ was issued on the 22nd of November, 1901. After the writ was issued Mr. Evan Thomas, one of the defendants, and a prominent official of the federation, speaking at a meeting of miners as to the way stop days would affect the right of haulers to a certain bonus payable to them by the masters, said, "When a stop day is declared, it is expected that everyone will morally abide by it, but if the haulers do not, they are in a sense acting disloyally towards the federation, and it will certainly mean that the executive council will either have to give this policy up or to do something else to meet the difficulty of carrying this policy out." It was true that within two or three days of this speech being reported Mr. Evan Thomas wrote to the newspapers to say that he had used the expression "executive council" by a slip, and that he ought to have said Sliding Scale Committee. But to his lordship it appeared that this official made no slip at all, and that he was quite right when he attributed the

stop day to the executive council of the federation. A number of witnesses were called on the part of the plaintiffs and on the part of the defendants. Mr. Dalziel, secretary of the Owners' Association, stated that he did not suggest that in giving the advice to to stop in November, 1900, there was any intention of injuring the masters, and the resolution of the masters passed on the 13th of November confirms Mr. Dalziel in that view. Then it appeared that in October, 1901, circumstances similar to those that led up to the stoppage in 1900 again occurred, and that these circumstances afforded the only reason for ordering the stop days in October and November, 1901. There was no quarrel between the masters and the men, and, so far as his lordship could see, no ill will. The men objected to the course of business adopted by the middlemen, and in this objection some at least of the masters seem to have shared. The evidence satisfied him that the action of the federation, and of the other defendants in 1901, was dictated by an honest desire to forward the interest of the workmen, and was not in any sense prompted by a wish to injure the masters. Neither the federation nor the other defendants had any prospect of personal gain from the operation of the stop days. Having been requested by the men by the resolution of the 12th of November, 1898, to advise and direct them as to when to stop work, the federation and the other defendants, who were its officers, in his lordship's opinion did, to the best of their ability, advise and direct the men. Whether they advised them wisely he could not say, though he was inclined to think not. But he was satisfied that they advised them honestly and without malice of any kind against the plaintiffs. He had to decide, in these circumstances, whether an action in tort would lie against the defendants. The advice and guidance of the defendants was solicited and involved, if followed, as the defendants knew, the breaking of subsisting contracts. It was followed, as the defendants wished it should be; and damage resulted to the masters; but there was no malicious intention to cause injury, no profit was gained for themselves by the defendants, and their sole object was to benefit the men, whom they were advising and directing. After examining the various authorities bearing upon the case, his lordship found that the federation and all the other defendants had acted honestly and without malice, and, in ordering the stop days, had done no more than that which they conceived to be in the best interests of the men they represented and for whom they had been acting. He found moreover that they had lawful justification or excuse for what they did in this—that, having been solicited by the men to advise and guide them on the question of stop days, it was their duty and their right to give the advice and to do what might be necessary to secure that the advice should be followed. As to the cause of action founded on conspiracy, his lordship said that an actionable conspiracy existed when a number of men combined either to do an unlawful act or to do a lawful act by unlawful means. In his opinion the acts of the individual defendants were not unlawful, and there was good authority for saying that a combination entered into for the purpose of doing a lawful act could not constitute an actionable conspiracy. In order to give a cause of action, the combination to do the lawful act must be entered into with a malicious intention of damaging the plaintiff and must cause him damage. Here no such conspiracy ever in fact existed, for there never was any malicious intention. His lordship accordingly gave judgment for the defendants on both branches of the plaintiffs' claim.

The plaintiffs appealed.

Sir E. Clarke, K.C., B. F. Williams, K.C., Lush, K.C., and *Trevor Lewis*, for the plaintiffs.

Rufus Isaacs, K.C., and *Gregory*, for the defendant federation.

Evans, K.C., and *Bailhache*, for the Sliding Scale Committee.

Sir E. Clarke, K.C., replied.

The arguments used appear sufficiently from the judgments.

The following cases were referred to: *Lumley* v. *Gye*, 1 W. R. 432, 2 E. & B. 216; *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 37 W. R. 756, 23 Q. B. D. 598, 40 W. R. 337, [1892] A. C. 25; *Read* v. *Friendly Society of Operative Stonemasons*, 51 W. R. 115, [1902] 2 K. B. 732; *Allen* v. *Flood*, 46 W. R. 258, [1898] A. C. 1; *Quinn* v. *Leathem*, 50 W. R. 139, [1901] A. C. 495; *Bowen* v. *Hall*, 29 W. R. 367, 6 Q. B. D. 333; *Emmens* v. *Pottle*, 34 W. R. 116, 16 Q. B. D. 354; *Vizetelly* v. *Mudie's Select Library*, [1900] 2 Q. B. 170, 48 W. R. Dig. 94; *Stuart* v. *Bell*, 39 W. R. 612, [1891] 2 Q. B. 341; *Youde* v. *Manchester and District Bill Posting Co., Times*, June 19, 1903; and *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K. B. 600.

Cur. adv. vult.

VAUGHAN WILLIAMS, L.J., read the following judgment: This is an appeal from the judgment in favour of the defendants delivered by Bigham, J., sitting as judge of fact and law. The action is brought by the Glamorgan Coal Co. (Limited) and seventy-three other plaintiffs against the South Wales Miners' Federation, its trustees, its officers, and a number of the members of the executive council to recover damages for wrongfully and maliciously procuring and inducing the workmen in the plaintiffs' collieries to break their contracts of service with the plaintiffs. In the alternative, the plaintiffs also sue the defendants for wrongfully, unlawfully, and maliciously conspiring together to do the acts complained of. The conspiracy count is put this way: The defendant federation, by its agents, its executive council, and the other defendants (naming them), well knowing the terms and conditions of the contracts of service with the workmen, wrongfully, unlawfully, and maliciously conspired together to do the acts complained of, that is, to procure the workmen to break their contracts of service by taking holidays called stop days. The plaintiffs claim both damages and an injunction. The defence of the defendants really consists of a traverse which, in the old days of pleading, would have taken the form of "Not guilty," but in these days of modern pleading assumes the form of an argumentative traverse; for the defendants, after denying the material allegations in the statement of claim, say that the acts complained of, if done at all, were done with reasonable justification and excuse. The defence thus pleaded is applied by the defendants both to the claim for procuring the plaintiffs' workmen to break their contracts and also to the claim for conspiracy. The learned judge began his judgment with a statement of facts showing the relations of the colliery proprietors and their workmen. [His lordship read from the statement of facts above given, and continued:] The learned judge then, in finding the facts of the case, in effect finds that the stop day must be attributed to the executive council of the South Wales Miners' Federation, and that the acts complained of in the statement of claim were the acts of that executive council, and not of the members of the Joint Sliding Scale Committee of the masters and men who represented the men, which was the view of

the evidence contended for on behalf of the defendants at the trial. The learned judge also said that the evidence satisfied him that the action of the federation and of the other defendants in 1901 was dictated by an honest desire to forward the interest of the workmen, and was not in any sense prompted by a wish to injure the masters. Neither the federation nor the other defendants had any prospect of personal gain from the operation of the stop days. The learned judge said: "Having been requested by the men by the resolution of the 12th of November, 1900, to advise and direct them as to when to stop work the federation and the other defendants, who were its officers, in my opinion did to the best of their ability advise and direct the men. Whether they advised them wisely I cannot say, though I am inclined to think not. But I am satisfied that they advised them honestly and without malice of any kind against the plaintiffs." The learned judge made a statement substantially to the same effect when dealing with the law in his judgment. Sir Edward Clarke, in his argument on this appeal, accepted the whole of the facts thus stated, excepting that he did not admit the request by the men for advice or direction so far as it relates to the "stop day" in 1900; but this seems to me of no importance, since the request is only material, if at all, to raise a duty, and the duty of the federation seems to me to be just as much raised by their constitution and the resolution of the 5th of November, 1898. The judgment of the learned judge, so far as concerns the procuring the breaches of contract by the men, is based on the duty of the executive council towards the men affording a justification for the interference by the executive council between the masters and the men, and the interference by the executive council in the existing contractual rights of the masters against the men, and he disposes of the claim for conspiracy on the same grounds. This decision of Bigham, J.'s, does not, of course, involve any such proposition as that the workmen have a right to break the contracts entered into by them respectively because each one of them may think honestly that it is either for his individual advantage, or for the advantage of the workmen collectively, that the contracts should be broken. Each workman will, of course, be liable to be sued for his own breach of contract. The question is whether an action will lie for procuring a breach of contract or for conspiracy. Taken in its simplest form, the question would be whether, if a hundred in the same employ agreed that they would each of them with the same object break their respective contracts on a given day, an action would lie, either against each of them for procuring breaches of contract by the others, or against the hundred collectively for conspiracy, or whether it could be said that there was anything in the relation of the men one to another which negatived an action in the form of an action for procuring a breach of contract, or an action for conspiracy, in a case in which that which was agreed to be done, or to do which the combination was formed, was undoubtedly a wrongful act, for which each one could be sued for breach of his own personal contract. It seems to me that if these *prima facie* causes of action, arising for procuring a breach of contract or combining to procure it, do not lie, it must be either on the ground that community of interest excludes a procuring each of the other connected by community of interest, or because the relation of the parties, whoever they are, raises a duty to counsel one another and arrange for concerted action. Some such proposition would cover the instances such as those suggested by the learned judge and by counsel in argument, such as a brother advising a sister, or a parent a child, or a doctor a patient, or a solicitor a client, but the principle is the same in each case, and the question must be the same in each case—Is the relation such as to raise the duty? In each of those cases the person breaking the contract is not the agent of the person giving the advice, however influential the adviser may be. The action for procuring a breach of contract is an action for wrongfully interfering in the contractual relations of other persons. The effect, if any, of the duty or right arising from the relation is only that it negatives the *primâ facie* presumption of malice which the law supposes from interference with contractual rights between the parties to a contract of which the interferer has notice; and the defendant can always rebut the *primâ facie* presumption thus arising by the proof of circumstances raising a duty to advise; but the plaintiff on his part can neutralize this by a proof of express malice. In no other sense is it true to say that, in an action for procuring a breach of contract, it is necessary to prove malice or motive, or anything more than mere notice of the contract. I think that similar observations arise on conspiracy; for, *primâ facie*, a combination to interfere with the civil rights of another, whether it be his right to full freedom in disposal of his own labour or his own capital or any other right of citizenship, is an unlawful combination, because such interference, if carried into effect, is an actionable wrong, and it is this fact, and not any mere malicious motive, which constitutes the combination a conspiracy. This *primâ facie* wrongful interference may be negatived by showing that the exercise of the defendants' own rights involved the interference complained of, which interference is merely the exercise of the right of a man to interfere in a matter in which he is jointly interested with others, and such interference gives no cause of action. In such a case there will be intentional procurement of a violation of individual rights, contractual or otherwise, but just cause for it, as being done for the maintenance of the equal civil rights of the defendants. This is what I understand Sir William Erle meant by the last words of the passage from his book quoted by Lord Brampton, delivering his opinion in *Quinn* v. *Leathem*: "Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right, which can be made compatible with the exercise of similar rights by others"; or, as Darling, J., puts it in *Read* v. *Friendly Society of Stonemasons*, 50 W. R. 619, [1902] 2 K. B. 88: "I think that their sufficient justification for interference with the plaintiffs' right must be an equal or superior right in themselves." I cannot but think that what was said by Bowen, L.J., in *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 23 Q. B. D., p. 598, "Intimidation, obstruction, and molestation are forbidden, so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it," applies to cases where the procurement of the violation of the individual contractual right constitutes the cause of action, whether it be for a conspiracy to violate the contractual right of another or an action against several persons for procuring a breach of such contractual right, or indeed an action for the same cause against one having a duty to advise. I think the same of Lord Macnaghten's observation in *Quinn* v. *Leathem*, [1901] A. C., p. 510: "A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law, if there be

no sufficient justification for the interference." In the present case the *primâ facie* actionable wrong is the interference with the contractual rights of the plaintiffs, and the question is whether there is such sufficient justification for the defendants' interference as to exclude an action for procuring a breach of contract or for conspiracy. To say that the means employed by the defendants were illegal, because of the breach of contract, seems to me to be arguing in a circle; and I dissent from the contention of the appellants, that just cause for interference is excluded in cases where the advice actually given is to break a contract, and in consequence the contract is broken. It seems to me in the result that the only question in this case is whether the interference of the defendants was justified, and not whether the men individually could justify the breaches of contract, which of course they could not. I doubt very much whether an action would have lain against the aggregation of individual men for procuring the several breaches of contract, because I think there is a good deal to be said for the proposition that the community of interest of all these men following the same occupation in the South Wales coalfields entitled them to confer and act in concert, without rendering themselves liable for actions for procuring breaches of contract by one another or for conspiracy. But the case is very much complicated by the existence of the federation, which, according to the decision in the *Taff Vale case*, is a thing which can own property, and which can employ servants, and which can inflict injury, and to which the Legislature has impliedly given the power to sue, and on which the Legislature has imposed the liability to be sued for injuries purposely done by its authority and procurement. I do not think that such a body is entitled to rely upon a defence based on its absolute identity with the aggregate of individual members who happen to constitute the union. If such absolute identity existed it would follow that the union would be responsible for the aggregate damages resulting from the aggregate breaches of contract, and no action for procuring breaches of contract, or for conspiracy, would be necessary. But, whatever may be the identity of the federation and the men, it seems impossible in any action for breach of contract merely, and nothing else, brought against the federation, as the collective forensic name of the men, to sign a judgment against the federation, because the federation are not parties to the contract which has been broken. It follows that, if the federation is liable at all, it must be either in an action for procuring breaches of contract or conspiracy, and in either form of action there is a *primâ facie* case against the federation, and the federation, being a separate entity from the men, must show some sufficient justification for their interference. The federation and the members of the council who are defendants seek to base this justification on the suggestion that their relation to the men raises a duty on their part to advise the men, or, at all events, negatives their being mere meddlers. It was argued before us that the defendants were not mere advisers, but that they were actors who did the very thing complained of, in that they issued the notices ordering the stop days, and compelled reluctant men to break their contracts by staying away from work, without giving proper notices to their employers, and that the view of the federation was that men who refused to stay away would be guilty of disloyalty to the federation; but this argument does not convince me that the federation were not acting as advisers, nor does the fact that the federation actually issued the notices deprive the defendants of their character of advisers. It is not suggested in this case that the men stayed away from work under threats, intimidation, or physical compulsion. I think, therefore, the judgment of Bigham, J., must be affirmed for the reasons given by him. I do not myself think that the ineffectiveness of the remedy by suing the men for breaches of contract is as complete as supposed, but, whether it is or not, it cannot affect the question of the liability of the defendants. I concur strongly in the advice of Bigham, J., to the parties to end this litigation if they can, so that in the future nothing may happen which may prejudice the very existence of the sliding scale, which in the view of both masters and men has worked so well to produce wholesome relations between them. I regret to say that my brethren do not agree in the conclusions at which I have arrived; but the case is obviously one raising questions of great difficulty, and I thought it my duty to express my individual opinion upon the case.

ROMER, L.J., read his judgment as follows: The law applicable to this case is, I think, well settled. I need only refer to two passages in which that law is shortly and comprehensively stated. In *Quinn* v. *Leathem*, [1901] A. C., at p. 510, Lord Macnaghten said: "A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference." And in *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D., at p. 614, Bowen, L.J., included in what is forbidden "the intentional procurement of a violation of individual rights, contractual or other, assuming always there is no just cause for it." But although, in my judgment, there is no doubt as to the law, yet I fully recognize that considerable difficulties may arise in applying it to the circumstances of any particular case. When a person has knowingly procured another to break his contract, it may be difficult under the circumstances to say whether or not there was "sufficient justification or just cause" for his act. I think it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is "sufficient justification," and most attempts to do so would probably be mischievous. I certainly shall not make the attempt. In particular I do not think it necessary or useful to discuss the point as to how far the question of justification can be assimilated to the question of malice in cases of libel and slander. As the present Master of the Rolls said, in *Read* v. *Friendly Society of Stonemasons*, [1902] 2 K. B., at p. 739: "It is not at all necessary to embark upon the question whether 'without just cause' is a complete equivalent for what was meant in the common law by 'malice.' I am inclined to think that, though in many cases adequate as a description, it is not co-extensive with it; nor do I think that in civil actions, any more than in criminal, it will be possible to eliminate motives from the discussion." I respectfully agree with what Bowen, L.J., said in the *Mogul case*, at p. 618, when considering the difficulty that might arise whether there was sufficient justification or not:—"The good sense of the tribunal which had to decide would have to analyse the circumstances, and to discover on which side of the line each case fell." I will only add that, in analysing or considering the circumstances, regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach. But, though I deprecate the attempt to define justification, I think it right to express my opinion on certain

points in connexion with breaches of contract procured where the contract is one of master and servant. In my opinion, a defendant sued for knowingly procuring such a breach is not justified of necessity merely by his shewing that he had no personal *animus* against the employer, or that it was to the advantage or interest of both the defendant and the workman that the contract should be broken. I take the following simple case to illustrate my view. If A. wants to get a specially good workman, who is under contract with B., as A. knows, and A. gets the workman to break his contract to B.'s injury by giving him higher wages, it would not, in my opinion, afford A. a defence to an action against him by B. that he could establish that he had no personal *animus* against B., and that it was to the interest both of himself and of the workman that the contract with B. should be broken. I think that the principle involved in this simple case, taken by me by way of illustration, really governs the present case. For it is to be remembered that what A. has to justify is his action, not as between him and the workman, but as regards the employer B. And if I proceed to apply the law I have stated to the circumstances of the present case, what do I find? On the findings of fact it is to my mind clear that the defendants, the federation, procured the men to break their contracts with the plaintiffs—so that I need not consider how the question would have stood if what the federation had done had been merely to advise the men, or if the men, after taking advice, had arranged between themselves to break their contracts, and the federation had merely notified the men's intentions to the plaintiffs. The federation did more than advise. They acted, and by their agents actually procured the men to leave their work and break their contracts. In short, it was the federation who caused the injury to the plaintiffs. This was practically admitted before us by the counsel for the federation, and, indeed, such an admission could not, in my opinion, be avoided, having regard to the facts stated by the judge in his judgment. And it is not disputed that the federation acted as they did knowingly. So that the only question which remains is one of justification. Now the justification urged is that it was thought—and I will assume for this purpose rightly thought—to be in the interest of the men that they should leave their work in order to keep up the price of coal on which the amount of wages of the men depended. As to this, I can only say that to my mind the ground alleged affords no justification for the conduct of the federation towards the employers; for, as I have already pointed out, the absence on the part of the federation of any malicious intention to injure the employers in itself affords no sufficient justification. But it was said that the federation had a duty towards the men which justified them in doing what they did. For myself, I cannot see that they had any duty which in any way compelled them to act, or justified them in acting, as they did towards the plaintiffs. And the fact that the men and the federation, as being interested in or acting for the benefit of the men, were both interested in keeping up prices, and so, in breaking the contracts, affords in itself no sufficient justification for the action of the federation as against the plaintiffs, as I have already pointed out. I think, therefore, that the appeal must succeed.

STIRLING, L.J.—The law applicable to the decision of this case is, in my judgment, as stated by Lord Macnaghten in *Quinn* v. *Leathem*. Referring to *Lumley* v. *Gye* his lordship said: "Speaking for myself I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not I think the gist of the actions—but on the ground that a violation of legal right, committed knowingly, is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." If it were necessary to say anything more on the subject of *Lumley* v. *Gye*, I should be content to refer to what was said by Lord Herschell in *Allen* v. *Flood*, to which I can add nothing.

In my opinion, therefore, only two questions have to be considered; (1) Did the defendants interfere with the contractual relation between the plaintiffs and their workmen? (2) Was there in law sufficient justification for the interference?

As to the first question, Bigham, J., has expressly fund that whatever was done in the way of interference was the act of this federation. I need not refer to specific acts beyond this—that all the men working at the South Wales and Monmouthshire collieries were directed to observe as holidays two days—the 25th and 26th of October, 1901—contrary to the contracts entered into by the workmen. The uncontradicted evidence of Evan Williams at the trial shows that in consequence of that direction men who otherwise would have worked on those two days did not do so. In these circumstances, it seems to me to be made out that the federation wilfully and with notice of the contracts procured some men to break their contracts, and therefore knowingly brought about a violation of legal rights which is actionable unless there is sufficient justification for what was done. That interference with contractual relations known to the law may in some cases be justified is not, in my opinion, open to doubt. For example, I think that a father who discovered that a child of his had entered into an engagement to marry a person of immoral character would not only be justified in interfering to prevent that contract from being carried into effect, but would greatly fail in his duty to his child if he did not. This duty is recognized by the court, for the Court of Chancery and the Chancery Division of the High Court of Justice have continually so interfered on behalf of wards of court, sometimes with a heavy hand; and the principle on which the judges of those courts have acted is simply that of doing on behalf of the ward that which a right-minded father would do in the true interest of his child. I conceive that circumstances might occur which would give rise to the same duty in the case of a contract of service. I need not say that the present is a very different case from that which I have just put. It would no doubt be desirable if a general rule could be formulated which would determine in what cases such a justification exists; but no such rule has been laid down, and I doubt whether this can be done. So far as I can see it must be left (in the language of Bowen, L.J.) to the tribunal to analyze the circumstances of each particular case and discover whether a justification exists or not.

In the present case the learned judge finds that the federation and the other defendants "had lawful justification or excuse for what they did in this, that having been solicited by the men to advise and guide on the question of stop days, it was their duty and right to give them advice and do what might be necessary to secure that the advice should be followed," and the existence of this duty has been strongly pressed upon us in argument by the learned counsel for the several defendants. It will be observed that the learned judge expressly finds that the defendants were not merely advisers but also agents "to do what might be necessary to secure that the advice should be followed." In the view which I take of the facts the defendants not only gave advice, but acted, and their action took the form of interfering with the

contractual relations between the masters and the men. If in so doing they committed a tort it would be no answer to say that they acted upon the advice of a third person—their own solicitor; and it is difficult to see how they can be in a better position simply because the advice on which they acted emanated from themselves.

In my judgment the liability of the defendants must turn on the answer to be given to the question whether the circumstances of the case were in fact such as to justify the defendants, or any of them, in acting as they did.

The circumstances, then, were these: Middlemen at Cardiff were attempting to reduce the price of coal, and it was feared that some employers might yield to the pressure of competition and enter into agreements for the sale of coal at prices lower than those existing at the time, with the result that the wages of the miners, which were regulated by a sliding scale, would be reduced.

To counteract this it was considered desirable by the men's advisers that prices should be sustained by diminishing the output of coal, and that this should be effected by the men taking the holiday complained of. It was not contended or suggested that a limitation of the output of coal was an illegitimate object or aim on the part of the men, or that if it could have been attained without the breach of contracts (as, for example, by the service of proper notices—putting an end to those contracts), the men would not have been without their legal rights. The difficulty which presented itself was this—that one of the terms of the arrangement under which the sliding scale of wages existed was that notices of the determination of contracts of employment should only be given on the first day of a calendar month to terminate on the last day, and this prevented notices of determination being effective at the desired moment. The critical period was known to occur in October or November. The men persuaded themselves that it was the masters' interest as well as their own that they should have power to take holidays at this period, but this was a point on which the masters were entitled to have their own opinion, and from what occurred in November, 1900, it was known to the men that the masters' view did not agree with that of the men. If the men had faith in the soundness of their opinion, their course was to negotiate through the defendants for a modification of the sliding scale arrangement; what they actually thought fit to do was that which, while insisting on the benefit of the sliding scale, they treated themselves as emancipated from the observance of one of the terms on which that scale had been agreed to, although the masters objected, and although the course taken by the men might result in serious damage to the masters, or some of them. This is, I think, a difficult position to maintain. The justification set up seems to me to amount to no more than this—that the course which they took, although it might be to the detriment of the master, was for the pecuniary interest of the men, and I think it wholly insufficient. The defendants took active steps to carry this policy into effect, and, as I have said, interfered to bring about the violation of legal rights. In my judgment they fail to justify those acts, and the appeal ought to be allowed.

THE COURT declined to grant an immediate injunction, but reserved liberty to the plaintiffs to apply for an injunction in case it should be necessary to do so.

Appeal allowed.

Solicitors, *Bell, Brodrick, & Gray*, for *C. & W. Kenshole*, Aberdare.

Riddell & Co., for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

High Court of Justice.

Chan. Div. } Dec. 1, 2.
Byrne, J. }

In re BROWN, DECEASED.
INGALL *v.* BROWN. (*a.*)

Will—Construction—Condition—Marriage with consent of mother—Withdrawal of consent.

Where a testator regulates the enjoyment of property given by his will, according as the beneficiary shall or shall not marry with the consent of her mother, but prescribes no particular form of consent, the court will treat such consent as a matter of substance rather than of form; it will not allow such consent, if once given, to be capriciously withdrawn.

This was a summons taken out to determine a question arising in the administration of the estate of R. Barclay Brown, deceased.

By his will the testator gave all his property to trustees upon trust for his wife (one of the defendants) for life, and after her decease to be equally divided between all the testator's children living at his wife's decease.

By a codicil, the testator bequeathed £500 to his daughter Lilias (the plaintiff).

In 1891, by a second codicil, the testator added that it was his wish that in the event of the plaintiff marrying against her mother's wish she should have the interest only upon the £500, the capital to be invested at her death for her children. Some time prior to the date of this second codicil there had been a possibility of the plaintiff's becoming engaged to some person (of whom her parents did not approve) other than her present husband, Mr. Ingall.

In 1893, the plaintiff became engaged to Mr. Ingall. Her parents were informed of that, and also of the fact that Mr. Ingall was not then in a position to marry immediately. Their consent was given both to the engagement and to its being made public, subject to a stipulation that the marriage should not take place until two years had elapsed from the date of the engagement.

Some time prior to the testator's death, his attention was directed to the fact that there was a certain indebtedness on Mr. Ingall's part, and that the marriage might have to be delayed, but nothing was said as to the withdrawal of the parents' consent. At the date of the testator's death in February, 1895, the two years had almost expired.

Shortly after that event there was an interview between Mr. Ingall and the plaintiff and her mother, at which the latter recognized the fact of an existing engagement. She desired, however, that the marriage should not take place till six months after the testator's death, that was, in August, 1895; and to this Mr. Ingall and the plaintiff acceded.

Disputes afterwards arose between the plaintiff and her mother upon the subject of the settlement to be made on the former's marriage, the latter insisting that the plaintiff should not be empowered thereunder to appoint to Mr. Ingall a life interest except with the mother's consent. The plaintiff contended that the settlement should be on the same lines as her sister's.

On the day before the marriage an offer was made to the mother to execute a settlement giving Mr. Ingall a protected life interest after the plaintiff's death. The mother refused this, and withdrew her

(*a.*) Reported by PERCY WINFIELD, Esq., Barrister-at-Law.

consent to the marriage, which took place on the 22nd of June, 1895. The plaintiff and Mr. Ingall knew of the mother's withdrawal of consent prior to the marriage.

The plaintiff now claimed her share in the testator's residuary estate, and £500 under his will and the first codicil. Her mother contended that, by withdrawing her consent to the marriage, the second codicil to the testator's will had come into operation.

Rufus Isaacs, K.C., and *Cassel*, for the plaintiff.—The parents' consent had been given two years before the marriage. It could not be subsequently withdrawn a day or two before the marriage. Had there been any objection to the husband's character that would have been different, but there was none. The policy of the law has always been to favour consent to marriage: *Lord Strange* v. *Smith*, Ambler, 263; *Campbell* v. *Lord Netterville*, cited in *Berkley* v. *Ryder*, 2 Ves. sen. 532; *Daley* v. *Desbouverie*, 2 Atkyns, 261; *Merry* v. *Ryves*, 1 Eden. 1; *Dashwood* v. *Bulkeley*, 10 Ves. 230; *In re Smith*, 38 W. R. 380, 44 Ch. D. 654. It was material that the testator had consented in his lifetime: *Parnell* v. *Lyon*, 1 Ves. & Bean. 479; *Clarke* v. *Parker*, 19 Ves. 1.

Levett, K.C., and *Peterson*, for the defendant.—Here the mother did not induce the engagement as in *Lord Strange* v. *Smith*. Here the husband was not in a sound financial position. There had been no proper settlement. This is not a case of forfeiture at all, as in the cases cited. It is one of settlement under the terms of a codicil whereby the daughter is restricted from getting the capital of the £500.

Cassel replied.

BYRNE, J., after dealing with the evidence, said: I think the mother made it clear that she did not, so far as it depended on her, intend that the marriage should take place without a settlement being made excluding the husband from any interest except such as she should consent to. She never said or did anything to show that she meant to relax what she said about the marriage taking place in August. The question arises whether the settlement made by the second codicil of the testator in the event of marriage against the mother's wish has any application, or whether, having regard to all the circumstances, the marriage ought to be deemed a marriage without consent. A good many of the older authorities have been cited in reference to clauses of forfeiture on marriage without consent. This much is clear, that the court, where no particular form is required for the consent, has treated the consent as a matter of substance, not of form. Here there is no question about the original consent having been given, and given in the father's lifetime. Two points should be noticed. One is that the codicil operates as from the testator's death. He had known for nearly two years before that, that there was an engagement subsisting between his daughter and Mr. Ingall. The second is that this is not a forfeiture clause in the sense that the wife's interest was to go over to somebody else, but a provident settlement in the event of an improvident marriage being made. What are the authorities as to the withdrawal of a consent once given? Several of those cited do not bear upon that point at all. [His lordship then referred to the judgments in *Merry* v. *Ryves*, 1 Eden 1, and *Dashwood* v. *Bulkeley*, 10 Ves. 230.] I understand that the principle underlying these cases is that it must be justifiable for persons *in loco parentis*, if circumstances subsequently come to their knowledge which, if known at the time of consent, would have justified refusal thereof, to retract that consent. On the other hand retractation must not be *ad libitum*, or from mere caprice. Here the defendant was compelled to put her case as high as to say that there was an absolute power of refusal on the mother's part, notwithstanding a previous consent. Now there was a consent of father and mother. There is no suggestion of want of moral character or any circumstances of that kind which would have prevented the parents from giving their consent. The young people had consented to the August condition. I must read this clause fairly, and looking at it as a matter of substance, I think there was a consent given, that it was not against the mother's wish that the marriage should take place, but that it was against her wish that it should take place *modo et formâ*, as it did take place. In substance, therefore, as far as the marriage itself was concerned, it was in accordance with the wish and consent of the mother that it should take place, and I think it would be too harsh to say that the fact of its having taken place some time anterior to the stipulated date should be a ground for withdrawing consent. As to the settlement, I am far from saying that a parent should not consider the advisability of it. But the true objection appears to have been that the marriage took place before six months had elapsed. On the whole, therefore, having regard to the principle, which I think I can gather from the cases cited, I think that no forfeiture has arisen under this will. I have decided in accordance with the rights of the parties. I am glad to hear, however, that the husband is prepared now to make a settlement substantially in accordance with that offered by his solicitor on the day before marriage.

Order: Plaintiff entitled to legacy of £500 absolutely for her separate use. The share of residue to stand on the same footing.

Solicitors for the plaintiff, *Morley, Shirreff, & Co.*

Solicitors for the defendant, *Godden, Son, & Holme.*

K. B. Div. (Walton, J.) — Dec. 7.

THE APOLLINARIS CO. (LIMITED) v. THE NORDDEUTSCHE INSURANCE CO. (a.)

Insurance—Marine—Deck cargo—River and canal—Rhine steamers—Dutch code—Liability of underwriters.

The rule which exempts underwriters from liability for loss of deck cargo does not apply to an inland voyage by canal or river plainly contemplated by a policy, on which voyage it is and has been the practice and usage to carry cargoes on deck.

Action tried in the Commercial Court.

This was an action to recover for a partial loss under a policy of marine insurance dated the 21st of August, 1902, underwritten by the defendants.

The policy contained the following clauses: "£10,000 on corks . . . from London and/or any port or ports on the East Coast of Great Britain to Rotterdam and/or Antwerp and/or Cologne and while there and thence by any conveyance or conveyances to Ramagen or the Apollinaris spring, Neuenahr, or by any other route whatsoever, or *vice versâ*, including all risks on quays or elsewhere during transit or until warehoused, and/or safely delivered into the hands of the consignees, whether such delivery takes place on shore or on board the export vessel. Including interest from Rotterdam to Remagen only, and/or to the Apollinaris spring, Neuenahr, or *vice*

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

versâ, the risk commencing from Rotterdam. . . . Deviation or change to be covered at premium to be arranged if notice given by assured on receipt of advice of such deviation or change of voyage. Including risk of . . . fire."

Attached to the policy was the following: "Including fire risk. . . . Including all risk of landing and reshipping and transhipping. Including all liberties and exceptions, as per B/L., and/or C/P., including negligence clause."

The through bill of lading under which the Holland Steamship Co. carried the goods was as follows: "*Viâ* Amsterdam. Shipped in good order and condition by the Apollinaris Co. (Limited) on board the steamship *Maastroom* . . . bound for Amsterdam . . . and for further despatch—from Amsterdam to Neuenahr, Germany, at ship's expense, but shipper's risk, 100 bales of cork . . . and to be delivered subject to the exceptions and conditions hereinafter mentioned . . . either into lighters or on the quay, where the ship's responsibility shall cease, at Port of Amsterdam, and thence by —— to Neuenahr, Germany. Exceptions . . . fire on board, in hulk or craft, or on shore, and all accidents, loss . . . or from perils of the sea and rivers, and all risk of transhipping or railway carriage, or from any act . . . Master . . . the owners being in no way liable for any consequences of the cause before mentioned.—31st December, 1902."

The goods were shipped in London and arrived safely at Amsterdam, and were then shipped on *The Amsterdam III.* for carriage up the Rhine to Remagen, whence they would be forwarded to the Appollinaris spring.

The corks were stowed on the deck of the Rhine steamer, and during the night of the 17th of January, while the vessel was still at Amsterdam, a fire broke out, and some of the corks were damaged and some destroyed.

The defendants contended that the goods were stowed on deck at the time of the loss and were not covered by the policy. The plaintiffs called evidence to prove that it was the usage and practice to carry deck cargo on the Rhine steamers. Evidence was given that by the Dutch code the owner of a vessel is liable to the shipper for all goods carried on deck without the written consent of the shipper.

A printed form of bill of lading was put in during the trial, which was the common form in use for shipments made by the Holland Steamship Co. on the steamers of the Rhine Steamship Co., the owners of *The Amsterdam III.*, and by it the Rhine Steamship Co. reserve themselves the right, among other liberties, to load goods on deck. This form is intended to be signed by the shipper and the master. No such bill of lading was in fact signed.

J. A. Hamilton, K.C., Loehnis, and *A. Talbot,* for the plaintiffs.

Scrutton, K.C., and *Leck,* for the defendants.

The following cases were cited: *De Costa* v. *Edmunds*, 4 Camp. Rep. 142; *Neale & Wilkinson* v. *Ross and Others*, 3 Com. Cas. 236; *Dixon* v. *Royal Exchange Shipping Co. (Limited)*, 12 App. Cas. 11; *Ross* v. *Thwaite*, 1 Park 26; *Blackett* v. *Royal Exchange Assurance Co.*, 2 Crompton & Jervis Rep. 244; *Miller* v. *Titherington*, 9 W. R. 437, 30 L. J. Ex. 217; *Stewart* v. *Bell*, 5 B. & Ald. 238.

Cur. adv. vult.

WALTON, J.—This is an action upon a marine policy, underwritten by the defendant company, under which the plaintiffs, the Apollinaris Co. (Limited) claim to be indemnified against a loss which they have suffered by the destruction or damage by fire of certain bales of corks which were, as the plaintiffs allege, covered by the policy at the time of the loss. The policy was upon "corks, bottles, and other goods by steamer or steamers and conveyances, including parcel post, at or from London to Rotterdam and/or Antwerp and/or Cologne, and while there and thence by any conveyance or conveyances to Remagen or the Apollinaris Co.'s spring, Neuenahr, or by any other route whatsoever, including all risks on quays or elsewhere during transit or until warehoused and/or safely delivered into the hands of the consignees." The corks were shipped in London by steamers belonging to the Holland Steamship Co., under through bills of lading, by which the Holland Steamship Co., undertook, in consideration of the payment to them of a through freight, to deliver the corks safely at Amsterdam, when the responsibility of the Holland Steamship Co. as carriers was to cease, and to have them despatched from Amsterdam to Neuenahr, in Germany, at the expense of the Holland Steamship Co., but at the risk of the shippers, the Apollinaris Co. The goods arrived safely at Amsterdam, and were there shipped on board a Rhine steamer, called *The Amsterdam III.*, for carriage by canal and river to Remagen, or some landing-place on the Rhine, whence they would be forwarded to the Apollinaris spring. There is no evidence before me which enables me to ascertain the contract under which the bales of cork were shipped by the Holland Steamship Co. on *The Amsterdam III.* Apparently no bill of lading for these goods was signed by the master or by any person on behalf of the owners of that steamship. A printed form of bill of lading was put in at the trial, which appears to be a common form in use for shipments made by the Holland Steamship Co. on steamers of the Rhine Steamship Co., who were, as I understand, the owners of *The Amsterdam III.* This form of bill of lading is intended to be signed by the shippers as well as by the master, and bears the printed signature of the Holland Steamship Co. as shippers. By the first of its conditions the Rhine Steamship Co. reserve to themselves, among other liberties, the right to load goods on deck. But there is no evidence upon which I can find that the corks were shipped upon the terms of this bill of lading. The corks were shipped at some time between the 15th of January and the 17th of January, 1903. They were stowed on deck with the intention that, so stowed, they should be carried to their destination on the Rhine. On the night of the 17th of January, while *The Amsterdam III.* was still lying at Amsterdam, a fire broke out on board by which some of the bales of corks were destroyed and some damaged. The amount of loss is admitted to have been £1,021 16s. 10d. The facts as I have stated them are admitted, and the only defence pleaded by the defendants is that "at the time of the loss the goods were stowed and carried on deck and were not covered by the policy." This case cannot, of course, be disposed of upon any technical point of pleading. But it is not irrelevant to observe that in 1842 the Court of Queen's Bench, in *Milward* v. *Hibbert*, 3 Q. B. 120, held that a plea substantially in the form of the defence here pleaded by the present defendants did not disclose a good defence in an action upon a marine policy for the loss caused by the jettison of deck cargo. The claim there was by the owner of the ship under a policy on the ship for the amount of the ship's contribution to general average in respect of some pigs which were carried on the ship's deck and were jettisoned. The defendant pleaded that the pigs were carried on deck. The plaintiff replied that there was a custom to carry pigs on deck on the voyage upon which the ship was engaged. To this replication the defendant demurred. Although the

question arose upon a demurrer to the replication, the judgment of the court proceeded upon an exception to the validity of the plea, and the court held that the plea was bad. The technical point actually decided is not important, but the judgment is useful, as it was necessary for the court from the nature of the question before them to consider the principle upon which the earlier decisions as to the carriage of deck cargo were founded. The judgment was delivered by Lord Denman. After referring to the early authorities to the effect that goods should not be stowed on deck and to a passage in the fifth edition of Lord Tenterden's book on Shipping, in which it was pointed out that there are exceptions to the rule, as where usage has sanctioned the practice and where the master has the merchants' consent, the Lord Chief Justice says: "Now it is obvious that there may be other and valid reasons for stowing goods on deck; indeed some goods could be stowed in no other place, such as timber, and in some voyages live animals; and they may certainly be there stowed with proper skill and care so as not to be in the way of the crew in their operations." The Chief Justice was here referring to one of the reasons for forbidding the stowage of cargo on deck which was relied on by Valin and others who wrote at a time when navigation by steam had not been invented. He proceeds: "These matters of fact may vary with every different trade or, indeed, with every single adventure," and in conclusion he says that "the mere fact of stowing them (the goods) on deck will not relieve the underwriter from responsibilty, inasmuch as they may be placed there according to the usages of the trade and so as not to impede the navigation or in any way increase the risks." Without pushing the decision in *Milward* v. *Hibbert* too far, it certainly seems to point to this—that the question whether stowage on deck is improper is strictly and properly a question of fact, and apart from express contract must be decided, whether as between different owners of goods in the same vessel or as between assured and underwriters, according to the circumstances of each case, having regard especially to the nature of the voyage and of the cargo and to the usages of the trade. It is, however, quite clear from all the authorities upon this question that it is a fact which has long been well recognized by all who are interested in maritime adventures, and by courts, that on ordinary voyages by sea goods which are carried on deck are exposed to peculiar and extraordinary danger. It follows from this, for reasons which are clearly analogous to those upon which the implied warranty of seaworthiness in contracts of marine insurances depends, that under an ordinary policy on goods for a voyage by sea, where there is no well-known usage to carry on deck goods such as are described in the policy on the voyage thereby insured, underwriters are not liable for the loss of deck cargo. Where from the description of the goods or the voyage, or both, it is apparent that, in accordance with a well-known practice or usage of trade, the goods will or even probably may be carried on deck, then even in the case of voyages by sea, where goods so carried are necessarily exposed to peculiar dangers, still the underwriters will be deemed to have consented to take this risk and will be liable for any loss of deck cargo by perils insured against. The question which arises as to the right to contribution in cases of general average where deck cargo has been jettisoned is very similar to the question between assured and underwriters as to the loss of deck cargo. The questions are not identical, because the obligations in the two cases are different in their nature and origin. But the underlying and governing principle applicable to each is the same. In the ancient collections of customs of the sea, such as the Consolato del Mare, and in the earlier codes, such as the Ordonnance de la Marine of 1681, the question is dealt with in connection with general average. Valin, in his commentary on that article of the Ordonnance which enacts that the owner of deck cargo which has been jettisoned cannot claim contribution in general average, says that it does not apply to boats or small vessels going from port to port when the custom is to load goods on deck as well as below. He is in this passage obviously referring to small coasting craft, sailing vessels, of course, which make short trips from port to port. Emerigon follows Valin and adopts the same exception to the general rule of the Ordonnance. The same view has been recognized in our own courts. Thus in *Wright* v. *Marwood*, 7 Q. B. D., at p. 67, in the year 1881, Lord Bramwell, referring to the general rule which requires contribution to be made in general average for cargo jettisoned, and to the exception to such rule in the case of deck cargo jettisoned, says: "There are two exceptions (to the exception) which perhaps resolve themselves into one—viz., that coasting vessels are without the exception, and also those cases where by custom the deck cargo is one customary in the trade and perhaps also from the port." The exception of coasting vessels, apart from custom, is intelligible only on the ground that in the short trips made by coasting vessels deck cargo is not exposed to peculiar danger, at all events to an appreciable extent. And when Lord Bramwell says that the two exceptions resolve themselves into one, I think he means that when the voyage is such that the cargo is carried on deck without peculiar risk it will in practice be so carried whenever it is convenient. I have considered the authorities at some length and endeavoured to arrive at the principle upon which they rest, because I have to deal with a question which, so far as I know, has not been considered in any reported English case—the question, that is to say, whether there is any general rule exempting underwriters on cargo from liability for loss of goods stowed on deck upon an inland voyage by canal and river. As it is well known that there is a great trade upon inland waters in the United States of America, I have thought it desirable to look into the American cases. I am afraid that my investigation has not been exhaustive nor quite up to date. The decisions of the American courts are not, of course, in any sense binding authorities, but we read them with respect, and they afford useful illustrations. In a case of *Harris* v. *Moody* in the Court of Appeal of the State of New York, 30 N. Y. C. of A., 266, I find it was decided that the rule that underwriters are not liable for the loss of deck cargo is not applicable to vessels which navigate smooth land-locked waters—in that case it was Long Island Sound—and where deck cargo can be carried without extraordinary peril. This case is cited as an authority by Parsons in his well-known treatise on Insurance. The American decisions, however, are not altogether uniform. The decision of the Supreme Court of Massachusetts in *Taunton Copper Co.* v. *Merchants' Insurance Co.*, 39 Mass. 108, is not perhaps consistent with the judgment in *Harris* v. *Moody*. But it proceeded upon different considerations and is not approved by Phillips (see Insurance, vol. 1, section 460). The true view of the matter appears to me to be that the rule against carrying goods on deck is really involved in and depends on a larger and wider rule, which is that goods carried on a vessel should not be stowed so as to be exposed to unnecessary and extraordinary peril during transit. Every one admits that on an ordinary voyage by sea deck cargo is exposed to peculiar and extraordinary danger, and it

follows that cargo should not upon such voyages be stowed upon deck. Where, however, the voyage is not by sea, but it is a voyage of a very different kind, other considerations may apply. In order to apply the principle to be gathered from the authorities to the present case I must add something as to the evidence and facts. On the part of the plaintiffs evidence was called to show that it is the usage and practice to carry deck cargo on the Rhine steamers. As against this a Dutch lawyer, who practises also as an average adjuster, was called, who referred to certain articles of the Dutch code, by which the owner of a vessel is liable to the shipper for all damage to goods carried on deck without the written consent of the shipper. He said that these articles applied to a steamer such as *The Amsterdam III.*, carrying goods by canal and river. I assume that this is a correct account of the Dutch law. The Dutch Code has a hard and fast rule which, though intended primarily, as I am satisfied, to apply to sea-going vessels, is wide enough to include river steamers. The effect of this is to impose a certain liability on the shipowner. But the same gentleman who proved the Dutch law also proved that deck cargoes are very commonly carried on the Rhine steamers. I understood from his evidence that the usual form of bill of lading used by the Rhine steamer gives express liberty to stow cargo on deck. The form of bill of lading of the Rhine Steamship Co. to which I have referred is an example of this, and the Dutch law explains why such form provides for signature not only by the captain, but also by the shippers. I have come to the conclusion that it is, and has been for many years, the practice and usage to carry deck cargoes on Rhine steamers plying from Amsterdam. This is a fact which is not altered by the Dutch code. The fact that the shipowners undertake a greater liability for cargo on deck than for cargo carried under deck does not appear to me to affect the question as between the assured and the underwriters. If there is such a liability in the present case the underwriters are entitled to the benefit of it. Mr. Scrutton relied upon certain letters written by the plaintiffs to the Holland Steamship Co., in which they maintained that the goods ought not to have been carried on deck. These letters were written with the knowledge and approval of the underwriters, who quite properly desired to make the shipowners pay for the loss if they were liable for it. I do not think that they ought to affect my decision. I may add that if the goods had been shipped under a bill of lading in the form which was produced, by which liberty was given to stow the goods on deck, the defendants would, in my opinion, have been liable under the clause in the policy, "Including all liberties and exceptions as per bills of lading." It could not have been said that the bill of lading was not in an ordinary form. In that case the defendants would have had no right over by subrogation against the shipowners. But there is, as I have said, no evidence that the goods were shipped under any such bill of lading. There is only one other point which ought perhaps to be mentioned. It was said that even on an inland voyage goods on deck were exposed to a greater danger of fire at all events than were goods under deck. I do not think that this is well founded. Goods on deck in case of fire have certain advantages and certain disadvantages as compared with goods under deck. I am not sure on which side the balance of advantage lies. But there is certainly no peril from fire or other causes to goods carried on the deck of a Rhine steamer which is in any way comparable with or similar to the pecular and extraordinary peril to which deck cargo is exposed at sea. I am by no means satisfied that the rule which exempts underwriters from liability for the loss of deck cargo applies to inland voyages by canal or river. I am satisfied that it does not apply to an inland voyage by canal and river plainly contemplated by the policy, on which voyage it is and has been for years the practice and usage for steamers and other vessels to carry cargoes on deck.

Judgment for the plaintiffs.

Solicitors for plaintiffs, *Hollams, Sons, Coward, & Hawksley.*

Solicitor for defendants, *James Ballantyne.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Nov 23.

In re THE TEA CORPORATION.
SORSBIE *v.* THE TEA CORPORATION. (*a.*)

Company—Voluntary liquidation—Scheme of arrangement—Assets insufficient—Meetings of members in classes—Dissent of class—No interest in assets—Sanction of court—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161—*Joint-Stock Companies Arrangement Act,* 1870 (33 & 34 *Vict. c.* 104), *s.* 2—*Companies Act,* 1900 (63 & 64 *Vict. c.* 48), *s.* 24.

Where the assets of a company in liquidation would, if distributed, be insufficient to do more than satisfy the creditors and those preference shareholders who are entitled to rank first in respect of capital, the ordinary shareholders have no interest in the assets, even if a scheme of reconstruction gives them a prospective advantage. Therefore their assent to the scheme is not required, the advantage it offers them being in the nature of a gift.

This was an appeal from an order of Buckley, J., sanctioning a scheme of arrangement between the company, which was in voluntary liquidation, and its creditors and contributories.

The scheme provided for the formation of a new company, to be called by the same name, which was to take over the liabilities of the old company, and to acquire its assets, property, and goodwill.

The debenture-holders and the preference and ordinary shareholders were to have the following advantages: The debenture-holders were to receive an equivalent for their debentures, paid partly in cash and partly in debentures of the new company, and they were to be paid their arrears of interest; the preference shareholders, who were entitled to priority in respect of capital as well as dividends, were to be allotted, in respect of each of the £5 shares held by them (which were fully-paid), four £1 shares in the new company, each credited with 10s. paid up thereon; the ordinary shareholders, for each of the £5 shares held by them (which were also fully-paid), were to have the option of applying for one £1 share in the new company, credited with 10s. paid up thereon.

This scheme was approved by the requisite majorities at meetings of the debenture-holders, the unsecured creditors, and the preference shareholders, but it was not passed at the meeting held by the ordinary shareholders.

Buckley, J., found, on the evidence before him, that the assets of the company, if distributed, would

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

be insufficient, after paying the secured and unsecured creditors, to pay the preference shareholders in full, so that nothing could be left for the ordinary shareholders. He held that consequently the latter had no interest in the assets, and accordingly he sanctioned the scheme.

From this decision H. G. Hemmerde, an ordinary shareholder, appealed.

Buckmaster, K.C., and *Austen Cartmell*, for the appellant, referred to the Companies Acts, 1862, s. 161, and 1900, s. 24, and the Joint-Stock Companies Arrangement Act, 1870, s. 2, and cited *In re Canning Jarrah Timber Co.*, [1900] 1 Ch. 708, 48 W. R. Dig. 36, and *In re Brownfields Guild Pottery Society*, (1898) W. N. 80.

Eve, K.C., and *Clauson*, for the liquidator, referred to the scheme sanctioned in the last-named case, as set out in Palmer's Prec. (8th ed.), Part 2, p. 819.

Manby and *Mark Romer*, for various other shareholders, supported the appeal.

A. & B. Terrell, for the plaintiff in the action.

Rowden, K.C., and *Gordon Brown*, for debenture-holders and their trustees, supported the scheme.

Buckmaster, K.C., replied.

VAUGHAN WILLIAMS, L.J.—With regard to the facts in substance there is little or no question. Buckley, J., has found as a fact that the value of the company's assets was such that the ordinary shareholders have no pecuniary interest whatever. There was no evidence that he was misinformed, and it is not denied that on the evidence before him he arrived at a right conclusion as to the value. It is said that the scheme gives the ordinary shareholders a right to take up shares with a certain amount paid up, but that, it is argued, was a gratuitous offer by the debenture-holders, who had a right to dispose of the assets. That may be quite true. As to the question of law, it is argued, first, that the scheme is one which could have been carried out under section 161 of the Companies Act, 1862, and that, being of that character, it ought not to be sanctioned unless it places the shareholders in the same position which they would have held under that section. In my opinion, that proposition is much too wide. Then it is said that the scheme could not have been adopted under section 2 of the Joint Stock Companies Arrangement Act, 1870, without also adopting section 161 of the Act of 1862. I will not say that, but I think the court would have refused in such a case to sanction it. Now, however, we have the Companies Act of 1900, section 24 of which appears to get over the difficulty. It enacts that "the provisions of section 2 of the Joint Stock Companies Arrangement Act, 1870, shall apply not only as between the company and the creditors, or any class thereof, but as between the company and the members or any class thereof." In accordance with that section there were meetings of the various classes—the preference shareholders and the ordinary shareholders. The former approved the scheme, but the latter did not, and it is argued that consequently the scheme is defective. But Buckley, J., was of opinion that as the ordinary shareholders had no possible interest, their consent did not matter. If you have the assent to a particular scheme of all classes who are really interested, that is enough. Otherwise the result would be that shareholders who had not the remotest interest could obstruct the scheme unless terms were made with them. In my opinion, the decision of Buckley, J., was right.

ROMER, L.J.—I am of the same opinion. The learned judge has held, and was justified in holding, that the ordinary shareholders had no interest in the assets of the company. Having regard to the admissions made before him, he was entitled to draw the inference he did. My opinion is based entirely on that ground.

If this scheme can be treated as a compromise between the company and the debenture-holders, and between the company and the preference shareholders, then the provisions of section 2 of the Joint Stock Companies Arrangement Act, 1870, extended by section 24 of the Companies Act, 1900, will apply.

It is true that the ordinary shareholders are entitled under the scheme to certain shares, but this must be regarded as a gift and not as something they can lay hold of as showing they have a share in the equity of redemption. The appellants have no cause to complain of the scheme, because it gives them the option of applying for shares. The debenture-holders and preference shareholders are satisfied, and the scheme has been rightly sanctioned.

STIRLING, L.J.—I am of the same opinion. There are three classes who would have a claim in the winding up of this company—the creditors, the preference shareholders (who have priority in respect of capital as well as dividends), and the ordinary shareholders. The assets are insufficient to meet the claims of more than the first two, therefore they only would have a voice if the scheme were limited to dealing with the company's property. But it gives a certain option to the ordinary shareholders. This, in my opinion, is only a concession which the debenture-holders have power to make, and whether it was made against the will of anyone is not now in question. The scheme was one which Buckley, J., was right in sanctioning.

Appeal dismissed.

Solicitors, *R. R. G. Norman; S. J. R. Stammers; Linklater & Co.; W. Shewell Morris.*

From K. B. Div. (In Bkcy.) (Vaughan Williams, Romer, and Stirling, L.JJ.) — Oct. 30; Nov. 6, 9.

In re A JUDGMENT DEBTOR.
Ex parte THE JUDGMENT CREDITOR. (*a.*)

Bankruptcy—Agreement for balance payable by instalments—Default—Garnishee order nisi—*Bankruptcy notice—Judgment creditor—Judgment debtor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g).

A debtor entered into an agreement with his creditor that he should pay a certain sum down, and by way of collateral security consent to judgment for the remainder, payable by certain instalments. Judgment having been signed against him for the balance yet due, the creditor obtained a garnishee order nisi *to attach all debts due to the debtor from his bankers. Shortly afterwards, two instalments being still owing on the judgment, the creditor issued a bankruptcy notice for these overdue instalments, after deducting the amount which had been garnished. The registrar set aside the bankruptcy notice on the ground that the creditor having issued a garnishee order, the proceedings on which were still pending, was not entitled under section* 4, *sub-section* 1 (g), *of the Bankruptcy Act*, 1883, *to issue the notice.*

Held, on appeal, that the decision of the registrar was right; and that the notice was bad, as being one which required the debtor to pay in accordance with the provisions of the agreement and not in accordance with the terms of the judgment.

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

In re Feast, 31 *SOLICITORS' JOURNAL*, 286, 4 *Morrell* 37, *discussed.*

Petition.

This was an appeal by a judgment creditor against a decision of Mr. Registrar Brougham on the 11th of August, 1903, setting aside a bankruptcy notice which the creditor had served on the judgment debtor. The notice was served under section 4, sub-section 1 (*g*) of the Bankruptcy Act, 1883.

The facts were as follows:

There had been considerable litigation between the creditor, Mr. T. Dott, and the debtor, Mr. H. Bottomley, and also between Mr. Dott and a company called the Associated Mount Jackson Gold Mines (W.A.) (Limited), and several actions resulted.

On the 18th of April, 1903, Mr. Dott obtained an order for judgment by consent by the master in chambers against Mr. Bottomley and the Associated Mount Jackson Gold Mines (Limited) for the sum of £2,700. The consideration for the said judgment by consent was embodied in an agreement of the same date by which it was agreed that the actions should be put an end to and settled upon certain terms, one of which was that the debtor should on or before the execution of the agreement pay to the creditor, the plaintiff in the action, the sum of £300 down, and as a collateral security consent to judgment for the £2,700 which was to be paid by instalments at one, two, three, four and five months, the first instalment to be the sum of £700, and the balance at the rate of £500 a month from the 27th of March, 1903. The defendant, the debtor, paid the £300 down on the same day. The first instalment of £700 became due on the 27th of April. This was not paid, but between the 27th of April and the 20th of May the debtor paid £350, but he did not pay the balance or the two instalments, which by the agreement were due on the 27th of May and the 27th of June.

On the 20th of May Mr. Dott obtained a garnishee order *nisi* attaching all debts owing or accruing due from the bankers of the debtor, the London and South Western Bank. The order was not served upon the debtor, but the bank informed him that an order absolute had been served upon them.

It appeared that on the 27th of May an application was made to the master in chambers to make the order *nisi* absolute. The debtor was not represented, not having been served with the summons.

The London and South-Western Bank at the hearing of that application admitted they had a sum of £82 8s. 10d. in hand; but the debtor contended that that sum was due to him only in his capacity as the liquidator of a company, the Associated Financial Corporation, and, being under the impression the order absolute had already been made, instructed his solicitor to claim any money which the creditor might have received under the order. Mr. Dott disputed the amount which the bank alleged they had, and obtained an order for the production of the books of the bank.

On the 2nd of June, 1903, the bank appealed against this order, and on the 5th of June the appeal was dismissed by Swinfen Eady, J., sitting in chambers.

On the 8th of June the matter came again before the master, but was adjourned for a further ten days at the request of the creditor's solicitors.

On the 19th of June the master, having read the affidavit of the debtor, directed an issue to be tried, the bank to retain the admitted sum of £82 8s. 10d., which they had in their hands, and to give inspection to the creditor of all the books relating to the debtor's account, the creditor having alleged that the £82 odd did not represent the true amount standing to the debtor's credit at the bank.

On the 13th of July the creditor issued a bankruptcy notice claiming £1,267 11s. 2d., made up of the instalments due on the 27th of April, the 27th of May, and the 27th of June, less the sum paid on the 20th of May and the £82 2s. 10d. in the hands of the bank. The bankruptcy notice was served on the debtor on the 16th of July.

On the 20th of July the debtor applied to set the bankruptcy notice aside, on the ground that he had a counterclaim exceeding the claim of the judgment creditor.

The application having come before the registrar on the 28th of July, was dismissed by him on the ground that as the debtor was not present he was not prepared to go on with the counterclaim, and he declined to go into the technical point on that application on the ground that technical points on the bankruptcy notice could only be raised by notice of motion.

Notice of motion was accordingly served on the 30th of July, and on the 11th of August, after going fully into the facts, the registrar made an order dismissing the petition on the ground that he was not prepared to hold that the creditor, Mr. Dott, having obtained the garnishee order *nisi* which was still pending, was entitled to issue a bankruptcy notice. The creditor subsequently issued a second bankruptcy notice, but this was dismissed on the 17th of August, 1903, by another registrar, after an unsuccessful attempt on the part of the petitioning creditor to have the petition adjourned until after the decision of the appeal from the order setting aside the former bankruptcy notice. The main question was whether or not, at the time when the bankruptcy notice was issued, it was a notice requiring the debtor to pay the judgment creditor in accordance with the terms of the judgment.

Section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, is as follows: "A debtor commits an act of bankruptcy in each of the following cases (*inter alia*): (*g*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or to compound for it to the satisfaction of the creditor or the court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the court that he has a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

From these decisions of the registrars the judgment creditor appealed, and it was agreed that the second appeal should abide the result of the first, but if the appeals were successful, then the petition was to be restored to the registrar's list, so that the facts might be fully gone into.

Muir Mackenzie and *J. S. Green*, for the appellant.—The execution on the judgment had not been stayed within the meaning of the section. The bankruptcy notice was perfectly regular with regard to the amount due in respect of the judgment.

The following cases were cited, the first four of which the learned counsel described as "warrant of attorney" cases: *Tilby* v. *Best*, 16 East. 163; *Barber* v. *Barber*, 3 Taunt. 465; *Cuthbert* v. *Dobbin*, 1 C. B. 278; *In re Followes*, [1895] 2 Q. B. 621, 44 W. R. Dig. 12;

and *In re Feast*, 31 SOLICITORS' JOURNAL 286, 4 Morrell 37.

H. Reed, K.C., and *J. R. Atkin*, for the respondent.—The money of a debtor could not be attached by a garnishee order, since it deprived him of the means of paying his debt, whilst at the same time a bankruptcy notice was issued against him. The creditor could not while he held such a security claim this debt by a bankruptcy notice. He had adopted other means, he could not levy execution while the issue was still pending, nor could he by this bankruptcy notice claim a part only of the judgment debt. The agreement was quite apart from the judgment. The cases cited for the appellant were no authority on the question of a bankruptcy notice; the question was as to the whole status of the debtor; the actual terms of the section must be looked to; the case of *In re Feast* was a case where the whole amount was sued for, but in this case it was for instalments, and the creditor is not suing in accordance with the terms of the judgment; he must take certain steps in accordance with the Act to ascertain what is due. Having regard to the terms the parties arranged, the debt was modified by the judgment, and none of the cases cited are relevant. There was no abandonment of the money, which had not become due at the date of the notice.

They cited the following cases: *Ex parte Raymond*, 9 Morrell 108 (note), 66 L. T. 400, 40 W. R. Dig. 14; *In re Child*, 40 W. R. 560, 9 Morrell 903, 40 W. R. Dig. 14; *Ex parte Ford*, 18 Q. B. D. 369, 35 W. R. Dig. 19.

Muir Mackenzie, in reply.—The debt was due upon the judgment. By the agreement payment of part of it had been postponed, and by the agreement of both the parties a bankruptcy notice might well be issued for the part due; the bankruptcy notice was perfectly regular, the debt was due in accordance with the judgment, and execution would issue on the judgment for the unpaid instalments. The case of *In re Feast* shows the amount for which you may issue execution, and the amount which the non-performance of the agreement releases is under the judgment and not under the agreement. In principle it does not differ from an agreement after the judgment controlling the right to enforce it; the only amount for which execution could issue would be the amount of the then due instalments. If judgment is for payment by instalments, the right to issue execution is for the amount of the instalments.

VAUGHAN WILLIAMS, L.J.—I have come to a conclusion in this case that I somewhat regret in being compelled to arrive at, as there are not on the part of the debtor any merits which would predispose one to arrive at a decision in his favour. In the case before us there was a negotiation between Mr. Bottomley and Mr. Dott which resulted in an agreement, and that an agreement which really amounts to other things, an agreement that Bottomley owed a particular sum, and that that sum should be paid by certain instalments. By way of collateral security for the due performance of the agreement it was agreed that Mr. Bottomley should consent to judgment. There was nothing said in the agreement as to whether successive executions are to become leviable on default of one or on successive instalments on this judgment. Default was made in payment of some of the instalments, so a bankruptcy notice was issued when Mr. Bottomley owed the whole of the judgment debt. The matter came before the learned registrar on an application to set aside the bankruptcy notice, and in my opinion it was rightly set aside, but Mr. Dott issued a second bankruptcy notice in spite of this, showing upon the margin of the request in which the bankruptcy notice was issued that the sum claimed consisted of the amount of the overdue instalments after giving credit for the amount which had been attached by the garnishee order.

The main question was whether at the time when the bankruptcy notice was issued, it was a notice requiring Mr. Bottomley to pay the judgment creditor in accordance with the terms of the judgment. I do not think that it was. I think that it was a notice requiring him to pay in accordance with the terms of the agreement. With regard to the sections of the Act of Parliament which create a new act of bankruptcy, such sections should be strictly construed. When I say that this was not a notice requiring him to pay in accordance with the terms of the judgment, I think that it is right I should make a few remarks about a *fi. fa.*, and in connection with this particular section. I am far from saying that at common law you could not have execution for part of a judgment debt, but such execution by a writ of *fi. fa.* would be clearly bad if it did not appear on the face of the *fi. fa.* that it was for part of the debt. In the case before us the notice, when it was served, was not a notice which showed it was for part of a debt. In addition, this notice is a notice which does not seem to me to fall within the spirit of the section at all. The Act of Parliament intended that an act of bankruptcy should be committed if the debtor did not pay a debt adjudged due from him, and the question here ought to turn on the judgment and not on an agreement more or less complicated. I do not think this notice comes within the terms of the section. There is nothing here to prevent the creditor from issuing a bankruptcy notice when all the instalments have become due. The whole of the judgment debt would then have become due. I do not think the position here is that, and therefore the bankruptcy notice as such fails.

ROMER, L.J.—I also think that this bankruptcy notice is bad. The judgment on the face of it does not require payment by instalments. I think it clear that when you have a judgment in that form a bankruptcy notice must require payment of the sum alleged to be due in accordance with the terms of the judgment. The debtor should be able to see from the bankruptcy notice the exact amount which is claimed upon the judgment. There is no doubt that a sum might be claimed other than the real amount due, this would not be fatal to the notice if it was clear that no amount more was to be claimed than in the notice itself. But a notice claiming payment of a part, leaving a balance due to be claimed afterwards, is clearly bad. In this case only part of the debt was claimed, there was something more claimed to be due, and it can only be justified by the express agreement of the parties; it is founded on the judgment as modified by the agreement, and the notice is no better than if it had set out on the face of it the facts, and requiring the debtor to pay according to the terms of an agreement outside the judgment. This was not a notice requiring payment according to the terms of the judgment, and, in my opinion, it is clearly bad. A section of an Act of Parliament specifying acts of bankruptcy needs a very careful and strict construction. The appeal therefore fails.

STIRLING, L.J.—I also am of opinion that the appeal fails. The appellant could not require the debtor to pay in accordance with the terms of the judgment, and by a collateral agreement agree to accept payment by instalments; till payment was due the creditor could not require it. I do not think the Act authorizes a notice in any such terms as here, and I also think that the creditor is not entitled to

issue a bankruptcy notice until all the instalments have become due. But in deciding this I am not in any way departing from anything which was laid down in *In re Feast*, for in that case the agreement provided that in default of payment of any instalment the whole debt should become due. The appeal therefore fails.

VAUGHAN WILLIAMS, L.J.—I wish to add that a bankruptcy notice for a smaller amount than the judgment debt on account of credit being given for payments already made by the debtor would be a notice requiring the debtor to pay the debt in accordance with the terms of the judgment.

Appeal dismissed, and application for leave to appeal to the House of Lords refused.

Solicitors for the appellant, *H. H. Wells & Sons.*

Solicitors for the respondent, *H. W. Chatterton.*

From K. B. Div.
(Earl of Halsbury, L.C., Lord Alverstone, L.C.J., and Cozens-Hardy, L.J.) } Oct. 29.

CIVIL SERVICE CO-OPERATIVE SOCIETY *v.* GENERAL STEAM NAVIGATION CO. (*a.*)

Contract—Impossibility of performance—Hire of ship for Coronation Naval Review—Money payable and paid before review postponed—Right to recover money so paid—Practice—Costs—Depriving successful defendant of costs—Discretion of judge—Judicature Act, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

In an action the plaintiffs sued to recover £1,500, *the amount paid by them for the hire of a steamer belonging to the defendants for the Naval Review at Spithead on the occasion of his Majesty's coronation, which was fixed to take place on the* 28*th of June,* 1902, *but was postponed.*

Held, that, although the money had been paid before it was known that owing to the King's illness the review could not take place, the defendants were entitled to retain the whole of the £1,500 *which had been paid to them by the plaintiffs.*

Held, also, that there were no materials before the judge at the trial upon which he could exercise any discretion with regard to depriving the defendants of their costs merely because, in his opinion, it was a case for compromise, and his offer to act as arbitrator had been declined by the defendants, and the order on that point was accordingly reversed.

Blakeley *v.* Muller, 19 *Times L. R.* 186, 88 *L. T.* 90, 51 *W. R. Dig.* 40, *approved.*

Appeal by the plaintiff society from a judgment of Bigham, J., who tried the case without a jury, sitting as judge to hear commercial causes, and cross-appeal by the defendant company from so much of the judgment as deprived them of their costs.

In the action the plaintiffs claimed to recover back £1,500, money paid by them for the hire of a steamer belonging to the defendants for the naval review which was to have been held at Spithead on the 28th of June, 1902, but was postponed owing to the King's illness.

By a charter-party dated the 22nd of March, 1902, the defendants agreed to let to the plaintiffs their steamer *Hirondelle* for three days from the hour when she was placed at the charterers' disposal in London on the day preceding the naval review to be held at Spithead on the occasion of the King's Coronation in June or July. The amount to be paid for the hire of the ship was £1,500. Of this sum £250 was to be paid on the signing of the charter-party and the balance ten days before the date fixed for the review. The review was afterwards officially fixed for the 28th of June.

The plaintiffs paid the £250 on signing the charter-party and the balance of £1,250 on the 18th of June.

On the 25th of June the Admiralty issued a notice postponing the review on account of the King's illness, and the review did not take place until August. The plaintiffs brought this action claiming to recover the £1,500 they had paid the defendants as money had and received to the plaintiffs' use on consideration which had wholly failed. At the trial evidence was given that the defendants had incurred substantial expense in preparing the ship for the review, and that they had offered to meet the plaintiffs by returning some part of the money paid. This offer the plaintiffs refused. The learned judge intimated that he thought this was a case in which there should be a compromise, and suggested that the parties should leave it to him to arbitrate in the matter. The defendants refused to accede to this proposal.

Bigham, J., in giving judgment held that, in strict law, the defendants were entitled to retain the whole of the £1,500, and he accordingly entered judgment for them. He considered, however, that they ought to have been satisfied with £500 and their costs, and on the assumption that no compromise could be arrived at he thought that each party should bear their own costs.

No compromise was come to, and judgment was accordingly entered for the defendants, but without costs.

The plaintiffs appealed, and there was a cross-appeal by the defendants, who asked that the order so far as it deprived them of costs should be reversed.

Bray, K.C., and *Eustace Hills*, for the plaintiffs.—This case differs from a number of cases which have recently been before the courts in so far that in all those cases the money was not paid in full prior to the postponement of the Coronation festivities being announced, and in all those cases the court has held that each party was excused from any further performance of the terms of the contract. On those authorities it is clear that if the £1,500 had not been paid the defendants could not have sued for it or any part of it. That is clear from *Krell* v. *Henry*, 19 Times L. R. 711. That was the case of an agreement to let a flat overlooking Pall Mall, and it was there held by Darling, J., whose decision was affirmed by the Court of Appeal, that it was not within the contemplation of the parties at the time when the contract was made that the Coronation procession would not take place, and it being an implied condition that the procession would take place, the defendant was not liable. Here the consideration wholly failed, the event contemplated in the charter-party not having taken place, and therefore money paid, the consideration for the payment of which has failed, can be recovered: *Taylor* v. *Caldwell*, 3 B. & S. 826.

The following cases were also referred to: *Appleby* v. *Meyers*, L. R. 2 C. P. 651, 15 W. R. Dig. 127; *Howell* v. *Coupland*, 24 W. R. 470, 1 Q. B. D. 258; *Blakeley* v. *Muller*, 19 Times L. R. 186.

Scrutton, K.C., and *Maurice Hill*, for the defendants, were heard only on the question of costs. There were no materials here upon which the learned judge could exercise any discretion with regard to depriving the defendants of their costs. Jessel, M.R., in *Cooper* v. *Whittingham*, 15 Ch. D., at p. 501, says: "Where a plaintiff comes to enforce a legal right,

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

and there has been no misconduct on his part—no omission or neglect which would induce the court to deprive him of his costs—the court has no discretion and cannot take away the plaintiff's right to costs." That statement of the law has never been questioned, and here there being no "good cause shown" why the defendants should not have their costs. The learned judge acted *ultra vires* in making an order depriving them of their costs. *Granville* v. *Firth*, 88 L. T. Rep. 9, 51 W. R. Dig. 126, is also an authority on this point. Merely because the defendants, after their offer to return half of the £1,500 had been refused, chose to stand on their strict rights and declined to agree to arbitration by the judge, is no ground at all —no misconduct—that could disentitle them to costs.

Eustace Hills, in reply.—Under section 5 of the Judicature Act, 1890, a judge has much wider discretion than formerly, and although the defendants were in his opinion entitled to judgment, the justice of the case in his opinion would be met by their being deprived of their costs. The learned judge on the facts, sitting as judge and jury, had jurisdiction to decide the question of costs, and under the statute he had power to make the order.

Earl of HALSBURY, L.C.—In this case it appears to me that without overruling a very considerable body of authority we cannot doubt the decision of the learned judge in respect of the main question here —viz., the right of the defendants to retain what they have got and to excuse the parties from any further performance of the contract on the either side. Without overruling a very considerable body of authority on that subject we cannot possibly disagree with what my brother Bigham has decided. I think his judgment in that respect is right. I think he rightly construed what are the obligations of the parties, and I think it may also be said that, without actually deciding this case in the Court of Appeal, the question has been brought before us in such a manner as I think it would in effect, though not perhaps in strict law, be to reverse a decision which this court has already arrived at. The question has been litigated before the Lord Chief Justice and he has taken a view on that subject with which I entirely concur. I observe that Channell, J., referring to the case of *Blakeley* v. *Muller*, says, "It does not appear whether there was any express contract as to when the money was payable. If the money was payable on some day subsequent to the abandonment of the procession I do not think it could have been sued for. If, however it was payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid and could not be recovered back and could not be sued for. All *Taylor* v. *Caldwell* says is that the parties are to be excused from the performance of the contract, and *Appleby* v. *Meyers* from the further performance. It is impossible to import a condition into a contract which the parties could have imported and have not done so. All that can be said is that when the procession was abandoned the contract was off, not that anything done under the contract was void. The loss must remain where it was at the time of the abandonment. It is like the case of a charter-party where the freight is payable in advance, and the voyage is not completed and the freight therefore not earned. Where the non-completion arose through impossibility of performance the freight could not be recovered back. Of course, if the contract for seats had been made subsequent to the abandonment of the procession, that would be different altogether. There the money could be recovered." I concur with every word of that, and I think, substituting the words "Naval Review" for "procession," the words are strictly applicable to the present case. The plaintiffs' appeal therefore fails.

There comes then the question which has been last argued—an important question, and one I think within the power of this court to entertain. No doubt where a judge has expressed his discretion upon certain materials which are before him, and has, with those materials before him, expressed that discretion, it may not be, and I indeed think it is not, in the power of the Court of Appeal to overrule that discretion, if what I have described as the necessary hypothesis is satisfied—namely, material upon which that discretion can be exercised. But in this case, so far as the evidence goes which is before us, I can see no materials whatever upon which the learned judge could exercise a discretion at all. The defendants are sued, and rightly, according to the law, resist the suit, and finally succeed, and in the judgment of this court and in that of Bigham, J., in point of law they are right. What, however, the learned judge did was practically to deprive the person sued of what is *primâ facie* his right—namely, the costs of the litigation which has been unsuccessfully brought against him; because he would not submit to the learned judge being himself the arbitrator to say what should be done. That is not exercising a discretion upon material properly before him; but it is depriving a suitor of the rights which by law he has, upon grounds which it is not competent for the learned judge to treat as grounds for the exercise of his discretion.

Under those circumstances I am of opinion that the cross-appeal must succeed, and that the defendants are entitled to their costs.

Lord ALVERSTONE, L.C.J.—I agree. Upon the merits I have nothing to add. The Lord Chancellor has expressed exactly my view, and I can only say that I do not think that this court could have decided otherwise without overruling the case of *Blakeley* v. *Muller*, the judgment of which, particularly the judgment of Channell, J., has been cited by the Lord Chancellor with approval.

On the second point I need only say that it has been laid down in more than one case that section 5 of the Judicature Act of 1890 did not in any way alter the law as to the discretion of a judge, or alter the law as to the power of the Court of Appeal with regard to discretion in dealing with questions of costs.

It merely brought within the orbit of that discretion certain cases as to which it was doubtful whether the costs were in the discretion of the learned judge. If it appears to the Court of Appeal that the learned judge has not exercised his discretion or has decided upon grounds which were not open for him, the Court of Appeal can still deal with his discretion.

I should like to say that the case which the Lord Chancellor probably for the moment forgot to mention, and which he decided in this court a few months ago, the case where a person was deprived of his costs because he pleaded the Gaming Act, is also in point. Therefore I think the cross-appeal must be allowed.

COZENS-HARDY, L.J.—I concur, and I have nothing to add.

The appeal was dismissed, and the cross-appeal allowed with costs.

Solicitors for the plaintiffs, *Nicholson, Patterson, & Freeland.*

Solicitors for the defendants, *W. Batham & Son.*

From K. B. Div.
(Earl of Halsbury, L.C., Lord Alverstone, L.C.J., and Cozens-Hardy, L.J.) } Oct. 29.

STEPHENSON v. LONDON JOINT-STOCK BANK (LIMITED). (a.)

Master and servant—Clerk in bank—Qualified to receive retiring allowance—"Retiring with the consent of the directors"—Act by clerk contrary to the policy of the bank—Intimation to clerk to resign—Right to pension.

When a clerk breaks an unwritten but well recognized rule of his employer, and receives in consequence a letter requiring him to resign, that notice, although polite instead of peremptory language was used, is a dismissal.

Held, therefore, that the plaintiff, who had received such a notice, was not entitled to a retiring allowance; one of the conditions on which such an allowance was granted being that the applicant "retired with the consent of the directors."

Appeal by the plaintiff from a decision of Wright, J.

The facts were substantially these:

The plaintiff entered the service of the defendant bank on the 24th of February, 1879, and signed a form of rules and regulations for granting retiring allowances to the officers of the bank. The second rule provided that each officer retiring with the consent of the directors should, if he had served twenty years or reached the age of sixty, receive an allowance of one-third his then salary. The fifth rule enacted that no retiring allowance whatever was to be granted to any officer who was dismissed.

In October, 1899, the plaintiff endorsed a promissory note which was drawn by a Mr. Horace Sedger. The note was discounted at a branch of the defendant bank, and the signature was noticed and information given to the directors, it being a rule of the bank that under no circumstances was any officer of theirs to put his name to a customer's bill. The plaintiff was called upon to explain and stated that he had been promised £25 for indorsing the note and that he was unaware that Mr. Sedger was other than a person of sound financial position.

On the 16th of November, 1899, the plaintiff received a letter from the secretary to the bank in regard to this matter, which contained these words, "You are required to resign your appointment in the bank forthwith," and on the 20th of November the plaintiff sent in his resignation.

Wright, J., held that the plaintiff, although he had served for twenty years, could not claim a pension, as he had failed to bring himself within the words of the rule "retiring with the consent of the directors," and he accordingly entered judgment for the bank.

The plaintiff appealed.

W. R. Warren, for the plaintiff.—The Act which the directors objected to the plaintiff doing was an Act *per se* not wrongful. At most therefore he had been guilty of a technical offence against an unwritten, though known rule, of the bank. It would be most unjust that such an offence should lose him the right to a pension, especially as he had, for the period of twenty years, so much each year set aside from his salary for the fund. There was no resolution of the Board dismissing him—no resolution of the Board that in their opinion he was not entitled to a pension. The words "you are required to resign" did not of themselves amount to dismissal, and he was justified in asking for a declaration that he was entitled to a pension from the bank on retiring from his position of clerk.

Bray, K.C., and *Schiller*, for the bank, were not called on.

Earl of HALSBURY, L.C.—I do not think we need hear the respondents in this case, for looking at the facts and the rules of the bank, I entertain no doubt on the point. In my judgment my brother Wright has come to a perfectly correct decision. I can quite understand that there may be cases in which a person may be permitted to resign without the intimation that he should do so amounting to a dismissal. But we must look at the whole facts of the case, and in doing so here there can be no doubt left that this plaintiff was dismissed. The defendants here used polite instead of peremptory language; but their doing so does not alter the fact that in plain language what they wrote was "you must go." That was a dismissal and there is an end of the case.

Lord ALVERSTONE, L.C.J., and COZENS-HARDY, L.J., concurred.

Appeal dismissed.

Solicitors, *Bate & Co.; Clarke, Rawlins, & Co.*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

From K. B. Div.
(Vaughan Williams, Romer, and Stirling, L.JJ.) } Aug. 6, 1903.

HERNE BAY STEAMBOAT CO. v. HUTTON. (a.)

Contract—Hire of ship—Purpose of hirer—Impossibility of carrying out purpose—Failure of consideration—Breach of contract—Damages.

The fact that in a contract for hire of a vessel the objects of the hirer are stated does not constitute those objects the basis of the contract so as to discharge the parties in the event of the performance of those objects becoming impossible. A ship was hired by agreement in writing "for the purpose of viewing the naval review and for a day's cruise round the fleet." On the postponement of the naval review the hirer declined to proceed with the contract.

Held, that this was not a joint speculation by the hirer and the owners of the ship, but that the risk was the hirer's alone; nor was the taking place of the review the basis for the performance of the contract. Consequently the hirer was not discharged from the contract, and was liable in damages for its breach.

This was an appeal from the decision of Grantham, J.

The plaintiff company owned a steamboat called *The Cynthia*, which was employed for the daily conveyance of passengers between Herne Bay and Gravesend and other places on the Thames.

On the 23rd of May, 1902, the following agreement was entered into between the defendant and H. C. Jones, a director and secretary of the plaintiff company, on behalf of the company: "*The Cynthia* to be at Mr. Hutton's disposal at an approved pier or berth at Southampton on the morning of the 28th of June, perils of the sea, &c., permitting, to take out a party, not exceeding the number for which the vessel is licensed, to the position assigned by the Admiralty, for the purpose of viewing the naval review and for a day's cruise round the fleet; also on Sunday, the 29th of June, for similar purposes. Owners to provide crew, coals, and all necessary assistance, Mr. Hutton to pay all tolls, pier dues, &c. Owners to have the right of ten persons above crew, &c., on board. Price £250, payable £50 down, balance before ship leaves Herne Bay."

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

It was also agreed that the plaintiffs should cater for the passengers during the two days at so much a head.

This agreement was signed by both parties, and the £50 deposit was paid to Jones. Considerable correspondence passed between the parties as to the position to be assigned to the ship at the review and other matters; the plaintiffs also assisted the defendant in the disposal of tickets and in posting notices of the intended trips.

Ultimately, on the 23rd of June, Mr. Jones wired to the defendant asking for payment of the balance of £200 and also a definite statement as to the number of people to be catered for, but received no reply.

On the 25th of June, 1902, the official announcement cancelling the review was published.

The ship being then at Herne Bay, Jones wired to the defendant's address "What about *Cynthia?* She ready to start at six to morrow, waiting cash," but received no reply.

The plaintiffs accordingly decided that the ship should resume her ordinary sailings, which she did, and the plaintiffs made profits thereby on the 28th and 29th of June.

On the 29th of June the defendant called on Jones and stated that as the review had been cancelled he did not require the ship. He declined to pay the balance of £200, or to have anything more to do with the agreement. On the two days in question, although the review was cancelled, the fleet remained anchored at Spithead.

On the 7th of July, 1902, the plaintiffs issued the writ in this action, claiming the balance of £200 under the agreement.

The defendant, in his defence, pleaded that the ship was not put at his disposal, but that the plaintiffs were running her for their own benefit on the 28th and 29th of June, and on each day between the 22nd of June and the 2nd of July inclusive. The defendant further alleged that it was a condition of the agreement, either expressed or implied, that the naval review should take place on the 28th of June, and that the consideration for the agreement wholly failed. The defendant counter-claimed for the return of the deposit of £50.

In their reply and defence to the counter-claim the plaintiffs asserted that they provided a crew, obtained coals, and prepared the ship for the use of the defendant, but that according to the terms of the agreement she was not to leave Herne Bay until payment of the balance of the agreed price, and that they did not run the ship until after the defendant had neglected to pay the balance. As to the counter-claim, they denied that the consideration had failed, and insisted that the £50 was paid down on account of the agreed price of £250.

At the trial the plaintiffs reduced their claim to £110, a profit of £90 having been made by their running of the ship on the two days in question.

The action was tried by Grantham, J., without a jury, and judgment was given for the defendant on the claim with costs, and for the plaintiffs on the counter-claim with costs, but execution was stayed to enable the plaintiffs to appeal.

The plaintiffs appealed from so much of the judgment as refused their claim.

Lush, K.C., and *Poyser*, for the plaintiffs.

Hansell and *Firminger*, for the defendant.

The following cases were referred to in the course of the arguments: *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826; *Besant* v. *Wood*, 12 Ch. D. 605, 27 W. R. Dig. 95; *Nickoll* v. *Ashton*, 49 W. R. 513, [1901] 2 K. B. 126; *Hobson* v. *Pattenden*, 88 L. T. 90; *Jackson* v. *Union Marine Insurance Co.*, 23 W. R. 169, L. R. 10 C. P. 125; *Dean* v. *Hogg*, 10 Bing. 345; and *Lucas* v. *Nockells*, 4 Bing. 729.

VAUGHAN WILLIAMS, L.J.—In my opinion this appeal must be allowed.

I wish first to call attention to this, that what the plaintiffs originally claimed in this action was the sum of £200, being the balance of the price of £250 which was agreed to be paid. That actual sum, in my judgment, the plaintiffs are not entitled to recover. I do not think Mr. Lush could have borne in mind that that was the original claim, and, therefore, he regarded some of the observations of Grantham, J., dealing with the original claim as if they were applicable to the subsequent claim. In my judgment there was, in this case, before the time came for the performance of the contract, a plain repudiation by the defendant of his obligations under it; and this is in fact admitted. He refused to carry out the contract on his part, and the plaintiffs, acting very properly in the circumstances, employed the steamer on her usual daily services, and made what profit they could out of her during the two days for which it was intended by the contract that the defendant should have the use of the vessel. Under these circumstances, the plaintiffs' claim is really for damages for the defendant's refusal to carry out the contract, and it is agreed that these damages are not £200, but that sum less the profit made by the plaintiffs from having the use of the ship after the repudiation of the contract by the defendant. These damages, I think, the plaintiffs are entitled to recover. In my opinion, this contract really placed the vessel at the disposal of the defendant for these particular days. The contract, which was signed by Mr. Jones, acting for the owners of the ship, runs thus: [His lordship read it, and continued:] According to my understanding of this contract, this ship was placed at the disposal of Mr. Hutton really for those two days. Mr. Hansell says this does not constitute a demise of the ship, and with that I agree. It is very rarely that a charter party does contain a demise of a ship. Generally speaking, the ship is not demised at all, but remains under the management and control of her owner. But at the same time this contract does, in my opinion, place the ship at the disposal of Mr. Hutton, just as a charterparty places the vessel, the subject of it, at the disposal of the charterers.

That being so, what is there besides in the present case? Only this, that Mr. Hutton, in hiring this vessel, had two objects in view: first, to take people to see the Naval Review, and, secondly, to take them round the fleet. Those, no doubt, were the purposes of Mr. Hutton, but it does not seem to me that because, as it is said, those purposes became impossible, it would be a very legitimate inference that the happening of the Naval Review was contemplated by both parties as the basis and foundation of this contract, so as to bring the case within the doctrine of *Taylor* v. *Caldwell*. On the contrary, when the contract is properly regarded, I think the purpose of Mr. Hutton, whether of seeing the Naval Review, or of going round the fleet with a party of paying-guests, does not lay the foundation of the contract within the authorities.

Having expressed that view, I do not know that there is any advantage to be gained by going on in any way to define what are the circumstances which might or might not constitute the happening of a particular contingency as the foundation of a contract. I will content myself with saying this, that I see nothing that makes this contract differ from a case where, for instance, a person has engaged a

brake to take himself and a party to Epsom to see the races there, but for some reason or other, such as the spread of an infectious disease, the races are postponed. In such a case it could not be said that he could be relieved of his bargain. So in the present case it is sufficient to say that the happening of the Naval Review was not the foundation of the contract.

ROMER, L.J.—I am of the same opinion. I may point out that this case is not one in which the subject-matter of the contract is a mere licence to the defendant to use a ship for the purpose of seeing the naval review and going round the fleet. In my opinion, as Vaughan Williams, L.J., has said, it is a contract for the hiring of a ship by the defendant for a certain voyage, though having, no doubt, a special object, namely, to see the naval review and the fleet; but it appears to me that the object was a matter with which the defendant, as hirer of the ship, was alone concerned, and not the plaintiffs, the owners of the ship.

The case cannot, in my opinion, be distinguished in principle from many common cases in which, on the hiring of a ship, you find the objects of the hiring stated. Very often you find the details of the voyage stated with particularity, and also the nature and details of the cargo to be carried. If the voyage is intended to be one of pleasure, the object in view may also be stated, which is a matter that concerns the passengers. But this statement of the objects of the hirer of the ship would not, in my opinion, justify him in saying that the owner of the ship had those objects just as much in view as the hirer himself. The owner would say, "I have an interest in the ship as a passenger or cargo-carrying machine, and I enter into the contract simply in that capacity; it is for the hirer to concern himself about the objects."

In the present case, with regard to the suggestion that there was something in the stipulations that the plaintiffs were to have the right on their part of placing ten persons on board, which would change the nature of the hiring, I need only say that there is nothing in that provision to lead the court to treat the transaction otherwise than as an ordinary case of hiring a vessel; it does not make it in any sense a joint speculation or anything of that sort. The stipulation that the owners are "to have the right of ten persons above crew, &c., on board" only amounts to this, that in the eye of the law the defendant as the hirer of the ship licenses the owner to send ten persons on board.

The view I have expressed with regard to the general effect of the contract before us is borne out by the following considerations. The ship (as a ship) had nothing particular to do with the review or the fleet, except as a convenient carrier of passengers to see it; any other ship suitable for carrying passengers would have done equally as well. Just as in the case of the hire of a cab or other vehicle, although the object of the hirer might be stated, that statement would not make the object any the less a matter for the hirer alone, and would not directly affect the person who was letting out the vehicle for hire. In the present case I may point out that it cannot be said that by reason of the failure to hold the Naval Review there was a total failure of consideration. That cannot be so. Nor is there anything like a total destruction of the subject-matter of the contract. Nor can we, in my opinion, imply in this contract any condition in favour of the defendant which would enable him to escape liability. A condition ought only to be implied in order to carry the presumed intention of the parties, and I cannot ascertain any such presumed intention here. It follows that, in my opinion, as far as the plaintiffs are concerned, the objects of the passengers on this voyage with regard to sight-seeing do not form the subject-matter or essence of this contract. With regard to the one contention of fact on which the defendant relied—namely, that the plaintiffs, the owners of the ship, had on their part put themselves in the position of not having been able to carry out the contract, and so repudiated it, I can only say that the defendant has not proved his case.

STIRLING, L.J.—I am of the same opinion. The plaintiffs are owners of a steam vessel for carrying passengers from Herne Bay to Gravesend and other places on the Thames. The defendant is a gentleman who seems to have formed the idea of making a profit by the conveyance of passengers on the 28th and 29th of June from Southampton to see the Naval Review, and afterwards for a cruise round the fleet. From the correspondence it appears to me to be clear that this venture was the venture of the defendant alone, and that although the plaintiffs assisted him by selling tickets and posting notices of what was proposed to be done, yet the risk was entirely that of the defendant.

In that state of things the defendant entered into a contract by which the steamship belonging to the plaintiffs was to be employed by the defendant for the purpose of this venture which, as I say, was his alone. The contract was reduced into writing. I need not read it again, but the most material part is that the vessel is to be "at Mr. Hutton's disposal" to take out the party of passengers. I agree that this contract did not amount to a demise of the ship; it was, however, a contract entered into for valuable consideration as to the employment of the ship on the two days in question, and it at least conferred this interest on the defendant that if the plaintiffs had attempted to violate it, that attempted violation would have been a ground for an injunction at the instance of the plaintiffs to prevent it. That is established by *De Mattos* v. *Gibson*, 4 De G. & J. 276. It is said that by reason of the reference in the contract to the "Naval Review" the existence of the review formed the basis of the contract, and that as the review failed to take place the parties became discharged from the further performance of the contract in accordance with the doctrine of *Taylor* v. *Caldwell*. I am unable to arrive at that conclusion. It seems to me that the reference in the contract to the "Naval Review" is easily explained: It was inserted in order to define more exactly the nature of the voyage, and I am unable to treat it as being such a reference as to constitute the Naval Review the foundation of the contract so as to entitle either party to the benefit of the doctrine in *Taylor* v. *Caldwell*. I come to this conclusion the more readily because the object of the voyage is not limited to the Naval Review, but also extends to a cruise round the fleet. The fleet was there, and passengers might have been found willing to go round it. It is true that in the events which happened the object of the voyage became limited, but in my opinion that was the risk of the defendant, whose venture the taking the passengers was.

For these reasons I am unable to agree with the learned judge that in the contemplation of the parties the taking place of the review was the basis for the performance of the contract, and I think that the defendant is not discharged from its performance.

I also agree that there is no evidence that the plaintiffs repudiated the contract before any breach by the defendant.

Appeal allowed.

Solicitors, *Jones & Hamp; Biggs Roche; Sawyer & Co.*

From K. B. Div.
(Vaughan Williams, Romer, and Stirling, L.JJ.) } Aug. 4, 6, 1903.

GREENOCK STEAMSHIP CO. (LIMITED) v. MARITIME INSURANCE CO. (LIMITED). (a.)

Insurance—Marine—Voyage policy—Round voyage—Implied warranty of seaworthiness—Insufficiency of coal—Sacrifice of cargo and spars—Negligence clause—Breach of warranty covered by insurance.

There are only two kinds of insurance policies, "time policies" and "voyage policies," and a voyage policy does not lose its character because the voyage is of an indeterminate nature instead of being between specified ports.

A steamship was insured for a round voyage from the United Kingdom to port or ports on the West Coast of South America and back again, with leave to call at any ports or places on the East Coast of South America. The perils insured against were of the seas, and the clauses annexed provided (inter alia) *that the insurance should cover loss through the negligence of master, mariners, engineers, or pilots. The vessel started on one of the stages of the voyage with an insufficient supply of coal to carry her to the next coaling place, in consequence of which it became necessary to sacrifice part of the cargo, spars, and fittings.*

Held, that the starting of the vessel on a stage of the voyage with an insufficient quantity of coal was a breach of the implied warranty of seaworthiness on the part of the shipowner.

The principle of The Vortigern, 47 *W. R.* 437, [1899] *P.* 140, *applied.*

Decision of Bigham, J. (51 *W. R.* 447, [1903] 1 *K. B.* 367), *affirmed.*

This was an appeal from a decision of Bigham, J. (reported 51 W. R. 447; 1903, 1 K. B. 367).

The action was brought by the owners of the steamship *Gulf of Florida* against the defendant company on a policy of insurance dated the 19th of July, 1897.

The policy contained the following terms: "For £3,000 on *The Gulf of Florida*, valued at £30,000, at and from to port and ports in any order in the United Kingdom and/or Continent between Bordeaux and Hamburg, both inclusive, and while there and thence to port or ports, place or places, on West Coast of South America backwards and forwards and forwards and backwards in any order or rotation, while there and thence to port or ports of call, and/or discharge in any order in the United Kingdom, and/or Continent between Bordeaux and Hamburg, both inclusive, and while there, however employed, until expiry of thirty days after arrival or until sailing on next voyage whichever may first occur. With leave to call at any ports or places for all purposes, and any ports or places on the east coast of South America and/or Falkland Island, both outwards and homewards. The risk not to commence before the expiration of previous policies. Against the risk of total loss only, but including collision clause, general average, and salvage charges. Perils insured against of the seas, &c. Subject to and including Gulf Line Voyage Clauses as annexed."

These clauses included the following: "This insurance also to cover loss through the negligence of master, mariners, engineers, or pilots. Including all risks incidental to steam navigation. General average salvage and special charges payable as per official foreign adjustment if so made up, or per York-Antwerp Rules, 1890, if in accordance with the contract of affreightment. Held covered in case of any breach of warranty, deviation, and [or] any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged. It shall be lawful to the assured, their factors, servants, and assigns to use, labour, and travel for, in, and about the defence, safeguard, and recovery of the said ship, &c., and any part thereof without prejudice to this insurance."

On arrival at Montevideo *The Gulf of Florida* filled up her bunkers with coal, and left on the 18th of December with 563 tons of coal. Meeting with an accident on the same day she put back to Montevideo.

On the 23rd of December she resumed the voyage, having 542 tons in her bunkers, which was considered still sufficient to take her to St. Vincent, her next coaling place.

On the voyage she encountered stormy head wind and seas. The coal was found to be burning quickly; consequently, on the 9th of January, the speed was reduced.

On the next and following days part of the cargo, fittings, and spars was used as fuel. But for this sacrifice the vessel would not have made St. Vincent unassisted.

The quantity of coal when the ship left Montevideo, both on the 18th of December and on the 23rd of December, was, in fact, insufficient for the passage to St. Vincent.

The plaintiff company paid £662 1s. 11d. for the cargo so used as fuel to the consignees, and the value of the spars and fittings so sacrificed was £312 4s.

The plaintiffs claimed that they were entitled to the defendants' proportion of the value of the spars and fittings so sacrificed and of the sums paid for the cargo so sacrificed, and alternatively for their proportion of the value of the spars and fittings so sacrificed and of the ship's contribution in general average in respect of the burnt cargo. Further, they claimed that they were entitled to recover on the payment of an additional premium to be fixed by the court.

Bigham, J., dismissed the action.

The plaintiffs appealed.

Carver, K.C., and *Leck*, for the plaintiffs.—If this policy is a "voyage policy" then we submit that there was no warranty of a sufficient supply of coal for the whole voyage: *Dixon* v. *Sadler*, 5 M. & W. 405. The case of *The Vortigern*, 47 W. R. 437, [1899] P. 140, is distinguishable. In that case the voyage was from one specified port to another specified port. Here the voyage is indeterminate. This is really a time policy, and no warranty of seaworthiness is implied: *Gibson* v. *Small*, 4 H. L. C. 353; *Dudgeon* v. *Pembroke*, 25 W. R. 499, 2 A. C. 284.

They also cited *Hamlyn & Co.* v. *Wood & Co.*, 40 W. R. 24, [1891] 2 Q. B. 488; *Strang, Steel, & Co.* v. *A. Scott & Co.*, 14 A. C. 601; *Montgomery* v. *Indemnity Mutual Marine Assurance Co.*, 50 W. R. 440, [1902] 1 K. B. 734.

Hamilton, K.C., and *Simey*, for the defendants.—This case is really covered by *The Vortigern*. The policy is a voyage policy for a voyage by stages, and if the shipowner has not sufficient coal at the commencement of each stage he fails in defeating the *primâ facie* inference of unseaworthiness.

VAUGHAN WILLIAMS, L.J.—I think this case is really covered by the decision in *The Vortigern*. Mr. Carver's argument was in reality an argument that the policy here was in effect a time policy. He felt pressed by the words of the policy, which not only do not describe the risk to be taken as being a time risk, but so describe it as to show obviously that the real risk was to continue from the time of leaving one of

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the optional ports, either in the United Kingdom or on the Continent, until the arrival back again of the ship at any of the optional ultimate ports. In stress of having to satisfy those words he attempted to say that this was neither a time policy nor a voyage policy and that therefore there was absolutely no warrant of seaworthiness by the shipowner at all. I do not myself think that it very much matters what this policy is called—whether a time policy or a voyage policy. One must look at the policy and see what was contemplated by the shipowner and the underwriters respectively, and whether, having regard to what both parties contemplated, the ship was seaworthy. Speaking for myself I utterly reject the notion that under this policy it is possible to say that there was no warrant of seaworthiness at all. In fact Mr. Carver himself shrank from saying that there was no warrant of seaworthiness at the commencement of the voyage. Once assume that there was an original warranty of seaworthiness, then it seems to me that the principle of the decision in *The Vortigern* absolutely covers this case. Looking at the judgments in *The Vortigern* it seems to me that whether one regards the judgment of Barnes, J., in the first instance, or the judgments in the Court of Appeal, the whole of the reasoning applies to the present case. For the purposes of my judgment I must assume that under the circumstances of this case there was a plainly implied warranty of seaworthiness at the commencement of the voyage. If that is so, it seems to me that the case is entirely covered by the judgment of Barnes, J., and of the Court of Appeal. I called attention just now to the passage in the judgment of Barnes, J., at the top of p. 147 of the report of *The Vortigern*, which seems to me to entirely accord with the following statement of A. S. Smith, L.J. on p. 153: "To obviate this difficulty—and a great difficulty it is in cases of long voyages of cargo-carrying steamships, for it is manifest that no cargo-carrying steamship can ever be seaworthy when she starts upon such a voyage as the present, by reason of the impossibility of her having on board such an equipment of coal as will be sufficient to take her to the port of destination—it has become the practice, by reason of the necessity of the case, for cargo-carrying steamship owners to divide these long voyages into stages for the purposes of replenishing their ships with coal, and thus, as far as practicable, complying with the warranty of seaworthiness which attached when the ship commenced her voyage." Looking at that passage, and also at the passage on p. 155 in the same judgment, it is clear that the holding is that the warranty of seaworthiness in the case of a long voyage is not broken because the steamer does not start in a seaworthy condition, but that the shipowner is entitled to satisfy the implied warranty by taking on board coal at the commencement of each stage of the voyage. It is plain that to hold that there is no such breach of warranty is a concession made by the law in favour of the shipowner rather than of the underwiters; and it is also plain that the way in which the court regards these stages is to look at the voyage which is contemplated at each point at which the ship takes advantage of this liberty and stops to coal—that is to say, the shipowner must coal before the then contemplated voyage. That does not mean, however, in a case like the present, a voyage which is defined in terms upon the face of the policy; but it means that the shipowner, taking advantage of this method of satisfying the implied warranty, must make up his mind to what port he intends to proceed; and he will only satisfy the warranty if he takes on board a sufficiency of coal for that contemplated voyage.

I only desire to add this: We have here a case which, having regard to the enormous extent of sea-carriage in the present day, must be arising every day. A voyage contemplated by a shipowner and underwriters such as we have here, including, as it does, undefined coasting voyages, must obviously be likely to give rise to occasions when the master of the ship is placed in great difficulty, not only in respect of the quantity and quality of the coal which he may be able to obtain, but also as to the time when he will be able to reach another coaling station. In such cases a very great stress must be thrown upon the master—even the most prudent master; and unless the shipowner was content that his ship should go to sea under such conditions as to render it by no means impossible that even with a fairly prudent master he, the shipowner, might find himself uninsured through the breach of warranty of seaworthiness—a warranty which *ex hypothesi* it is impossible to satisfy at the starting of the ship—one would have thought that, as between the contracting parties, the underwriters would have charged a sufficient premium in such a form that the shipowner's insurance should not be entirely dependent upon the judgment of the master in the decision of this difficult question as to the quantity and quality of the coal which he might require. But for some reason or other the parties to these contracts of insurance seem to consider that the interests of commerce are forwarded by leaving things in a more or less uncertain state, so that the shipowner undertaking a voyage of this sort can never feel very confident that he is really covered by his insurance.

In my opinion the decision of the learned judge was right, and this appeal must, therefore, be dismissed.

ROMER, L.J.—I have come to the same conclusion. I think this case is covered in principle by the case of *The Vortigern*, by which this court is bound. The form of the policy, on which the case before us turns, is one which to my mind shows that the policy is what is commonly called "a voyage policy"—a voyage policy properly so called. I may here remark that the policy is so described by the parties on the face of it. It is for a voyage from any port or ports in the United Kingdom and the continent between Bordeaux and Hamburg to any port or ports on the west coast of South America, and back again to corresponding ports. Undoubtedly this voyage is a curious one, because it may cover voyages between ports on the west coast of South America. If the case had been one simply for a voyage, say, from any port to be selected in a defined portion of Europe to a port to be selected in any defined portion of the west coast of South America and back again, nobody could for a moment have suggested that that was not a voyage policy in the strictest sense of the term to which the ordinary insurance law applicable to an implied warranty of seaworthiness would apply. The difference between that case and the present is really only one of degree. No doubt the voyage that is defined in this policy was a very onerous one for shipowners to undertake to insure against on one policy, but that was for them to consider. If the shipowners had wished to negative the implied warranty of seaworthiness on such a voyage to any extent, it was for them to do so by express bargain and by express stipulation in the policy. According to insurance law as applicable to the kind of question we have to decide on this appeal, there are only two kinds of insurance policy known—a time policy and a voyage policy. Speaking for myself, I think it would be most unfortunate for commercial law, and therefore for commercial people, if we had been obliged in this

case to say that there was also a policy of a third kind known to the law—a kind of policy not hitherto supposed even by lawyers or by commercial men to exist. I do not of course mean to say but that one document might cover two policies—a voyage policy and a time policy—but in the present case the policy is not really two policies. The document does not cover two distinct insurances, and the policy is not in any true sense a time policy. It is as I have pointed out, a voyage policy, and nothing else; and I may point out, as has been frequently pointed out before, that the case of *The Vortigern* was really decided in favour of the shipowners.

It was to free them in long voyages from what would otherwise have been a most onerous obligation on their part in the case of steamers—namely, that they would have been obliged, however long the voyage might be, to ship coal sufficient to last the whole of the voyage. In the present case, but for the principle of *The Vortigern*, it would, notwithstanding the curious nature of the voyage, have been obligatory on the part of the shipowners to take care that when their vessel started from the port of departure it was reasonably coaled for the coming voyage.

With reference to an argument that was used before us in which it was said it was impossible for any shipowner to have coaled for such deviations of voyages on the west coast of South America as appear to have been contemplated by this policy, I need only say that this is not necessarily so. What the shipowner would have to do would be to coal to the extent that was reasonable, having regard to the probable nature and duration of the voyages likely to take place on the west coast.

As I have said, if shipowners choose to undertake voyages with steam vessels, and such a voyage as this, so described and so long, it is for them to protect themselves if they do not wish to incur the ordinary obligations that are cast upon them as shipowners in respect of such a voyage.

For the reasons I have given I think this appeal fails.

STIRLING, L.J.—I am of the same opinion. I entirely agree with what was said by Bigham, J., in his judgment. He rested his decision, to a large extent, on the case of *The Vortigern*. That is a decision of the Court of Appeal. It was binding upon Bigham, J., and it is no less binding upon us; and unless it can be effectually distinguished from the present case it seems to me to follow that Bigham, J.'s, decision must be affirmed. Now, how is it sought to distinguish the two cases? In the first place it is said that the case of *The Vortigern* related to a contract of affreightment, whereas this relates to a contract of insurance. In *The Vortigern* I observe that the learned counsel who argued for the appellant said in his reply that the doctrine of stages which was relied upon was a doctrine of insurance and ought not to be extended to a case of affreightment. Here the argument is the other way—this is a doctrine which relates to cases of affreightment alone, and ought not to be applied to cases of insurance. Now it seems to me that both the Court of Appeal and Barnes, J., rejected that argument and treated the case as being the same, whether it arises between the steamship owner and his underwriter on a voyage policy, or between the steamship owner and the cargo owner upon a contract of affreightment. I think, therefore, that the two cases cannot be distinguished on that ground.

But then it is said in the second place—and this is really the main contention—that the contract in the case of *The Vortigern* related to a specified voyage, and that the contract in this case relates to a voyage of a different character. In *The Vortigern* the voyage was, in substance, from Manila to Liverpool, with liberty to call at any ports in any order, and it was there held that the doctrine of stages applied. Now we have before us, undoubtedly, a case in which the voyage is described in much wider terms. It is from a port or ports in the United Kingdom, or within specified limits on the Continent, to a port or ports, or place or places, on the west coast of South America, and then back to a port in the United Kingdom, and between specified limits on the Continent, with power to go backwards and forwards, and forwards and backwards on the west coast of South America. The risk is extended also until the expiring of thirty days after arrival, or until sailing on the next voyage, whichever first happens. Now Bigham, J., held that in these circumstances the policy is what is termed, in the language of insurance, "a voyage policy," and it seems to me that it is. If the voyage had simply been described as one from a port in the United Kingdom to a port on the west coast of South America, and back from there to the United Kingdom, it would have been precisely within the decision in *The Vortigern*; and the power to go backwards and forwards on the west coast of South America does not seem to me to really affect the substance of the case.

It is possible that there are reasons which may be urged against the law as laid down in *The Vortigern*; but if such there be, I express no opinion whatever upon them; they must be dealt with, if necessary, by a higher tribunal.

I think *The Vortigern* cannot be distinguished for the purposes of the present case.

Appeal dismissed.

Solicitors, *Coote & Ball*, for *Adamson & Adamson*, North Shields; *Field, Roscoe, & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool.

High Court of Justice.

Chan. Div. } Nov. 27.
Farwell, J. }

In re WEST AND HARDY'S CONTRACT. (a.)

Married woman—Trustee-mortgagee—Transfer of mortgage—Deed not acknowledged—Bare trustee—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 2—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 16.

Two trustees for sale, of whom one was a lady, sold land, and next day took a mortgage from the purchaser for a sum expressed to belong to them on a joint account. The lady having afterwards married, she and her co-mortgagee transferred the mortgage, and, on a sale by a person deriving title under the transferees, the purchaser objected that the deed of transfer had not been executed by the husband of the married woman or acknowledged by her. The vendor replied that, being a mortgagee, she could convey as a feme sole *according to the decision in* In re Brooke and Fremlin's Contract, 46 *W. R.* 442, [1898] 1 *Ch.* 647.

Held, following that case, that the purchaser's requisition had been satisfactorily answered.

This was a summons by the vendor, under the Vendor and Purchaser Act, 1874, for the determination of the following question:

In 1892 J. K. Barton and Louisa Barton were trustees for sale of a house and land under a trust deed,

(a.) Reported by R. HILL, Esq., Barrister-at-Law.

executed by the beneficiaries under their father's will on the 14th of April, 1892.

They sold and conveyed the property to C. J. West, the present vendor, on the 23rd of January, 1893, and the following day took from him a mortgage in fee thereon for £1,250, which sum was expressed to belong to them on a joint account.

In February, 1893, Louisa Barton married E. G. Armstrong, and on the 14th of February, 1894, she and J. K. Barton, as mortgagees, executed a transfer of the mortgage to two persons (who were since dead) as joint tenants.

C. J. West, the mortgagor, paid off the mortgage, and being legal personal representative of the last surviving mortgagee, he reconveyed the premises to H. Behan to the use of him, C. J. West, in fee, and afterwards entered into the present contract for sale thereof.

On investigation of the title the purchaser objected that as Mrs. Armstrong was a trustee, the deed of transfer in which she joined to convey the property should also have been executed by her husband and acknowledged by her, according to the decision in *In re Harkness and Alsopp's Contract*, 44 W. R. 683, [1896] 2 Ch. 358. The vendor replied that as Mrs. Armstrong was a mortgagee, her conveyance as a *feme sole* was good according to the decision in *In re Brooke and Fremlin's Contract*, 46 W. R. 442, [1898] 1 Ch. 647, or alternatively that she could convey as a bare trustee by virtue of section 16 of the Trustee Act, 1893, and he took out the present summons asking for a declaration that the purchaser's requisition had been satisfactorily answered.

Upjohn, K.C., and *Curtis Price*, for the vendor.—The decision in *In re Harkness and Alsopp's Contract* turned entirely on trusteeship. *In re Brooke and Fremlin's Contract*, on which we rely, was a case of a married woman mortgagee. It was followed in *In re Howgate and Osborn's Contract*, 50 W. R. Dig. 48, [1902] 1 Ch. 451, where the married woman was a trustee-mortgagee. Further, Mrs. Armstrong, as soon as the mortgage money was paid, became a bare trustee for the transferees, and could convey under section 16 of the Trustee Act, 1893.

Bradley Dyne, jun., for the purchaser, was asked by the court if he could distinguish *In re Brooke and Fremlin's Contract*.—In that case the married woman was beneficially entitled to the mortgage money. Here, I submit, Mrs. Armstrong and J. K. Barton, from the date of the mortgage, held, not only the money, but the land, in trust for the persons entitled to the money. *In re Harkness and Alsopp's Contract* expressly decides that where a married woman holds the property otherwise than beneficially, her husband must execute the deed and she must acknowledge it. *In re Howgate and Osborn's Contract* was not fully argued. The conveyance of the 23rd of January, 1893, reciting as it does both the devise in trust and the deed of arrangement of the 14th of April, 1892, contained quite sufficient reference to a trust to put the purchaser upon enquiry.

FARWELL, J.—There is nothing in the purchaser's objection. The cases cited show that the Married Women's Property Act, though not applying to a married woman who is a trustee, applies to one who is a mortgagee. The trustees for sale sold the property, and next day invested money in it on mortgage. The joint account clause was no notice of the trust, and there was no other. The decision in *In re Brooke and Fremlin's Contract* applies, and I therefore follow it.

Declaration in terms of the summons.

Solicitors, *C. W. & H. R. Taylor; Hind & Robinson.*

Chan. Div. } Dec. 8.
Buckley, J. }

In re EDWARD CHESTER & CO. (LIMITED). (*a.*)

Company—Winding-up—Supervision order—Service of liquidator—Costs—Companies Winding-up Rules, 1890, *r.* 35.

In rule 35 of the Companies Winding-up Rules, 1890, *the words "unless presented by the company" govern the rule throughout, and not merely the first paragraph, and therefore, where a company in course of voluntary winding up presents a petition for a supervision order, it is not necessary to serve the petition upon the liquidator, and the costs of doing so will not be allowed.*

This was a petition by the above company, which was being wound up voluntarily, for a continuance of the winding up under the supervision of the court. The liquidator had been served with the petition, and appeared.

The order asked for having been made, the petitioners asked that the costs of serving the liquidator, and of his appearing, should be allowed.

Clauson, for the company.—The petitioners were obliged to serve the liquidator under the last paragraph of rule 35 of the Companies Winding-up rules, 1890. The costs of the service, and of his appearing, ought consequently to be allowed.

Hollams, for the liquidator.

Eve, K.C., and *W. E. Vernon*, for creditors, supported the petition.

BUCKLEY, J.—I do not think that the liquidator need have been served in such a case as the present one. The words "unless presented by the company," in rule 35, govern the rule throughout, and not merely the first paragraph. As, however, the matter was not quite clear I shall allow the costs of the service of the liquidator, and of his appearing in the present case, but I shall not allow them in future cases of this kind.

Solicitors, *Hollams, Sons, Coward, & Hawksley; Slaughter & May.*

Chan. Div. } Dec. 4, 7, 8.
Swinfen Eady, J. }

DUNLOP PNEUMATIC TYRE CO. (LIMITED) AND PNEUMATIC TYRE CO. (LIMITED) *v.* MOSELEY & SONS (LIMITED) AND INDIA RUBBER AND TYRE REPAIRING CO. (*b.*)

Patent—Infringement—Combination patent.

A patent, consisting in a particular combination, cannot be infringed unless the whole of it is taken, and the manufacture and sale of a subordinate part thereof is not unlawful unless such part be new, useful, and patentable in itself. Further, a maker and seller of an unprotected subordinate part of a combination patent is not burdened with the duty of enquiring into the intentions of a purchaser of such part, notwithstanding that the ultimate purposes for which the part bought might be used by the purchaser, would infringe the combination patent.

Action.

This was a consolidated action in which the plaintiff companies, which were the owners of the Welch patent for improvements in rubber tyres and metal rims

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

(*b.*) Reported by H. STEPHEN, Esq., Barrister-at-Law.

or felloes of wheels for cycles and other light vehicles, and the Bartlett patent for improvements in tyres or rims for cycles and other vehicles, asked for an injunction to restrain the defendant, David Moseley & Sons (Limited) from infringing the said patents by making selling and offering to sell beaded edges and other tyres, and to restrain the defendant, the India Rubber and Tyre Repairing Co., from selling those articles when made by and sold to it by the other defendant.

T. Terrell, K.C., J. C. Graham, and *A. J. Walter,* for the plaintiffs. — Defendant Moseley infringed plaintiffs' patents by making and putting on the market a cover which could not be used except for the purposes of the said patents, the cover being of the substance of the patented combinations. The defendant Moseley had committed an infringement by selling the cover to the defendant, India Rubber and Tyre Repairing Co., which put together the tubes and rims, and became a joint tort feasor in the latter's infringement. Moseley should have enquired into the objects with which the cover was bought. A person who sells powdered zinc with an invitation to the purchaser to use it so as to infringe a patent for using zinc powder to prevent corrosion in steam boilers may be restrained from so doing. Again, a person who takes the pith or marrow of a combination patent infringes the patent, though such part is not specially specified in the claim, since a patentee's rights do not depend on the wording of the claim but on what is really the invention.

They cited *United Telephone Co.* v. *Dale,* 32 W. R. 428, 25 Ch. D. 778, 782; *Innes* v. *Short and Beal,* 15 Rep. Pat Cas. 449; *Dunlop Pneumatic Tyre Co.* v. *Neal,* 47 W. R. 632, [1899] 1 Ch. 807.

Cripps, K.C., Eve, K.C., and *O. Leigh Clare,* for defendant Moseley.

MacNaghten, K.C., and *M. Romer,* for defendant India Rubber and Tyre Repairing Co., contended that plaintiffs' patents had not been infringed either by the making and selling of the covers by the former defendant or by the selling of them by the latter defendant after their manufacture and sale by the former.

SWINFEN EADY, J.—It is not disputed that the defendant, David Moseley & Sons (Limited), was making and selling outer detachable tyre covers, or covers with a lining suitable for the insertion of wires in such a manner that the covers as sold by it were adapted for use in the manner described in the Welch patent, but not necessarily solely for that purpose, and that it also made and sold a cover with beaded edges which was capable of being used as described in the Bartlett patent, and this for a considerable period of time; the only issue is infringement or no infringement of the plaintiffs' patents, and it is alleged that the covers can only be used in one or the other of the patents and that their mere sale infringes the patents in question. Both patents have been the subject of numerous decisions and I can add nothing to the construction placed on them. With respect to the Welch patent it is clear that the invention consisted in a particular combination. [His lordship cited *Dunlop Pneumatic Tyre Co. (Limited)* v. *New Lamb Tyre Co.,* 19 Rep. Pat. Cas. 384, 388; *Pneumatic Tyre Co. (Limited)* v. *East London Tyre Co.,* 14 Rep. Pat. Cas. 573, 581; *Pneumatic Tyre Co. (Limited)* v. *Leicester Pneumatic Tyre Co.,* 16 Rep. Pat. Cas. 531, 542.] With respect to the Bartlett patent it is also clear that a particular combination is the basis of the patent (citing *Gormully and Jeffery Manufacturing Co.* v. *North British Rubber Co.,* 15 Rep. Pat. Cas. 245, 254). It has been settled by the House of Lords in *Clark* v. *Adie,* 2 App. Cas. 315, that there is no infringement of a patent solely for a combination unless the whole is taken, and that in order to protect a subordinate integer it must be new and useful and patentable *per se.* Now it is clear that rims usable in both the tyres have for a long time been openly made and sold, and, in short, are ordinary articles of commerce. It is alleged that the defendant Moseley has infringed the patents by selling covers which probably would be used in either the Welch or Bartlett combination: but those combinations do not exhaust the possible purposes for which they can be used. As a matter of law, the defendant Moseley is not infringing either patent, otherwise it could not carry on its trade of manufacturing rubber. Selling for export is lawful, so is selling to licensees of the plaintiffs and to say that the ultimate purposes of purchasers might infringe the patents, and that it is the duty of the defendant to make inquiry as to the uses to which the covers are to be put by their purchasers is to throw on it a burden not required by the law. The mere manufacture and sale of one of the component parts is not an infringement of the whole patent, notwithstanding the *dictum* of Pearson, J., in *United Telephone Co.* v. *Dale,* 32 W. R. 428, 25 Ch. D. 778, 782, that "if there was a patent for a knife of a particular construction, and an injunction was granted restraining a defendant from selling knives made according to the patent, and he was to sell the component parts so that any schoolboy could put them together and construct the knife, surely that sale would be a breach of the injunction."

Mr. Terrell laid stress on *Innes* v. *Short and Beal,* but that case is distinguishable from this; he insisted also that the intent of the defendant was material, but since the defendant may lawfully make and sell these covers it may make and sell them with any intent. [His lordship here cited *McCormick* v. *Gray,* 9 W. R. 809, 7 H. & N. 25.] On the point whether a sale of one component part infringes an entire combination it is quite clear that, in the case of a combination patent, it is only the combinations claimed that may not be used, the other elementary combination may be used unless it is within the purview of the claim (citing *Townsend* v. *Haworth,* 12 Ch. D. 831*n*; *Sykes* v. *Howorth,* 27 W. R. Dig. 147, 12 Ch. D. 768; and distinguishing *Dunlop Pneumatic Tyre Co.* v. *Neal,* 47 W. R. 632, [1899] 1 Ch. 807). With respect to the India Rubber and Tyre Company the plaintiff's proof has entirely failed to meet his allegations.

Action dismissed with costs.

Solicitors, *J. B. & F. Purchase; Gregory, Rowcliffe, & Rawle,* for *Woodcock,* Manchester.

Prob. Div. & Adm. Div. } Oct. 30.
Divorce. }

CONSTANTINIDI *v.* CONSTANTINIDI AND LANCE. (*a.*)

Divorce—Adultery of petitioner—Statutory discretion—Conduct conducing—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.

The Court held that if a wife leaves her husband because she has transferred her affections to another man, and her husband is aware that that is the cause, and he thereafter commits adultery, such conduct in the wife is conduct conducing to the husband's adultery; and exercising its discretion under section 31 *of the Divorce Act,* 1857, *it further held that, in the circumstances of the case, it was justified in granting the husband a decree* nisi *for dissolution of marriage.*

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

The petitioner, Demetrius Sophocles Constantinidi, prayed for a decree dissolving his marriage with Julia Constantinidi, *née* Ralli, on the ground of her bigamy and adultery with Dr. Henry William Lance, against whom damages were claimed.

The respondent and co-respondent denied the charge, and the respondent further alleged that before she married the co-respondent at Sioux Falls, Minnehaha, U.S.A., she had obtained a decree for the dissolution of her marriage with the petitioner in the court of the city of Sioux Falls.

The respondent counter-charged adultery against the petitioner with a woman named Madame Lester, otherwise Blitz, at Ostend, which charge was also denied.

Lawson Walton, K.C., and *Priestley* were for the petitioner.

Bargrave Deane, K.C., and *Barnard*, for respondent.

Eldon Bankes, K.C., and *Cassell*, for the co-respondent.

In the result the jury found that the respondent and co-respondent had committed adultery, and that the petitioner had committed adultery, and they assessed the damages at £25,000. The petitioner prayed the court to exercise its discretion under section 31 of the Matrimonial Causes Act, 1857.

The following cases were cited in the course of argument: *McCord* v. *McCord*, 3 P. & D. 237; *Morgan* v. *Morgan*, 1 P. & D. 644; *Grosvenor* v. *Grosvenor*, 34 W. R. 140; *Goode* v. *Goode*, 2 Sw. & Tr. 253: *Collins* v. *Collins*, 9 P. D. 231; and *Coleman* v. *Coleman*, 1 P. & D. 81.

The facts are fully stated in the following judgment.

JEUNE, P., said: In this case adultery was proved to have been committed by both the petitioner and the respondent; and the question is whether, in the exercise of the discretion vested in me by section 31 of the Divorce Act of 1857, I ought to pronounce a decree against the wife. The facts, so far as they are material, are as follows: The parties were married on the 26th of October, 1889, and made the acquaintance of the co-respondent in 1896. Before that time the husband and wife had lived on terms of great affection; but in the autumn of that year the respondent and co-respondent met in the country at the house of her father, whose medical adviser the co-respondent was; and when the husband returned from a visit to Switzerland in October, 1896, a marked coldness was exhibited by the wife towards the husband, and matrimonial intercourse was refused by her. The wife left her husband and went to Ireland in 1897, clearly with the intention of never returning to him. In December, 1899, the husband obtained a decree of judicial separation on the ground of desertion, the wife offering no real defence. In February, 1901, she went to Sioux Falls, in the State of Dakota, U.S.A., and so commenced what was no doubt a residence intended to qualify for a divorce under the law of that State. She obtained such a divorce in February, 1902, and almost immediately after married the co-respondent, who had joined her in Dakota, and thenceforward cohabited with him. It was proved that in July and August, 1901, and also 1902, the husband committed adultery with a woman of loose character. From the facts proved in the case I draw the following conclusions: (1) That when the wife left the husband in 1897 she did so because she had transferred her affections to the co-respondent, and the petitioner believed this at the time; (2) that the husband's misconduct did not cause or conduce to that of the wife, inasmuch as, without inferring any act of adultery on her part before the marriage with the co-respondent, as no such adultery was either directly proved or charged, there can, I think, be no doubt that at least when she went to Dakota in February, 1901, and probably some time before, she was contemplating an American divorce from her husband and consequently a marriage to and adultery with the co-respondent; (3) that the wife's conduct in leaving her husband in order, after an interval, to commit adultery with the co-respondent, may, in the sequence of events, have caused, or conduced to, the adultery of the husband. How far it did so I shall presently consider. In *Symons* v. *Symons*, [1897] P. 167, 45 W. R. Dig. 46, I had occasion to consider the exercise of a discretion under section 31 in a suit by a wife against a husband, in which it was proved that the husband had committed adultery, and that the wife had subsequently committed adultery, and in which it was, as I held, also shown that the husband by his wilful neglect or misconduct had caused, or conduced to, the adultery of his wife. In that case I thought it my duty to consider carefully the terms of the Act and the authorities bearing on it; and in the result I held that the wife was not, by reason of her adultery, disentitled to a decree dissolving her marriage. I do not think it necessary in the present instance to repeat the various considerations which I stated on that occasion. But the very able argument of Mr. Lawson Walton having left on my mind the impression that the present case was governed by *Symons* v. *Symons*, I reserved my judgment in order that I might carefully reconsider that case and the numerous authorities relating to the matter. It is not, I think, desirable to allow ourselves to dwell exclusively, or even principally, on these authorities. The question, after all, is one of the effect to be given to the provisions of section 31 of the Divorce Act of 1857, and the state of the law in view of which that section was enacted. There can be little or no doubt as to the object of the Legislature in conferring the discretion which is permitted by that section. Before the Act of 1857, the Ecclesiastical Court, with regard to divorce *a mensa et thoro*, in cases of mutual misconduct, held fast by the maxim of the canon and also the civil law: "*Viro atque uxore invicem accusantibus, causam repudii dedisse utrumque pronuntiatum est: id ita accipi debet ut ea lege quam ambo contempserunt neuter vindecetur; paria enim delicta mutua pensione dissolvuntur*" (Digest, 24, 3, 39). How rigidly the Ecclesiastical Courts adhered to this principle may be gathered from the case of *Otway* v. *Otway*, 13 P. D. 141, 37 W. R. Dig. 84, in the Court of Appeal. The case of *Proctor* v. *Proctor*, 2 Hagg. C. 292, decided in 1819, contains, in the judgment of Sir William Scott, a complete exposition of the law of the Ecclesiastical Courts on this subject, and makes it clear that those courts proceeded on the fixed and almost mechanical principal of compensation or set-off, and did not at all regard the special circumstances of individual cases. I have pointed out in *Symons* v. *Symons*, [1897] P. 167-175, that the House of Lords took a very different course, and always inquired into the conduct of a petitioner seeking a divorce, refusing relief if it was shown that there had been on his part a want of due care and caution. I came then to the conclusion to which I now adhere, that the intention of the Legislature was to correct the over-rigid procedure of the ecclesiastical courts, and in preference to follow the more elastic and juster procedure of the House of Lords; and with this intention they conferred a discretion on the court without imposing specifically any limitation or other directions with regard to its exercise. It is quite true that in *Morgan* v. *Morgan*, 1 P. & D. 664, Lord Penzance used language, repeated with approval in subsequent cases by Sir James Hannen and Mr. Justice Butt, which

has been considered to impose special restrictions on the discretion of the court and to render it imperative in every case to proceed on some specific principle. But I think that these restrictions are more apparent than real. If it is remembered that the causes for which the court may in the exercise of its discretion allow a divorce, notwithstanding misconduct by a petitioner, are to be taken in combination, and according to their several degrees of force, and also that the list of such causes is not a closed book, but may be extended as occasion arises, I think that the expressions used by the learned judges whom I have mentioned will be seen not to amount to more than an emphatic assertion of the grounds on which and the manner in which a judicial, as opposed to an arbitrary, discretion should in any and every case be exercised. It is not, I think, easy to understand why the Legislature, having determined to abrogate the fixed rule of the Ecclesiastical Courts, still thought it desirable to maintain the refusal of a divorce to petitioners guilty of misconduct, and to insist on retaining within the bonds of matrimony two persons, both of whom have proved unmindful of their marriage vows; and therefore it is difficult to conjecture with any confidence the principles upon which the Legislature intended that judges should act in the exercise of the discretion conferred on them, of the nature of which principles the Legislature abstained from giving any indication. I think, therefore, one can find guidance only by reference to general principles of justice; and no principles of justice in regard to this matter seem to me clearer than these; first, that a petitioner by whom adultery has been committed should not be allowed to obtain a divorce if such adultery in any serious degree contributed to the misconduct of the respondent; and, secondly, that a respondent should not be allowed to avoid the consequences of proved misconduct by putting forward an act or acts of misconduct on the part of the petitioner for which the respondent was himself or herself in any serious degree responsible. To hold otherwise would be to allow a wrongdoer to profit by wrongdoing. I have no doubt that the Legislature intended that the court should act on these principles, whether or not it intended that the court should act on any other principles. On these grounds I had no hesitation in *Symons* v. *Symons* in coming to the conclusion, to quote the headnote in that case, that "the circumstances to be considered by the court in exercising its discretion under section 31 of the Divorce and Matrimonial Causes Act, 1857, to grant a divorce to a wife who has been guilty of adultery, include the case of the husband causing or conducing to her adultery by his own wilful neglect or misconduct." I do not, of course, forget that in *Hulse* v. *Hulse and Tavenor*, 2 P. & D. 259, when the adultery of the petitioner was committed after the decree *nisi*, it might in the above view have been contended that the divorce should be allowed because the adultery of the petitioner was probably caused, in some degree, by the adultery of the respondent. But, in fact, no such point was raised, the petitioner being content, I presume, to rely on the argument that misconduct after decree *nisi* was not misconduct during the marriage within the meaning of the 31st section. I am of opinion that the present case is in law governed by *Symons* v. *Symons*. I am quite unable to accept the argument pressed on me, especially by Mr. Barnard, that a husband and a wife are in a different position of responsibility each to other, and that a guilty wife should be entitled to escape a divorce on account of misconduct on the part of her husband, even if she actually and directly caused it. No doubt the case of a wife's going so far as this is improbable, though not inconceivable; and no doubt also the cases in which a husband has been allowed a divorce in spite of adultery by him are extremely rare. But in principle I must decline to draw any distinction between the responsibility of the sexes in this respect, and I know of no authority for doing so. The law therefore appears to me clear. But there remains the question—whether on the facts it is shown in the present case that the respondent conduced to the adultery committed by the petitioner. I think that the verdict of the jury goes a long way to decide this question; because they could not have given the decision they did unless they were satisfied that, when the respondent left the petitioner in 1897, she was already under the influence of the co-respondent and had in fact then transferred her affection to him. But I do not think I am bound by the decision of the jury in this matter, though I agree with it. And, forming my own opinion, I cannot for a moment doubt that the petitioner was quite right in what he told us was his belief, that his wife had yielded to the co-respondent, whether to the extent of actual adultery or not I do not pause to consider, before his return from Geneva in October, 1896, and that when she deserted him in 1897 she was unfathful to him in heart and intention, though perhaps not then in person. Under these circumstances, did the wife's conduct conduce to the subsequent adultery of the husband? I have in *Synge* v. *Synge*, [1900] P. 180, 48 W. R. Dig. 56, and I think also in other cases, repudiated, as emphatically as I could, the suggestion that a wife who refuses directly or virtually by desertion the matrimonial rights of her husband, thereby justifies him in committing adultery, or can properly be said to cause his so doing by such refusal. But when a wife not only leaves her husband, but does so because she has transferred her affections to another man, and her husband believes this to be the case and is right in his belief, I cannot bring myself to say that she has not conduced to misconduct on his part. What, in fact, has she done? She has shattered his ideals of the purity of womanhood and of his wife. She has set him a glaring example. She has deprived him of what is to most men the strongest, to some men probably the only, safeguard of their virtue, respect for the mutual obligations of married life and respect for the women whose love and honour and happiness are in their keeping. After the respondent left the petitioner—for no reason, as I believe, except her intention to be unfaithful to him—I do not think she can be heard to say that she is not in a very serious degree responsible for the misconduct of her husband afterwards—and, it is to be remarked, it was apparently a long time afterwards, when all hope of reconciliation must have vanished—falling a victim to the wiles of a professional seductress. In this case I do not think it necessary to rely on a point pressed on me, that unless a divorce be granted the pecuniary relations of the husband and wife cannot be adjusted, and the large property of the wife will, in whole or part, fall into the hands of the "seducer." No such principle has ever, so far as I know, been invoked, and I do not discuss it now; but I do not wish to say that in a future case it may not be admissible. On the whole, therefore, I am of opinion that this is not a case in which I ought to refuse to the petitioner the relief to which his wife's infidelity has entitled him, and there will be a decree *nisi* with costs.

Solicitors for the petitioner, *Hollams, Son, Coward, & Hawksley.*

Solicitors for the respondent and co-respondent, *Lewis & Lewis.*

House of Lords.

From C. A. (England). Aug. 6, 1903.

BWLLFA AND MERTHYR DARE STEAM COLLIERIES v. PONTYPRIDD WATERWORKS CO. (a.)

Lands Clauses Act—Compensation—Notice to treat—Colliery-owner to leave coal unworked—Subsequent rise in price of coal—Basis of assessment—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 22, *and* 25.

Where a notice to treat has been given under the Lands Clauses Act, 1845, *for the assessment of compensation payable in respect of certain seams of coal which a waterworks company requires the coal owner to leave unworked, the arbitrator is entitled to take into consideration, in assessing compensation, a rise in the value of coal which has taken place subsequently to the notice to treat.*

Decision of the Court of Appeal (50 *W. R.* 627, [1902] 2 *K. B.* 135) *reversed.*

Appeal from an order of the Court of Appeal (50 W. R. 627, [1902] 2 K. B. 135) (Vaughan Williams, Romer, and Mathew, L.JJ.), which reversed that of the King's Bench Division (Ridley and Phillimore, JJ.) (50 W. R. 135, [1901] 2 K. B. 798), where the award stated in the form of a special case is set out at length.

The facts are given in Lord Macnaghten's judgment.

Upjohn, K.C., and *W. D. Benson*, for the appellants.—This is not a case of a purchase of the coal: *Great Northern Railway* v. *Inland Revenue Commissioners*, 49 W. R. 261, [1901] 1 Q. B. 416. The compensation should be what the mine-owner would have received if he had been allowed to work the coal.

Smith v. *Great Western Railway*, 3 App. Cas. 165, was referred to.

Balfour Browne, K.C., and *Trevor Lewis* (*Francis-Williams, K.C.*, with them), for the respondents.

Upjohn, K.C., replied.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—I think in this case that Phillimore, J., stated the question for debate with perfect accuracy when he said that "the true inquiry here is not of the value of the coalfield or what the value of the coal is, but what would the colliery company, if they had not been prohibited, have made out of the coal during the time it would have taken them to have got it."

It was not a purchase of the coal, nor is it analogous to a purchase of the coal. It is what it is, and it appears to me that considering what it is I think the question propounded is solved by the statement of what it is. If it were a purchase, the rights and liabilities, and profits, if there were any, would pass to the purchaser, and its value, with all its possibilities, would pass at the time the notice to treat was given; but, if the question is that which I think it was, then the person who had to make the calculation of what was the compensation ought to have arrived at the sum which experience has now shown to be the correct amount. It is true that he probably would not have been able to arrive at that sum accurately, but he ought to have calculated, upon such material as he had, what would be the true sum. He ought to have considered the possible rise or fall of prices; but, as I have said, he probably would have made a mistake. We now know what would have been the true sum, and the proposition baldly stated appears to be that, because you could not arrive at the true sum when the notice was given, you should shut your eyes to the true sum now you do know it, because you could not have guessed it then.

It is, of course, only an accident that the true sum can now be ascertained with precision; but what does that matter? It seems to me that the whole fallacy of the contention that you may not look to the facts that have occurred rests upon the false analogy of a sale. I am of opinion that the analogy is a false analogy, and I move that the decision of the Court of Appeal be reversed and the original judgment restored, and that the respondents pay to the appellants the costs both here and below.

Lord MACNAGHTEN.—This is a question of compensation under the Waterworks Clauses Act, 1847. The appellants are mine-owners. They are, in fact, lessees, but the term granted was long enough for working out all the minerals comprised in the lease. In reply to a notice under section 22 of the Act of 1847, the respondents, by notice in writing dated the 15th of October, 1898, required the appellants to leave unworked a seam of coal lying under a parcel of land about five and three-quarter acres in extent. On this notice the parties went to arbitration, but owing to delays, for which neither party was to blame, proceedings under the reference did not commence until June, 1900. The arbitration was finished on the 1st of February, 1901, and on the 26th of April following the arbitrator stated his award in the form of a special case. The material paragraphs in the case are as follows: "9. Coal rose in value subsequently to the date of the said notice of the 15th of October, 1898. 10. . . . the coal company claimed that, in consequence of such rise, the compensation to be paid by the waterworks company should be assessed not on the basis of the knowledge . . . possessed at the date of the said notice of the 15th of October, 1898, which basis is hereinafter called 'the first alternative,' but on the basis of the knowledge which was subsequently acquired, which last-mentioned basis is called 'the second alternative.'" The arbitrator found that, according to the first alternative, the compensation payable was £2,950; according to the second, £5,650. The Divisional Court held the appellants entitled to the larger sum. The Court of Appeal reversed this decision. They held that the appellants were only entitled to the lesser sum—that is, a sum assessed according to the first alternative.

The statement in the special case as to the rise in the value of coal seems to require a little further explanation. There is no dispute as to the facts. It was stated by the appellants and not disputed by the respondents that, but for the notice given by the respondents, the coal in the protected area would have been reached about June, 1900, and would have been worked out in about two years from that date. The appellants gave evidence before the arbitrator to prove—first, the tonnage of coal in the protected area that would have been brought to bank within each consecutive period of three months; secondly, the cost and expense of getting that coal; and thirdly, the market prices current during each period in respect of such coal. The appellants also gave evidence to prove that at the time when the rise in price came they would have been in a position to make forward contracts for the delivery of the whole of the coal within the protected area, and would thus have been enabled to secure the full benefit of the rise. It was contended by the respondents that the arbitrator ought to have rejected this evidence alto-

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

gether, and to have been guided in making his award solely by facts and circumstances known at the date of the notice of the 15th of October, 1898, and such inferences, if any, as to the probable course of future events as experts (if experts there be in such matters) could properly have drawn at the date of the notice, supposing them to be unbiassed and unprejudiced in their forecast by knowledge of what actually did occur. That view was adopted by the Court of Appeal.

The question turns on three sections of the Waterworks Clauses Act, 1847, ss. 6, 22, and 25. These sections cover much the same ground. They are to be read together; and if any defect or obscurity be found in any one recourse is to be had to the whole series of enactments: See *Smith* v. *Great Western Railway*. Section 6 requires the undertakers to make "full compensation" for the value of lands used for the purpose of their special Act, and for all damage sustained by reason of the exercise of the powers vested in them by the special or any general Act. It also provides by reference to the Lands Clauses Consolidation Act, 1845, for the adjustment of compensation and the enforcement of payment. Section 22 enacts that if a mine-owner desires to get the minerals lying under the property of the undertakers, or within the prescribed distance from their works, he is to give thirty days' notice before commencing to work, and then, where danger is apprehended, the undertakers may by counter-notice prevent working within a specified area on the terms of making compensation. In the absence of agreement, compensation is to be made "as in other cases of disputed compensation." Section 25 provides for payment by the undertakers of all "expenses and losses" occasioned by the exercise of their powers as well as payment for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the works or by reason of apprehended injury from the working of such mines or minerals; and again, in regard to the question of compensation, reference is made to the Lands Clauses Consolidation Act. I cannot find in this group of sections any provision or even any suggestion to the effect that a line is to be drawn at the date of the counter-notice, and that all that occurs after that date is to be as if it had never happened.

It appears to me that the case put forward on behalf of the respondents is based on a false analogy. The counter-notice by the undertakers following a notice of the mine-owners under section 22 does not operate to make a contract or to transfer property. It is not even a step towards a contract or a step towards expropriation. The undertakers acquire no property in the minerals. The property remains where it was. The mine-owner is prohibited from working, and the undertakers are bound to make full compensation. This is all. If the question goes to arbitration the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion, it is his duty, I think, to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him why should he shut his eyes and grope in the dark? The mine-owner prevented from working his minerals is to be fully compensated—the Act says so. That means that as far as money can compensate him he is to be placed in the position in which he would have been if he had been free to go on working. Here it has been proved to demonstration that if he had not been interfered with he would have made between £5,000 and £6,000. I cannot understand upon what principle it is maintained that he should be content with half—and that half is full compensation.

I think the appeal ought to be allowed, and the judgment of the Divisional Court restored, with costs here and below.

Lord Shand has asked me to add that he concurs in this opinion.

Lord ROBERTSON.—The following propositions in law seem to be perfectly clear: The coal in question was not taken and acquired (and could not be taken and acquired) by the respondents; but, on the contrary, remained the property of the appellants. After the notice of the 15th of October, 1898, the appellants were disabled from working the coal. The resulting pecuniary obligation on the respondents was to pay compensation to the appellants for being thus prevented from working the coal. It follows that what is due to the appellants is not the price on a transaction of sale, but compensation for a continuing embargo on working. The sum to be paid would thus be whatever sum could best be made out to be the profit that would have been made by the appellants if they had been free to work. Any estimate of this profit necessarily involves the question, How long would the coal in question take to work out?—if for no other reason than in order to compute the cost of working. If the question thus presented has to be solved *ab ante*, the arbitrator, or whoever has to deal with it, must form the best conjecture he can of probable prices and probable wages during the period required to work out the area in question. But these calculations are resorted to merely in the absence of facts, and not because the time to be considered is that moment of time when the notice of the 15th of October, 1898, was presented. And if, owing to the course of the procedure, the period required for the working out of the coal in question has come to be a matter of history, then estimate and conjecture are superseded by facts as the proper *media concludendi*. I do not mean that the proper course in awarding compensation is to wait for the expiry of the period required for working out the coal. On the contrary, it is natural that the compensation should be assessed once for all, and by estimate. But the point is that, as in this instance the facts are available, they are not to be shut out.

I have only to add that my view exactly coincides with that of Phillimore, J., when he says, "The true inquiry here is not of the value of the coalfield or what the value of the coal is, but what would the colliery company, if they had not been prohibited, have made out of the coal during the time it would have taken them to have got it."

The opposite view seems to me to rest on the erroneous analogy between the notice given on the 15th of October, 1898, and a notice where land is taken. The notice of the 15th of October is merely, and purports to be merely, a notice of the willingness of the respondents to make compensation for what they require to be left unworked, and so it is described in section 23 of the Act in question.

Lord LINDLEY concurred.

Appeal allowed.

Solicitors for the appellants, *Bell, Brodrick, & Gray*, for *C. & W. Kenshole*, Aberdare.

Solicitors for the respondents, *Wrentmore & Son*, for *Frank James & Sons*, Cardiff.

Court of Appeal.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Dec. 19.

RIGBY & CO. v. COX. (a.)

Master and servant—Employers' liability—Accident—Compensation—Appeal—Costs—Refusal of judge to direct review of taxation—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., cl.* 12; *Sched. II., cl.* 4.

An appeal will not lie to the Court of Appeal from the refusal of a county court judge to direct a review of taxation of the costs of an application to vary a weekly payment under Schedule I., clause 12, *of the Workmen's Compensation Act*, 1897.

Appeal from a decision of his Honour Judge Emden, sitting at the Bromley County Court.

The employers of a workman, who had been injured by an accident, agreed to pay him a weekly sum as compensation under the Workmen's Compensation Act, 1897, and a memorandum thereof was registered under clause 8 of Schedule II. to the Act. The employers subsequently applied to the Bromley County Court judge under clause 12 of Schedule I. for a review of the weekly payment upon the ground that the workman was able to resume work. The county court judge dismissed the application with costs on scale B. Upon taxation the registrar taxed the costs under scale B., as upon an interlocutory application in the arbitration, upon the ground that the judge had made a general order applicable to all his courts that the costs of an application to review a weekly payment were to be so taxed. The workman applied to the county court judge to direct a review of taxation, when the judge stated that he had laid down a general rule that the costs of an application to vary an award or an agreement registered under clause 8 of Schedule II. to the Workmen's Compensation Act, 1897, should be taxed as a mere application in the matter of the arbitration and not as an original arbitration or proceeding; and he accordingly refused to direct a review of the taxation.

The workman appealed to the Court of Appeal.

Duckworth, for the employers, took the preliminary objection that the appeal did not lie direct to the Court of Appeal. The Court of Appeal has only jurisdiction to hear appeals from a county court judge when acting as an arbitrator under the Workmen's Compensation Act, 1897: see Schedule II., clause 4. The county court judge's functions as arbitrator came to an end when he made the award dismissing with costs the application to review the weekly payment. The application for a review of the taxation of those costs was a proceeding subsequent thereto, and was made to the judge in his capacity as county court judge, and subject to the County Court Rules: *Keane* v. *Nash*, 88 L. T. 790, 51 W. R. Dig. 102; *Leech* v. *Life and Health Assurance Association*, 49 W. R. 482, [1901] 1 K. B. 707; Workmen's Compensation Rules, 1898, r. 33. The appeal, if any, did not lie direct to this court.

Harold Morris (*Chester Jones* with him), for the workman.—The application to review the weekly payment under Schedule I., clause 12, was an arbitration under the Act, and the taxation of the costs took place in that arbitration. The application for a review of the taxation was therefore made in the arbitration, and an appeal lies direct to the Court of Appeal. In *Keane* v. *Nash* there was an action under the Employers' Liability Act, 1880, which was dismissed, and the county court judge thereupon, at the request of the plaintiff, proceeded to assess compensation under section 1, sub-section 4, of the Workmen's Compensation Act, 1897. The question in that case arose as to the taxation of the costs of the action. Here there was no action, only an arbitration under the Act, and the question arises as to the taxation of the costs of that arbitration. The appeal therefore lies to this court.

He referred to *Skeggs* v. *Keen*, 1 Minton-Senhouse W. C. C. 35; *Jones* v. *Great Central Railway Co.*, 4 Minton-Senhouse W. C. C. 23.

COLLINS, M.R.—In my opinion the preliminary objection must prevail. The county court judge made an award dismissing an application to review a weekly payment and allowing the workman his costs on scale B. He clearly at that time was exercising the functions of an arbitrator under the Workmen's Compensation Act, 1897. The registrar taxed the costs as upon an interlocutory application, and upon an application for a review of the taxation the county court judge stated that he had given a general direction that the costs of such an application should be so taxed, and he refused to direct a review of taxation. An appeal is then brought here. It seems to me that the case is covered by the decision in *Keane* v. *Nash*. The headnote in that case states that "an appeal will not lie to the Court of Appeal from the refusal of a county court judge to direct a review of the taxation of costs under an order made under section 1, sub-section 4, of the Workmen's Compensation Act, 1897." That decision, I may say, applies equally whether the judge reviews or refuses to review the taxation. In the present case the judge, as in that case, refused to direct a review of taxation. No appeal therefore lies from his decision to this court. I express no opinion as to whether there is any appeal at all. I merely say that no appeal lies direct to this court.

MATHEW, L.J.—I am of the same opinion, and I say so with some reluctance, because I cannot help thinking that there is apparently a contradiction between the award of the county court judge allowing costs upon scale B and the taxation of those costs. The judge seems to have acted upon a general rule which, in my opinion, he ought not to have laid down.

COZENS-HARDY, L.J.—I am of the same opinion. I desire to express my agreement with the observations of Mathew, L.J., as to the propriety of this general rule.

Appeal dismissed.

Solicitors for the workman, *Shaen, Roscoe, Massey, & Co.*

Solicitors for the employers, *W. Hurd & Son.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Dec. 17.

HIGGINS v. CAMPBELL & HARRISON (LIMITED).
TURVEY v. BRINTONS (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation — Disease — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

A workman who was employed in a wool-combing factory had to cart some wool to the washing machine in the factory, and in doing so he had to pass close to some Persian wool and thereby caught anthrax, which was a disease commonly imported in Persian wool.

A workman, who was employed as a wool sorter in a factory, in the course of his duty had to handle Persian wool, from which he caught anthrax.

Held, that, in both cases, the injury was caused by "accident" arising out of and in the course of the employment within the meaning of section 1 of the Workmen's Compensation Act, 1897.

These were two appeals under the Workmen's Compensation Act, 1897.

HIGGINS *v.* CAMPBELL & HARRISON (LIMITED).

Appeal from an award of his Honour Judge Bompas, at the Bradford County Court.

The applicant was a workman in the employment of the respondents, Campbell & Harrison (Limited), in a wool-combing factory at Bradford. The bales of wool, when unloaded from the carts which brought them to the factory, were placed on cars, and the applicant's duty was to run those cars of wool to the washing machine, where the wool was washed. On the 14th of November, 1902, when the applicant was running the cars, he had to pass close to some brown Persian wool, and consequently caught a disease called anthrax. Anthrax was a disease that was common in Persian sheep, and when the infected sheep were killed their skins were packed with other skins and sent over to this country. The anthrax germ or bacillus was in this way imported into this country. Persian skins did not necessarily contain the anthrax bacillus, some consignments being free from it. The applicant on the day in question had a pimple on his neck, and his collar rubbed it off, and the medical evidence was to the effect that the anthrax germ probably settled on the raw surface where the pimple was rubbed off, and brought on the disease which was known as cutaneous anthrax. The evidence showed that workmen employed in wool-sorting were exposed to the risk of catching anthrax, but that it was not inevitable that they should catch it; and that wool-sorting was one of the unhealthy employments which were placed under strict regulations by the Home Office under the Factory Acts. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, it was contended that this was personal injury by "accident" arising out of and in the course of the employment within section 1 of the Act. The county court judge held that there was a distinction between accidents and disease, and disease as such did not come within the Act. It seemed to him that the Act only applied if the accident itself caused the injury. In the present case the anthrax germ alighted on a raw surface on the applicant's body. That in itself caused no injury; it was the disease which arose from the germ multiplying in the blood that was the cause of the injury, and that, in his opinion, was not within the Act. In the cases which had been decided on the meaning of the term accident in policies of insurance the distinction between accident and disease had been repeatedly pointed out—see especially the judgment of Cockburn, C.J., in the case of *Sinclair* v. *Maritime Passengers Assurance Co.*, 3 E. & E. 478—and he made an award in favour of the respondents.

The award in this case, and also the award in the next case, were made before the decision of the House of Lords in *Fenton* v. *Thorley & Co.*, *ante*, p. 81, [1903] A. C. 443.

J. J. Wright, for the appellant.—This was an "accident" within section 1 of the Workmen's Compensation Act, 1897. There was here a fortuitous element, as it was not inevitable that a workman employed in a wool-combing factory should catch anthrax. It was a mishap or untoward event not expected or designed: *Fenton* v. *Thorley & Co.*, *ante*, p. 81, [1903] A. C. 443; *Boardman* v. *Scott*, 50 W. R. 184, [1902] 1 K. B. 43. The fact that it was the applicant's duty to deal with this infected wool made it an accident arising out of and in the course of his employment. *Hensey* v. *White*, 48 W. R. 257, [1900] 1 Q. B. 481, has been overruled by *Fenton* v. *Thorley & Co.*

He also referred to *Walker* v. *Lilleshall Co.*, 48 W. R. 257, [1900] 1 Q. B. 481; and *Stewart* v. *Wilsons and Clyde Coal Co.*, 5 F. 120.

S. T. Evans, K.C., and *Minton-Senhouse*, for the employers.—There was no "accident" here. This disease is called wool-sorters' disease, and the risk of catching it is an ordinary incident of the applicant's employment. The injury was caused by disease and not by accident. In *Fenton* v. *Thorley & Co.*, Lord Macnaghten carefully stated that the words "injury by accident" were introduced into the Act for the purpose of confining "injury" to a certain class of injuries, and of excluding other classes, such as injuries by disease or injuries self-inflicted by design. Every disease was in one sense accidentally contracted. If a workman contracted typhoid fever in his master's factory, as, for example, if a furnaceman to quench his thirst drank a glass of impure water, or if a workman, when working in an open building, caught cold, that could not be said to be an injury by accident within the Act. The judgment of the county court judge was right.

Wright replied.

TURVEY *v.* BRINTONS (LIMITED).

Appeal from an award of his Honour Sir Richard Harington, the judge of the Kidderminster County Court.

The applicant for compensation was the widow of a workman named Turvey who was employed in a factory as a wool-sorter. While Turvey was sorting some Persian wool he caught anthrax in one of his eyes and died from the effects of it. He had at the time no abrasion on his body. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge said: "I find as a fact that the anthrax which was the immediate cause of death was caused by the accidental alighting of a bacillus from the infected wool on a part of the deceased's person, which afforded a harbour in which it could multiply and grow and so cause malignant disease and consequent death. I can see no distinction in principle between the accidental entry of a spark from an anvil or the accidental squirting of scalding water or some poisonous liquid into the eye. The only difference is that in those cases the foreign substance would be so large as to be visible, in this case the foreign substance is microscopic." The judge went on to state that his judgment was based on the fact that there was in this case a fortuitous intrusion of a foreign substance into the eye which by its presence there caused death; and he awarded £201 3s. 2d. compensation.

The employers appealed.

Ruegg, K.C., and *Albert Parsons*, for the employers, adopted the contentions advanced on behalf of the employers in the last case, and pointed out that the Factory and Workshop Act, 1901, had drawn a distinction between accidents, which were dealt with by sections 19 to 22, and dangerous and unhealthy

trades which were likely to cause disease, and which were dealt with by sections 73 to 86 of the Act.

Pritchett, for the applicant.

COLLINS, M.R.—These two cases raise the same point, though the decision of the county court judge in each case is different. In the first case a workman who had an abrasion on his neck caused by his collar rubbing a pimple, was, in the course of his work, brought into contiguity with some infected wool and caught a disease called anthrax. He recovered and took proceedings under the Workmen's Compensation Act, 1897. The county court judge held that there was no "accident" within the meaning of the Act, and made an award in favour of the employers. In the second case the workman had no discernable break in the skin, and when he was handling some infected wool he caught anthrax in the eye and died from the effects of it. The county court judge held that there was an "accident" within the meaning of the Act, and he awarded compensation.

Now, the whole principle which governs the construction to be placed upon the word "accident" in the Act has been altered, or at any rate modified, by the decision of the House of Lords in *Fenton* v. *Thorley & Co.* We must look to that decision as the expression of the highest tribunal in the country as to the meaning of the word "accident" as used in the Act, and we must discard the principle upon which this court proceeded in *Hensey* v. *White*, which case was overruled by the House of Lords in *Fenton* v. *Thorley & Co.* I do not stop to inquire, as it is not necessary to do so, whether the two other cases—*Lloyd* v. *Sugg & Co.* and *Walker* v. *Lilleshall Co.*, which are reported with *Hensey* v. *White*, are affected by the decision in the House of Lords. It is clear, however, that in so far as either of them was decided upon the same principle as that upon which *Hensey* v. *White* was decided they are overruled. I propose to deal first of all with the second case, because the learned county court judge has there stated the case as well as it could possibly be stated. [His lordship read that part of the county court judge's judgment set out above between inverted commas.] That appears to me to be the meaning of the word accident as used in the Act, a meaning which is well founded both in logic and on principle. The case, in my opinion, falls within the decision in *Fenton* v. *Thorley & Co.* Lord Macnaghten in that case said: "I come therefore to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word." If the learned lord had stopped at that point, a difficulty might have arisen, because it might be said that injury by disease is not an accident in the popular and ordinary meaning of the word. But he goes on: "As denoting an unlooked-for mishap or an untoward event which is not expected or designed." In my opinion the catching of anthrax in the present case was an unlooked-for mishap or an untoward event which was not expected or designed. A passage in Lord Macnaghten's speech, a little before the passage just quoted, was pressed upon us for the purpose of showing that the catching of the disease was not an accident. That passage was as follows: "Now the expression 'injury by accident' seems to me to be a compound expression. The words 'by accident' are, I think, introduced parenthetically, as it were, to qualify the word injury, confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design." In my opinion this passage was not intended to and does not cut down the later passage to which I have already referred. It seems to me that the word disease in that collocation is not meant to bear the meaning which counsel attributed to it. It means disease which is already in the workman and which he brings with him to his work. The passage does not cover the accidental catching of infection or, as I may perhaps put it, the receipt of a blow, however infinitesimal, from a germ—that is to say, the incursion of a bacillus or germ of disease into the body, in the course of the workman's employment, which may be an accident within the Act. I do not think that that passage displaces the other passage to which I have referred. In my opinion, the catching by the deceased workman here of this disease was an injury by accident within the Act. The disease arose out of and in the course of the employment, but it is not every contagion nor every disease or illness that can be said to so arise. The workman's employment was in connection with this wool, and the infected wool which he had to deal with was the direct cause of his catching the disease. In my opinion both these cases fall within the same category, and come within the definition of accident laid down by Lord Macnaghten in *Fenton* v. *Thorley & Co.* The observations of Lord Shand are similar, and none of the other lords say anything inconsistent with that view. In each case, therefore, there was an accident within the meaning of the Act. The consequence is that the appeal in the first case must be allowed and the appeal in the second case must be dismissed.

MATHEW, L.J.—I am of the same opinion. The decision of the House of Lords in *Fenton* v. *Thorley & Co.* comes to this, that if the injury is caused by an unlooked-for mishap or an untoward event not expected or designed it is caused by an accident within the meaning of the Act. This court in the earlier cases thought if the injury was due to the workman's physical infirmity and weakness it was not caused by an accident. The House of Lords have swept that away, and have made that point quite clear. In that case, however, Lord Macnaghten used words which were pressed upon us as limiting the view which the House of Lords took of the word accident, and which, if they have the effect contended for, would, in my judgment, take away a great deal from the beneficial effect of the decision. Lord Macnaghten said that "the words 'by accident' are, I think, introduced parenthetically, as it were, to qualify the word injury, confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design." It is said that the injuries in the present cases were due to disease, and that Lord Macnaghten took especial care to exclude diseases of all sorts. That does not seem to me to be a proper conclusion to draw from his language. He was there referring to the case of a workman bringing a disease with him to his work. Lord Macnaghten's description of "accident"—namely, that it "is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed"—is not, in my opinion, affected by that passage. In the same way Lord Lindley says that "an accident means any unintended and unexpected occurrence which produces hurt or loss." The facts in these two cases show that the disease was unexpected. The workman, when dealing with the infected wool, as it was his duty to do, did not expect to catch anthrax. It was quite unexpected. It was an unlooked-for mishap or misadventure throughout. The cases seem to me to be covered by the decision in *Fenton* v. *Thorley & Co.*

COZENS-HARDY, L.J.—I am of the same opinion. It is not necessary to say what conclusion I should have arrived at apart from the decision of the House

of Lords in *Fenton* v. *Thorley & Co.*, and in this connection one must not forget that the award of the learned judge of the Bradford County Court, as well as the award of the learned judge in the second case, was made before the decision of the House of Lords in that case. Having regard to that case I do not think that it is open to us to adopt the view of the judge of the Bradford County Court. It seems to me that upon the facts here there was something unexpected arising by reason of the workman dealing with this raw material in the process of manipulation. It was an an accident arising out of and in the course of the workman's employment. I desire to emphasize that, because many of the illustrations which were put before us raised considerations which were clearly outside the Act. I should be sorry to hold that every disease or illness which was contracted by a workman in his employment was an accident arising out of and in the course of his employment. It is not necessary to discuss that question. Where the infection is communicated, as it was in this case, it is an injury by accident arising out of the employment.

Appeal in the first case allowed; appeal in the second case dismissed.

Solicitors for the applicant in the first appeal, *Wrensted & Hind*, for *W. H. Scott*, Bradford.

Solicitors for the employers, *Wynne-Baxter & Keeble*.

Solicitors for the applicant in the second appeal, *Robbins, Billing, & Co.*, for *W. Waldron*, Brierley Hill.

Solicitors for the employers, *Helder, Roberts, & Co.*, for *Tunbridge & Co.*, Birmingham.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Dec. 15.

GREEN v. BRITTEN & GILSON. (a.)

Master and servant—Employers' liability—Accident—Compensation—Factory—Warehouse—Wholesale business—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A place which is used for storing goods for sale in a wholesale business, and as ancillary thereto, is a "warehouse" within the meaning of section 7 *of the Workmen's Compensation Act*, 1897.

Burr *v.* Whiteley, 19 *Times L. R.* 117, *discussed.*

Appeal from an award of his Honour Judge Addison, at the Southwark County Court under the Workmen's Compensation Act, 1897.

The applicant was a workman in the employment of the respondents, Messrs. Britten & Gilson, who carried on business as oil and colour merchants and drysalters and wholesale and retail dealers in glass. The respondents had a shop in Union-street, Southwark, where they sold oils, colours, and drysalters' goods, and in connection with the business they had two railway arches on the opposite side of a narrow street. These two arches communicated with each other, and from one of the arches, which was used as a lead and glazing shop where stained glass was made, there was an underground way to the shop. The other arch was used for storing cases of heavy glass and was called the "plate arch," the glass being polished there. It was 80 feet in depth, 36 feet wide, and 15 feet high. The cases of glass came from abroad, and when sold they were delivered in vans. Glass was constantly coming into the plate arch in carts and being sold, but customers did not go into the arch, no buying or selling going on there. One witness stated that he had seen 400 or 500 cases of glass in the arch. The business of the respondents' firm was conducted in the shop, and the glass was either supplied to the shop for customers giving their orders there, or was taken away direct from the arch in the respondents' carts when the orders were received from the respondents' travellers. No more glass was stored in the arch than was necessary for the current business, only things required in the course of the business being kept in the arches. The respondents' business was mainly a wholesale one, the retail business forming a small part of it. While the applicant was working in the plate arch unloading some cases of glass, three cases fell upon his leg and injured it. The county court judge in giving judgment said: "I find that the plate arch was used as ancillary to the business carried on in Union-street, and only so used—a store-room from which the wholesale and retail customers giving their orders either in the shop or to the travellers were supplied, goods being daily delivered there and also delivered out, and so it was not a 'warehouse' within the meaning of the Act." He accordingly made an award in favour of the respondents.

The applicant appealed.

P. T. Blackwell and *Martin O'Connor*, for the applicant. — Whether the plate arch is a "warehouse" within the meaning of section 7, sub-section 2, of the Workmen's Compensation Act, 1897, is not solely a question of fact. It is a mixed question of law and fact. When the facts have been found, it is a question of law whether a place is a "warehouse" within the Act: *Hoddinott* v. *Newton, Chambers, & Co.*, 49 W. R. 380, [1901] A. C. 49. The county court judge decided it as a question of law and not as a question of fact, and he misdirected himself in laying it down that because the arch is ancillary to a wholesale and retail business, it is not a "warehouse." The Act contains no definition of warehouse, and therefore the word must be construed in its ordinary and popular signification: *Haddock* v. *Humphrey*, 48 W. R. 292, [1900] 1 Q. B. 609. Johnson's Dictionary (1870 ed.) describes a warehouse as a "storehouse for merchandize"; and the Century Dictionary as "a house in which wares or goods are kept; a storehouse," and "a store for the sale of goods at wholesale; also, often, a large retail establishment." This arch comes within that description. A warehouse in business language includes a place where goods are stored when they come from the factory for sale in the shop. In *Burr* v. *Whiteley*, 19 Times L. R. 117, the place in question was simply used as a place where goods were kept for sale by retail in the shop above. The arch in the present case is mainly used for storing goods in connection with the respondents' wholesale business. It is therefore not a shop nor a store-room ancillary to a retail shop, but a "warehouse" within the meaning of the Act.

They also referred to *Wilmott* v. *Paton*, 50 W. R. 148, [1902] 1 K. B. 237; *Watson* v. *Cotton*, 17 L. J. C. P. 68.

Shakespeare, for the respondents.— The county court judge has found that the respondents' business is carried on in the shop. The goods are sold either in the shop or through travellers, and the fact that goods are delivered out of the arch without being first taken into the shop can make no difference. No more goods are stored than are necessary for the current business, and the arch is used and used only as ancillary to the business carried on in the shop. The case comes exactly within *Barr* v. *Whiteley*, and

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the arch is not a "warehouse" within the meaning of the Act. In no business carried on in a shop are all the orders given in the shop itself, and nearly every such business has a place where goods for which there is no room in the shop are stored. If this arch is held to be a warehouse, then every shop in London has a warehouse attached to it. A warehouse within the meaning of the Act must be a place which is used as an ordinary warehouse. The business of the occupier of the place must be looked at. If he carries on a warehousing business, the place is a warehouse within the Act. But where a person merely stores his own goods as ancillary to his real business, the place of storage is not a warehouse. The Act is intended to cover particular trades, of which the trade of a warehouseman is one. The last clause of section 4 shows that the real business of the employer is to be regarded, and not that which is merely ancillary or incidental to his real business. [He also referred to *Colvine* v. *Anderson*, 5 Fraser 255.] Further, this is a question of fact upon which no appeal lies from the decision of the county court judge, unless, indeed, which is not the case here, the evidence is such that the place is necessarily a warehouse. It is also a question of fact whether the arch was used merely as ancillary to the real business of the respondents.

Blackwell replied.

COLLINS, M.R.—This is an appeal from the decision of the judge of the Southwark County Court, and the question arises in this way: A workman met with an accident in what I will at present call a warehouse. The accident happened while the workman was unloading some heavy cases of glass. Three cases fell upon him and injured his leg. It appears that two railway arches were occupied and used by the respondents, one being used for storing cases of heavy glass, and the other being used for other purposes. The respondents also occupied a shop in which they carried on both a wholesale and a retail business, and the arch in question was used for storing cases of glass in connection with the wholesale and retail business carried on in the shop. Orders were given by customers either in the shop or to travellers, and the goods ordered were sent out from this warehouse. This arch, so far as the wholesale trade is concerned, fulfilled all the purposes of a warehouse. The retail trade which the respondents carried on formed but an insignificant part of their business. The question is whether the arch is a "warehouse" within the meaning of the Workmen's Compensation Act, 1897. The county court judge held that it was not.

It is exceedingly difficult, by reason of the course which the decisions have taken, to draw the line between that which is, and that which is not, a warehouse. The decisions have gone a long way, and have excluded certain lines of definition. It is no longer possible to say that a warehouse within the meaning of the Act is limited to a place for storing goods in contiguity to a dock, wharf, or quay, or to water. Nor is it possible to limit the word to a place where the public have a right, upon pavment, to send their goods to be stored, such as one of the large furniture repositories with which one is familiar. It has been applied to places which are only used by the owner for the storage of his own goods, and which have no connection with water transit. Was, then, this arch a warehouse within the meaning of the Act? In a recent case we adopted a principle laid down by Judge Wightman Wood in *Hunt* v. *Grantham Co-operative Society*, L. T. Journal, Feb. 15, 1902, that where a store is merely ancillary to a retail shop it is not a warehouse within the Act, as neither shops nor shopkeepers are brought within the Act. Adopting that principle, we held in *Burr* v. *Whiteley* that a large receptacle used for storing goods kept for the purpose of sale in a retail shop was not a warehouse within the meaning of the Act. Now we have a case where a wholesale business is carried on, and at the same time a retail business is carried on in the shop. Looking at the whole of the facts it seems clear that this arch was used almost entirely for the purposes of the wholesale business, and, in my opinion, the county court judge misdirected himself in saying that the store was merely ancillary to the business carried on in the shop, and was therefore not a warehouse within the Act. That result does not necessarily follow, because one must see what is the business carried on, and if it is substantially a wholesale business, the store may well be, and as far as I can see, as a matter of law it must be, a warehouse within the Act. A store which is merely ancillary to a retail business is very different from a store which is ancillary to a wholesale business. If this arch is ancillary to the wholesale business it is a warehouse; if ancillary to the retail business it is not a warehouse. It is a mixed question of law and fact, and in my opinion the county court judge misdirected himself in point of law. It seems to me that the business carried on by the respondents was in the main a wholesale business, and the arch was used substantially for the purposes of that business. The Legislature, in introducing the word warehouse into the Act, was dealing with the probable danger to workmen by reason of the handling of goods on a large scale, and that is just as likely to occur where the place in which the goods are handled is ancillary to another place in which the actual sale of the goods wholesale takes place. The case of *Colvine* v. *Anderson* was cited to us as being inconsistent with the view which I am now putting forward. I do not think so. When that case is looked at I can see no inconsistency between it and our decision in the present case. I am willing to adopt the language of the Lord President, where he says: "Upon these facts I am of opinion that the respondents' premises are not a 'warehouse' within the meaning of the Workmen's Compensation Act, 1897. There is no definition of 'warehouse' in the Act of 1897, and we know that the term is used in a variety of senses, but I think that, as used in that Act, it does not include a retail shop, which the respondents' premises practically are, otherwise every such shop would come under the provisions of the Factory Acts, which have not hitherto, so far as I am aware, been held applicable to them. While it may be difficult to define 'warehouse,' I am of opinion that, as used in the Act of 1897, it involves the idea of a place normally of considerable size, mainly used for the storage of goods in bulk, or in large quantities, and in which, consequently, the dangers incident to the handling of goods in bulk or in large quantities might naturally arise." That seems to me to express as accurately as possible the meaning of the word "warehouse" in the Act. All the elements mentioned by the Lord President are present in this case. In my opinion the county court judge was too strict in holding that the rule laid down as to a store that is ancillary to a retail business applies to this case. The arch here is ancillary to the wholesale trade, and is therefore a warehouse within the meaning of the Act. The appeal must therefore be allowed.

MATHEW, L.J.—I am of the same opinion. The county court judge has given us a full statement of the grounds of his decision, and in my opinion upon the evidence furnished to us the store was used so as in law to be a warehouse within the meaning of the Workmen's Compensation Act, 1897. The glass is

brought to the arch for the purpose of being polished, and it is stored there in the first instance for that purpose, and when polished it remains there in large quantities and in heavy packages awaiting sale whether by orders given by customers in the shop or by orders given to travellers. The county court judge thought that there was a wholesale and retail business, and that the store was ancillary to the shop where the business was carried on. In other words, that the store itself was a shop. That conclusion was arrived at by the use of the word ancillary. Without doubt that is a proper word to use where the store is merely auxiliary or appurtenant in the sense of being subsidiary to the purpose for which the business is carried on. In the present case the store was necessary and indispensable and not merely subsidiary to the carrying on of the wholesale business. I feel therefore relieved from the difficulty which the county court judge created by the use of the word ancillary. It seems to me that the mistake made by the judge lay in treating the store as nothing more than the shop. Our decision entirely follows from the decisions in *Burr* v. *Whiteley* and *Colvine* v. *Anderson*. This arch is used in connection with the wholesale business as a store where goods are kept for safe custody and for delivery to customers when sales take place. It is therefore a warehouse within the Act.

COZENS-HARDY, L.J.—I have felt and still feel some doubt in this case, but it is not sufficient to cause me to differ from the Master of the Rolls and Mathew, L.J.

Appeal allowed.

Solicitor for the applicant, *W. B. Blackwell.*

Solicitors for the respondents, *W. Hurd & Son.*

From K. B. Div.
(Vaughan Williams, Romer, and Stirling, L.JJ.) } July 8, 9, 1903.

OLIVER *v.* NAUTILUS STEAM SHIPPING CO. (LIMITED). (*a.*)

Master and servant—Employers' liability—Accident—Compensation—Damages—Payments by employer—Receipts "without prejudice"—"Proceeding"—Action against third person—Exercise of "option"—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), s. 6.

The mere fact that a workman has received money from his employer and given receipts therefor, which receipts are expressed to be without prejudice, does not amount to an exercise of his option, under section 6 *of the Workmen's Compensation Act,* 1897, *to proceed against the employer, so as to preclude him from subsequently pursuing any legal remedy which he may have against some person other than the employer. And in dealing with any particular case it should be regarded as a matter of substance, so that the omission of the words "without prejudice" from the first receipt will not irrevocably bind the workman so as to make it impossible for him to pursue his legal remedy, notwithstanding that the subsequent payments show that the parties must, as between themselves, have treated him as not irrevocably bound by the first payment.*

This was an appeal from a decision of Jelf, J.

The plaintiff was an engine-fitter in the employ of John Rodgers & Co. (Limited), ship repairers, at Cardiff, who in November, 1901, were carrying out repairs on board the steamship *Elm Branch*, belonging to the defendants.

On the 26th of November the plaintiff, by the direction of his employers, went on board the vessel, and while he was working close to the disconnected end of the steampipe from the donkey-engine a man in the employment of the defendants, and in charge of the donkey-engine, suddenly, and without any warning to the plaintiff, started it, with the result that the plaintiff was severely scalded by the escaping steam, and had to be taken to the Cardiff Infirmary. At the time of the accident the plaintiff was in receipt of wages of £2 1s. a week.

On the 2nd of December, 1901, he wrote to his employers from the infirmary informing them of his accident, but not making any formal claim for compensation. At that time he was aware that in order to claim compensation under the Workmen's Compensation Act, 1897, notice of the accident must first be given to his employers.

On the 8th of January, 1902, the agent of the insurance company, with whom the employers had effected the insurance against accidents to workmen in their employ, and to whom they had handed the notice, called on the plaintiff at the infirmary to ascertain his condition, and the plaintiff was also examined by a medical practitioner on behalf of the employers.

On the 15th of January the agent called again and paid the plaintiff £4 13s. 4d., being at the rate of £1 a week for four weeks and four days up to the 11th of January. He handed to the plaintiff, and the plaintiff signed, a receipt stating that the sum had been received from his employers per the insurance company "on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897, in respect of the accident which occurred to me on the 26th day of November, 1901."

On the 22nd of January the insurance agent called again and tendered the plaintiff £1 as a payment for the week from the 11th to the 18th of January. In the interval the delegate for a trade union of which the plaintiff was a member had called upon the plaintiff and cautioned him against accepting any further payments without stipulating that he did so "without prejudice." The plaintiff accordingly informed the insurance agent that he could only accept further payments "without prejudice." The agent assented, and said that he would make a note of it, which he then did in his note-book, and he subsequently informed the insurance company that the plaintiff would only accept payments subject to that qualification. The plaintiff then accepted the £1 and signed a receipt as before, which did not itself contain the words "without prejudice."

On the 1st of April, 1902, the plaintiff left the infirmary. Weekly payments of £1 continued to be made to him as before until the 29th of May, when he refused to accept any further payments.

On the 5th of June, 1902, he issued the writ in this action against the defendants, the owners of the steamship, claiming damages for personal injuries.

The action was tried at Cardiff by Jelf, J., without a jury, the damages being agreed at £375 in the event of the judge finding in favour of the plaintiff.

The learned judge held that the plaintiff was in the circumstances debarred by the provisions of the Workmen's Compensation Act, 1897, from pursuing his common law remedy against the defendants, and ordered judgment to be entered for the defendants.

The plaintiff appealed.

By section 6 of the Workmen's Compensation Act: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

workman may, at his option, proceed either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person."

S. T. Evans, K.C., and *J. Sankey*, for the plaintiff.—Under section 6 of the Workmen's Compensation Act, 1897, the plaintiff had an option to proceed either against the defendants for damages or against his employers for compensation, but not against both. The plaintiff cannot be said to have exercised his option, because there is nothing to show that when he accepted the money he was aware of his legal remedy against the defendants. Nor has he taken any "proceeding" against his employers so as to give up his rights against the defendants. All he has done has been to accept a sum of money paid to him by way of compensation, and this does not amount to a "proceeding" nor to a claim for compensation against the employers.

Abel Thomas, K.C., and *Parsons*, for the defendants.—The only question is whether the plaintiff in the present case has not "proceeded" and so exercised his option under the Act. When a workmen receives as compensation from his employers a weekly sum, knowing that it is as compensation, that amounts to an exercise of his option. Here the workman signed a receipt which is inconsistent with his not having exercised his option, and Jelf, J., has found as a fact that he has exercised it.

S. T. Evans, K.C., replied.

The following cases were referred to in the course of the argument: *Powell* v. *Main Colliery Co.*, 49 W. R. 49, [1900] A. C. 366; *Wright* v. *John Bagnall & Sons (Limited)*, 48 W. R. 533, [1900] 2 Q. B. 240; *Randall* v. *Hill's Dry Docks Engineering Co. (Limited)*, 48 W. R. 530, [1900] 2 Q. B. 245; *Perry* v. *Clements*, 49 W. R. 669; *Tong* v. *Great Northern Railway Co.*, 86 L. T. 802; *Field* v. *Longden & Sons*, 50 W. R. 212, [1902] 1 K. B. 47; *Little* v. *Maclellan*, 2 Fraser 387; *Beckley* v. *Scott & Co.*, [1902] 2 I. R. 504; *Thompson & Sons* v. *North-Eastern Marine Engineering Co. (Limited)*, [1903] 1 K. B. 428, 51 W. R. Dig. 106; *Lee* v. *Lancashire and Yorkshire Railway Co.*, 19 W. R. 729, L. R. 6 Ch. 527; and *Ellen* v. *Great Northern Railway Co.*, 49 W. R. 395.

VAUGHAN WILLIAMS, L.J.—In this case the plaintiff sues the Nautilus Steam Shipping Co. (Limited) upon the ground that he has been injured under circumstances which throw upon the defendants *primâ facie* a legal liability in respect of the injury which he has sustained. It is not in dispute that that is true. The defendants who are under this *primâ facie* liability rely for their defence upon section 6 of the Workmen's Compensation Act, 1897. I will read that section in a moment, but I want to say beforehand that the Workmen's Compensation Act, 1897, is not a very easy Act of Parliament to construe. It is an Act of Parliament as to which I think I may properly say that the difficulties of construction are so great that it is not desirable that in any case judges should decide more than is absolutely necessary for the decision of the particular case before them. However, I do not propose to do so myself if I can help it. Now, section 6 says this: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof." I pause for a moment to remark that we have that here, because the defendants, the Nautilus Steam Shipping Co. (Limited), are persons other than the employer liable to pay damages in respect thereof. The section goes on to provide: "The workman may, at his option, proceed either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act the employer shall be entitled to be indemnified by the said other person." Now, "the said other person" in the present case are the defendants. They contend that the plaintiff has proceeded "against his employer for compensation under this Act": that he has not only proceeded "against his employer for compensation under this Act," but that he has succeeded in obtaining payment of compensation under this Act; and that, under those circumstances, by the very terms of the 6th section, the workman cannot now bring an action against any other person legally liable to pay damages, because he has proceeded against his employer, and has received compensation from the employer under the Workmen's Compensation Act, 1897. I do not understand Mr. Evans to argue that, if it was true to say in this case that a workman had received from his employer compensation under the Workmen's Compensation Act, 1897, as such, he could afterwards sue the "other person." I do not think he contends so; but, whether he does so or not, I say that in my judgment if that had happened it is perfectly plain, whichever view you may take of the 6th section, that a workman who has received compensation from the employer under the Workmen's Compensation Act, 1897, cannot afterwards sue that other person. Therefore really the sole question in this case is: Has the plaintiff received compensation from his employer under the Workmen's Compensation Act, 1897? Mr. Evans addressed to us an argument which, I think, was based upon *Rendall* v. *Hill's Dry Dock Co.* He says that in that case it was held—there being a receipt in the identical form of the receipt in the present case—that the plaintiff there who had received moneys, much as this plaintiff has received moneys, had not thereby commenced proceedings so as to exempt himself from the operation of the limitation which is provided by section 2, sub-section 1. That is the section which says "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury." He contends that, because the Court of Appeal held in the case of *Rendall* v. *Hill's Dry Dock Co.*, that the payment and the existence of the receipt in the same form as the receipt in this case, was not held to be a claim for compensation within the six months so as to oust the operation of the statutory limitation, therefore we ought to hold in the present case that there has been no claim under the Act of 1897, and no payment under such a claim. I can only say that I do not agree with that argument. It must be remembered that, at the time when that case was decided, it was supposed—following the law as laid down by the Court of Appeal in *Powell* v. *Main Colliery Co. (Limited)*—that the claim for compensation which must be made within the six months was a claim which must be made by a step in legal proceedings, such as filing a claim for arbitration in the county court. Therefore I shall not trouble any more about that case, because I really do not think that it affects the question which we have to decide here at all. The only question which we have to decide here is whether or not there has been money paid under the Workmen's Compensation Act, 1897,

by the employer to the workman. I should have been inclined to say that if it had not been for the evidence about the receipt being "without prejudice"—which was expressed by the workman upon the occasion of receiving the second payment, and which, moreover, was noted by the agent who made that payment in his book—the action against the person other than the employer could not possibly have been brought, having regard to the terms of section 6 of the Act of 1897. I think, however, that what was said by the workman in the hospital about "without prejudice" and accepted by the agent paying the money, makes all the difference. Mr. Abel Thomas, who always is willing in any case which he argues to meet the real difficulty in the case, most frankly accepted the proposition that if there had been no first payment made without being subject to this expression of "without prejudice," he really could not have supported his case here. He accepted the position that the result of the expression "without prejudice" was that which was described by the learned judge in the court below, who said in his judgment: "I find also as a fact that the insurance company intended to pay the compensation under the Act, and that the plaintiff intended to take it under the Act; but that the plaintiff tried, after the first occasion when he got the £4 13s. 4d., to keep open any other remedy if he could." If that was so, Mr. Abel Thomas was perfectly right in saying, that, having regard to all those payments which were made under the reservation of "without prejudice," it could not be said that those payments were payments which prevented the plaintiff suing the "other person" mentioned in the 6th section of the Act, because those payments were made without prejudice (as the learned judge in the court below says) to any other remedy which the plaintiff might have. And I should go further myself and say: "Altogether without prejudice in any respect." Here there was an agent who was standing in the shoes of the employer, and who might be expected to act in the same way that an employer, taking an interest in his workmen, might be expected to act—that is to say, come to the man lying in a state of suffering, as he then was, and say: "You are entitled under the Act of Parliament, if you claim compensation, to receive each week a sum of money being the statutory proportion to your wage. Here it is, take it, and take it without prejudice; which means leaving you exactly in the same position as if you had not taken it, and not binding you to retain the money in any way if you, upon rising from your sick bed, should think it better not to accept this money from me, your employer, under the Workmen's Compensation Act, 1897, but elect to take the remedy against the other person who has the legal liability described in the 6th section of the Act."

Now, having said that, it seems to me that the only difficulty which remains is the difficulty which arises in respect of the first payment—that is, the payment which was made up on the 15th of January, 1902. That was not made subject to any such reservation as "without prejudice." The real question is, Ought we to treat the first payment as having been made subject to the same condition as the later payments? I think we ought. My reason for that is this: After all, a receipt does not in itself create any estoppel of any sort or kind. You may take all the circumstances surrounding it into consideration and ask yourself the question what really was intended by the parties when the receipt was given and taken. One must not forget—although I am not going to quarrel with Jelf, J.'s, findings—that the plaintiff understood what he was doing when he gave the receipt—understood, that is to say, that he was receiving a payment of compensation under the Workmen's Compensation Act, 1897. I do not think that it would be a fair inference to draw that the plaintiff at that moment was in such a state of bodily health and mind that really he could make no election as to what would be the best course to pursue. To my mind, you cannot have a stronger piece of evidence that this is true as to the state of things upon the 15th of January, 1902, than the evidence of the acts of the agent of the insurance company. What does the agent mean when, upon the next occasion, the next week, he accepted, as he clearly did accept, the receipt which was given subject to the qualification of "without prejudice"? He accepted it upon that occasion, and he accepted it upon all subsequent occasions until the month of May, 1902, when the plaintiff refused to receive any more payments. What did the agent think it all meant when he accepted that qualification or that reservation? Did he really think, and did he ask the learned judge who tried the case, and does he ask us now to say—or do those who really rely upon his evidence ask us to say—that when this reservation was given and accepted by him it did not matter whether the plaintiff made a reservation or whether he did not make a reservation, because he had already committed himself by the first receipt and the first acceptance; and that it was idle for him to think of reserving any other remedy that he might have because he had already precluded himself from any further option by the first payment which was made, and in respect of which he was content to give a receipt? I do not think that the agent would be willing to have that view taken of his conduct. My own view is that by quietly accepting that reservation or qualification "without prejudice," which he entered in his book and communicated to his principals without making any protest or objection to it to the plaintiff, he agreed really that the qualification was to override the whole of the receipts. Once you have got it that that qualification is to override all the receipts, it seems to me that there is an end of the defence set up by the defendants here. It may be perfectly true to say that where there is a receipt which without any qualification acknowledges the receipt of money under the Workmen's Compensation Act, 1897, there has been a claim or a proceeding within the meaning of section 6. But, in my judgment, that cannot properly be said where the payment in question is not an unqualified receipt of the money, but a receipt given by a sick man who, at the moment of giving the receipt, expressly makes the acknowledgment of the receipt subject to the qualification of "without prejudice." In my judgment, this is sufficient to dispose of the case. I think that, under those circumstances, the plaintiff was entitled to bring his action; and, as the damages have been agreed, I think that we ought to allow this appeal and reverse the decision of Jelf, J., and enter judgment for the plaintiff for £375. I only have to add that I have tried not to express any opinion, or give any judgment, upon any points other than those necessary for the decision of the present case, beyond saying that if there is a payment and a receipt of money under the Workmen's Compensation Act, 1897, and that receipt is in no way qualified, I think that that is sufficient to bring the case within the operation of section 6, and put the workman in a position of a man who has proceeded against his employer for compensation and recovered it. I express no opinion whatsoever upon the numerous points which have been very properly raised in the discussion of this case before us.

ROMER, L.J.—I have come to the same conclusion.

To my mind the question upon which the present appeal turns is simply whether the plaintiff before he commenced this action had exercised the option given to him by section 6 of the Workmen's Compensation Act, 1897, by proceeding against his employers so as to preclude him, by virtue of that section, from now suing the defendants. The learned judge in the court below came to the conclusion that the plaintiff had exercised the option in the sense that I have mentioned. But this, to my mind, is chiefly because the learned judge drew certain inferences from the facts of the case which were really not much in dispute. It is quite open to us, in my opinion, to differ from the learned judge upon the conclusion of fact which he has come to in this case. This is not like a case where a judge has seen the witnesses and has had to decide a question of fact that depended upon which side the witnesses were speaking the truth, where there was a direct conflict of evidence. Where there is a direct conflict of evidence on the main issue of fact, and the judge has seen the witnesses and declared that he believes one side and not the other, naturally enough the Court of Appeal would not like to differ from the judge in such a case as that. That is to my mind wholly distinct from the present case. I think that this case is one, as I have said, where the learned judge has proceeded upon certain inferences which he has drawn from the facts and from these facts it is as well open for us to draw inferences, as the learned judge in the court below. I think, therefore, that I am at liberty to decide this question of fact for myself upon the evidence; and looking at the evidence I come to the conclusion that it would not be right for us to hold that the plaintiff had precluded himself by what he did from now suing the defendants. In the first place let me point out that under section 6 of the Workmen's Compensation Act, 1897, it cannot, I think be said that a workman must necessarily be held to have exercised the option given to him by that Act as against his employers or as against the stranger liable, because he has taken some proceeding either at law against the stranger or under the Act against his employer. Whether the proceedings would in fact be such as to bind the workman must depend upon the circumstances of each case, including a consideration of what has resulted from the proceedings and whether or not any injustice will result if the proceedings are held not to irrevocably bind the workman. Farther, I should like for myself to say that in dealing with any particular case, I should try and look at it as a matter of substance, and decide it on the substance rather than on matters of form. I will further add that as at present advised, though it is not necessary for me to express a final opinion for the determination of this case, I am disposed to think that proceedings should not be held to irrevocably bind the workman unless those proceedings have resulted in some compensation as such, having been paid to and received by the workman so as to bind the parties.

With those observations I proceed to deal with the facts of the present case. The workman after he was injured sent in a notice of injury. That was a proceeding taken, and properly taken, by him by way of caution, and certainly was an innocent act and one that would not bind him in any way so far as concerns the point involved in this appeal. Now, until I come to deal with the question of certain payments that have been made to him, beyond sending that notice of injury it seems that the workman did absolutely nothing in this case—he did not make a formal claim; he sent in no notice of claim. The fact that a doctor subsequently visited him I only mention in passing, because it appears to me that it really has no materiality. I therefore proceed at once to the question of the payments that were made to the workman. To my mind it is most material to see how those payments were made, and in what respect they were paid, and how they were received by the workman. They were paid in this wise: The workman was lying seriously ill. I take it that, although seriously ill and in great pain, he understood sufficiently to know what was passing. An agent comes from the insurance company who have indemnified the employers—and therefore are the persons really bound to pay if the employers are liable—and offers to make a certain payment—something like a weekly payment to the workman and take a receipt. That receipt has been so often read that I need not repeat it. It purports to be a receipt of a sum on account of compensation which might be or become due to the workman under the Workmen's Compensation Act, 1897. I will take it that the workman knew what was in that receipt, and that he knew that he had a claim or might make a claim under the Workmen's Compensation Act, 1897. But when the receipt is considered, this is at any rate clear, that it in no wise bound the employers to any recognition of liability on their part. It left everything open to them except—although I need not decide the question—that it is possible after the receipt has been given it might be implied as between the parties that a claim was supposed to have been made by the workman under the Act. But the payments were not made, as I have already pointed out, as admitting any liability on the part of the employers; nor can the payments be taken, therefore, as against the workman, to have been received by him irrevocably, or as having been made on an admission as between the parties of liability on the one part and receipt in respect of an admitted right by the workman on the other. It seems to me to have left, even on the form of the receipt, the position of the parties in an intermediate state. Neither party, it appears to me, was absolutely bound by the payments, nor by the form of the receipt. But the matter does not stand there. After the first payment had been made, the agent of the insurance company comes again to make a further weekly payment. In the meantime, between the first payment and the second, the plaintiff is informed by an officer of his trades union that payments ought to be received by him expressly without prejudice, and accordingly the next payment and all the subsequent payments are made to the workman on the terms that they are received by the workman expressly "without prejudice." I infer from the officer of the trades union having come to the workman, and from the evidence in this case, that between the first payment and the second the plaintiff had been informed of what he was previously ignorant, that he might have a claim against the defendants and not necessarily a claim against the employers at all under the Workmen's Compensation Act, 1897. At any rate this is clear, that the second payment and all subsequent payments were made to and received by the workman expressly without prejudice. It is noticeable that no objection was made on behalf of the agent for the insurance company to the payments being made and received on that footing. It appears to me that under those circumstances we ought not to consider the first payment to be left standing as it were by itself as an isolated and fatal fact, but that we must look to see what subsequently took place. I think that the second payment and subsequent payments made expressly without prejudice show under the circumstances that the parties must have treated the first payment as being

held as between the parties not to have irrevocably bound the workman, but to be taken also for the purpose I am now considering as being likewise without prejudice. It is admitted before us that for the purpose of this appeal the plaintiff cannot be said to have been at all prejudiced or affected by any of the payments after the first. But it is said, and the learned judge in the court below has so decided, that because of that one payment made, and that one without anything expressly being said by the workman at the time of payment, notwithstanding the form of the receipt and notwithstanding the other circumstances—that that first payment and retainer of the money irrevocably bound the workman, and made it impossible for him, notwithstanding all the circumstances thereafter, to say that the defendants remain liable to him, as they undoubtedly were liable, at common law. I think that under the circumstances we ought not to agree with the learned judge in that conclusion. It seems to me that, looking at the substance of this case, justice requires that we should hold that the workman has not irrevocably bound himself by what he has done; and that he has not exercised his option under section 6 in such a manner as to enable the defendants to say in this case that they are free from all liability to the plaintiff under the common law. I need only say in conclusion that, in my opinion, the case of *Ryan* (or *Little*) v. *MacLellan* is perfectly distinct from the present case. In fact, if the judgments of the learned judges who decided that case are looked at, it will be seen that they base their decision on grounds which emphasise the distinction between that case and the present. They found there, as a matter of fact, the payments were made to and received by the workman as payments due in respect of an admitted liability, and as a satisfaction *pro tanto*, as they went on, of the liability under the Workman's Compensation Act, 1897. The circumstances of that case are quite distinct from the present; and, as I have said, the very reasons on which that case was based show, to my mind, that, if the learned judges had had to decide the present case, they would have decided it in the way in which we are doing. At any rate, it forms no authority against the views I am now expressing. I agree, therefore, that this appeal ought to succeed.

STIRLING, L.J.—I am entirely of the same opinion. I respectfully differ from Jelf, J., on one point. I think, as my brethren do, that he has attached too little importance to the fact that all the payments after the first were made without prejudice. I do not differ from him or question any of his findings of fact as they stand. But I think, in the conclusion at which he has arrived, he neglected to give the weight which is attributable to that circumstance. And I agree with the view which my brethren have taken of the case, having regard to the fact that the payments subsequent to the first were so made. I wish, however, to say for myself that I have great difficulty in seeing how Jelf, J.'s, decision is reconcilable with the decision in *Rendall* v. *Hill's Dry Dock Co.*, which was cited by Mr. Evans. That case must be read in connection with the case which preceded it of *Wright* v. *John Bagnall & Sons* (*Limited*). I understand *Wright* v. *John Bagnall & Sons* (*Limited*) to be a decision that, where an agreement is arrived at between the employer and the servant, that there is a statutory liability on the part of the employer to pay compensation under the Workmen's Compensation Act, 1897, but the amount of compensation is left to be settled afterwards by a judge or arbitrator, the employer will not be allowed to set up the defence that no claim was made within six months of the accident. That I understand to be in accordance with the decision in the Scotch case of *Ryan* (or *Little*) v. *MacLellan*, which has been referred to. That being the state of things in *Wright* v. *John Bagnall & Sons* (*Limited*), the case of *Rendall* v. *Hill's Dry Dock Co.* occurred shortly afterwards. There what took place was this: There was apparently no notice of the injury sent under the Act; nor was there any formal claim put forward. But payments were made by an insurance company on behalf of the employers and receipts were taken precisely in the same form as are found to have been taken in the present case. In that state of things the county court judge before whom the case came held that a claim for compensation under the Workmen's Compensation Act, 1897, did not mean only an application for arbitration. He further held that if, having regard to the defence of the appellants, it was open to them to object that the weekly receipts signed by the respondent were not claims for compensation, such receipts were either claims for compensation or were evidence that a claim had been made; and that the appellants, by taking such receipts and paying the weekly sums therein mentioned, either waived a claim for compensation or were estopped from taking their objection. He held, therefore, that the employers were not entitled to set up the objection that no claim had been made within the six months. I think that it is quite true, as has been pointed out by my lord, that at the time the decision in *Powell* v. *Main Colliery Co.* (*Limited*) in the Court of Appeal was standing, and the case was decided with reference to that decision. But it does not seem to me that that exhausts the case, because Smith, L.J., who delivered the judgment of the court, after referring to the receipt says, (at p. 249 of [1900] 2 Q. B.): "Do these circumstances show a waiver of the six months' limitation, or amount to an estoppel against setting up that defence? Clearly they do not." Then, after referring to the case of *Wright* v. *John Bagnall & Sons* (*Limited*), he says: "What was the *ratio decidendi* in that case? There the claim for compensation had not been made within six months of the accident, and the county court judge held, as my brother Collins says, that the parties had agreed that there was a statutory liability on the respondents to pay compensation, and that each of them had reserved the right to go to the court to have the amount determined. My brother Williams seems also, during the argument, to have said what was exactly to the same effect. Where is there any evidence in the present case that the parties agreed that there was a liability on the part of the employers to pay compensation? I can see no evidence of any such agreement." The evidence before the court in that case was exactly similar to the evidence which occurs here. And it seems to me that that case constitutes a great difficulty in the way of upholding Jelf, J.'s, decision in the present case. I desire to abstain from expressing any opinion as to what might be held to be the true meaning of the word "proceed" in the 6th section of the Workmen's Compensation Act, 1897, only saying that it seems to me that great weight should be attached to the judgments which have been delivered in the Irish case of *Beckley* v. *Scott & Co.*

Appeal allowed.

Solicitors, *Riddell, Vaizey, & Smith*, for *Harry Williams*, Neath; *Botterell & Roche.*

High Court of Justice.

Chan. Div. Byrne, J. } Nov. 20, 21, 23-26; Dec. 14.

In re WELLCOME'S TRADE-MARK. (*a.*)

Trade-mark—Fancy word not in common use—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64.

It is not necessary in order that a word may be validly registered as a trade-mark under the Patents, Designs, and Trade-Marks Act, 1883, *s.* 64, *as "a fancy word not in common use," that it should be wholly unsuggestive. The word "tablet" was well known in reference to solid drugs long before* 1884. *In* 1884 *the word "tabloid," which had not been in use before, was registered under the Act in respect of substances used in medicine and pharmacy.*

Held, that, although there was a suggestion and atmosphere of description about the registered word, yet that as it did not "really intelligibly describe the thing sold," it was a "fancy word" within the above section.

This was an application by Messrs. Thompson & Capper, carrying on business as chemists in Manchester, to have the register of trade-marks rectified by removing therefrom the trade-marks of "tabloid" and "tabloids," belonging to J. S. Wellcome, trading as "Burroughs, Wellcome, & Co."

The motion came on with an action by J. S. Wellcome against the applicants for an injunction restraining them from infringing the trade-marks and from passing off their goods as those of the plaintiff.

The word "tabloid" was registered by the respondent J. S. Wellcome or his firm on the 14th of March, 1884, a trade-mark in class 3 in respect of substances not included in class 1 used in medicine and pharmacy, and on the 27th of January, 1885, they registered in the same class the representation of a box with the word "tabloids" upon it. Previously to these registrations the firm were manufacturing and selling compressed drugs in a solid form, and of a lenticular or bi-convex shape.

The registrations had been renewed and were in force. The respondent firm had continually made and sold compressed drugs in connection with the word "tabloid" or "tabloids." The word "tablet" was well known with reference to solid drugs as early as the time of Lord Bacon, as appeared from a quotation given in Johnson's Dictionary, edition of 1848. In the Imperial Dictionary, published in 1868, tablet was defined as "a medicine in a square form." The word "tablet" had also been used to denote compressed drugs made up in the bi-convex shape in question by the respondent firm in connection with Wyeth's tablets, and by some other persons. The firm had registered "tablet" for the same class, intending to use it as their trade-mark, but finding that it could not be sustained, the word "tabloid" was invented and was registered. It was used by the respondent firm for the first time at the time of registration.

Moulton, K.C., Neville, K.C., Levett, K.C., Sebastian, and *D. M. Kerly,* for the plaintiffs in the action and the respondents in the application.—"Tabloid" is a fancy word, and is similar to the word "Bovril," which was held to be a fancy word: *In re Trade-Mark "Bovril,"* 45 W. R. 150, [1896] 2 Ch. 600. So "Mazawattee," although compounded of a Hindoo and a Cingalese word, was held a fancy word: *In re Densham's Trade-Mark,* 43 W. R. 515, [1895] 2 Ch. 176. "Solio" was held an invented word in *Eastman's Photographic Materials Co.* v. *Comptroller-General,* 47 W. R. 152, [1898] A. C. 571. An invented word must be a fancy word.

A. J. Walters and *J. H. Gray,* for defendants and applicants.—"Tabloid" is merely the word "table" or "tablet" with the well-known suffix "oid" added. The word only means a kind of tablet. It is similar to the words "rhomboid" and "fungoid." It does not follow that because that particular form of the word was not in existence before the registration that it is a fancy word. "Electroid," although not to be found in any dictionary, was held not a fancy word: *In re Hannay's Trade-Mark,* 7 Rep. Pat. Cas. 46. The respondents had no right to appropriate a word which was the natural development of the English language. The words "Melrose Favourite Hair Restorer" and "Electric Velveteen" have been held not to be fancy words: *In re Van Duzer's Trade-Mark* and *In re Leaf & Co.'s Trade-Mark,* 35 W. R. 294, 34 Ch. D. 623. So also the word "reversi": *Waterman* v. *Ayres,* 37 W. R. 110, 39 Ch. D. 29. The word "tablet" was in common use to designate articles used in pharmacy before the registration.

They also referred to *In re Jackson & Co.'s Trade-Mark,* 6 Rep. Pat. Cas. 80; *Meaby & Co.* (*Limited*) v. *Triticine* (*Limited*), 15 Rep. Pat. Cas. 1; and *J. C. & J. Field* (*Limited*) v. *Wagel Syndicate* (*Limited*), 48 W. R. 390, 17 Rep. Pat. Cas. 266.

Dec. 14.—BYRNE, J.—The registrations of the marks in question were under the Act of 1883, and having regard to the terms of section 64 (1) (*c*) the question is whether or not "tabloid" was a distinctive fancy word not in common use at the date of registration. The case of *In re Trade-mark "Bovril"* before the Court of Appeal relieves me from a close examination of earlier cases, and gives me a guide in endeavouring to determine whether or not "tabloid" was a fancy word. The earlier leading cases of *Van Duzer's Trade-Mark* and *Leaf & Co.'s Trade-Mark* were cases in which, as pointed out by Lord Lindley in the "*Bovril*" case, a coined word was not under consideration at all, but ordinary English words. "Where," Lord Lindley says, "you have got a fanciful use of a known word, you must have a word which is obviously non-descriptive." I think that I also get this from that case, that it is not necessary that the word should be absolutely unsuggestive. The word "Bovril" was suggestive of "ox"; but as a whole it was held not to be descriptive. The argument in the present case for the applicants was that this was a word compounded of "table" or "tablet" with a common suffix "oid," the suffix meaning "in the form of" or "like" or "allied to," as used in many English words, especially in connection with a scientific nomenclature. On the other hand, it was forcibly urged that the only attribute common to the things denoted by the words "table" and "tablet" is a suggestion of flatness on one side or other, or on both sides of the object, without any notion of convexity. If the suffix is appended to "tablet" the new word is "tabletoid" and not "tabloid," and though "tabloid" would probably be a natural way of adding the suffix "oid" to "table," and though solid drugs in certain forms were known as "tabellae," or "tabulae," yet there is nothing that I can find to denote convexity or compression in the word. I think that the case is near the line, but, treating it as a matter of fact in the particular case, I come to the conclusion that in March, 1884, the word was not "really intelligibly describing the thing sold," which is the way Lord Lindley in the *Bovril case* ([1896] 2 Ch. p. 609) puts the proper form of direction to the jury. I agree that there is a suggestion or atmosphere of

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

description about the word as here used, but I do not think that it can be said to be other than a "fancy word" as applied to goods in the class in which it was registered.

[His Lordship afterwards granted an injunction in the action].

Motion dismissed.

Solicitors for the plaintiffs and the respondents, *Markby, Stewart, & Co.*

Solicitors for the defendants and applicants, *Sharpe, Parker, Pritchard, Barham, & Lawford*, for *Alsop, Stevens, Harvey, & Crooks*, Liverpool.

Chan. Div. }
Farwell, J. } Nov. 10, 11.

In re CALVERLEY'S SETTLED ESTATES.
CALVERLEY *v.* CALVERLEY AND OTHERS. (*a.*)

Settled land—Housing of the Working Classes Acts —Improvements—Cottages for labourers, &c.—Additions or alterations to enable house to be let—"Available for the working classes"—"Building not injurious to the estate"—37 & 38 *Vict. c.* 38, *s.* 25 (*x., xx.*); 48 & 49 *Vict. c.* 72, *s.* 11 (1) (b); 53 & 54 *Vict. c.* 70, *s.* 74 (1) (b); 53 & 54 *Vict. c.* 69, *ss.* 13 (*ii.*) *and* 18.

Section 13 (*ii.*) *of the Settled Land Act*, 1890, *which authorizes, as improvements under the Act, "the making of additions to or alterations in buildings reasonably necessary or proper to enable the same to be let," refers to a future letting. Therefore, where a scheme submitted by tenant for life to trustees included additions to a house occupied by a tenant,*

Held, that the trustees would have discretion to approve the work if the present tenant should give notice to quit, or even if they were satisfied he was resolved to do so.

The expression "available for the working classes" in section 74 (1) (b) *of the Housing of the Working Classes Act*, 1890 (*replacing a repealed enactment*), *means "actually available," and cannot apply to dwellings which are in the occupation of persons whom the Acts do not define as belonging to those classes.*

The condition in the same sub-section limiting it to dwellings, "the building of which, in the opinion of the court, is not injurious to the estate," applies only where it is desired to build, and does not restrict the powers conferred by section 25 (*xx.*) *of the Settled Land Act*, 1882.

Semble, *a cottage occupied by a labourer, farm servant, or artizan is substantially within section* 25 (*x., xx.*) *of the Settled Land Act*, 1882, *notwithstanding that it is rented in the name which his wife formerly bore as widow of a man not answering any of those descriptions.*

This was an action, commenced by originating summons, by the tenant for life of settled estates, for the determination of the question whether certain proposed works, of which a scheme had been submitted by him to the respondent trustees, were improvements within the meaning of the Settled Land Acts, 1882 to 1890.

There was not in the hands of the trustees a sufficient amount of capital money arising under the Acts to pay for the proposed work.

The settlement was created by the will dated in 1868 of Edmund Calverley, who died in 1897, having by a codicil appointed the said respondents trustees of the settlement for the purposes of the said Acts. The persons entitled in remainder were also respondents and opposed the scheme—mainly in regard to the following items, which for the purposes of this report are distinguished by the letters A, B, and C:—

A.—Repair and part reconstruction of a cottage rented by the widow of a miner. She had, since the scheme was propounded, been re-married to a labourer employed on the settled estate, but the cottage was still held in her name.

B.—The addition of a wash-house and privy to a house occupied on a yearly tenancy by one Dr. Buck. From an affidavit by the applicant it appeared that the doctor had taken the house from a former tenant for life under the settlement, on the condition that this work should be done, and that it was expected he would leave if it were not carried out. The house was rated at less than £100 a year.

C.—Sanitary work which had been ordered by the local sanitary authority to be done to 133 tenements rated, as to the greater number, at less than £8, and none of them at so much as £100 each per annum.

Austen-Cartmell, for the applicant relied, on the following enactments: The Settled Land Act, 1882, s. 25, which (by sub-section x.) names the building of cottages for labourers, farm servants, and artizans, and (by sub-section xx.) their reconstruction, enlargement, or improvement, as authorized improvements under the Act: The Housing of the Working Classes Act, 1890, s. 74 (1) (*b*) (replacing s. 11 (1) (*b*) of the Act of 1885), which extends the above-named provisions to "any dwellings available for the working classes, the building of which, in the opinion of the court, is not injurious to the estate." The Settled Land Act, 1890, s. 18, which enacts that the provisions of the last-named section shall have effect as if the expression "working classes" included all classes of persons who earn their livelihood by wages or salaries, but applies only to buildings rated at £100 a year or less; and section 13 (ii.) of the same Act, which provides that improvements authorized by the Act of 1882 shall include making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let.

He cited *In re Duke of Norfolk's Parliamentary Estates*, 48 W. R. 328, [1900] 1 Ch. 461, and *Stanford* v. *Roberts*, 49 W. R. 315, [1901] 1 Ch. 440. [The court referred to *In re Millard's Settled Estates*, 41 W. R. 577, [1893] 3 Ch. 116.]

Wace, for the remaindermen, contended that, as to A, the tenant was not a labourer, farm servant, or artizan, so as to bring her dwelling within the terms of section 25 (x., xx.) of the Settled Land Act, 1882; that, as to B, since the house was already let, the works were not necessary or proper to enable it to be let; and that as to C, the tenements were not available for the working classes, since many of them were occupied by tradespeople.

Stafford Crossman, for the trustees, said they were in a difficulty with regard to the sections which had been cited from the Housing of the Working Classes Acts. The point will be found mentioned in the judgment.

FARWELL, J., in giving judgment, allowed the work mentioned above under A, as being substantially within the meaning of section 25 (clauses x., xx.) of the Settled Land Act, 1882. As to B, his lordship said: "This little matter involves the consideration of section 13 (ii.) of the Settled Land Act, 1890. The wording of that sub-section points to a future letting. If the present tenant gives notice to quit, the proposed works will come within the meaning of

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

the sub-section, and being within it, the trustees will have discretion to approve them. The trustees are, in my opinion, not bound to wait till a formal notice is given; it will be enough if they are satisfied of the tenant's intention to leave, and as to this, in order to be quite secure, they should satisfy themselves by inquiry. The works are trifling, but not too small to be within the Act—unless, indeed, they are so small as not to affect the letting capabilities of the house."

As to C, his lordship held that the word "available" in the Housing of the Working Classes Acts, meant "actually available," and therefore could not apply to dwellings now let to tradespeople and the like; and as to these, the applicant could not succeed. As to the rest, there was considerable difficulty, but he must bear in mind what was said in *Bruce* v. *Marquis of Ailesbury*, 41 W. R. 318, [1892] A. C. 356, the view there taken being that the object of the Legislature was to preserve settled land from going out of cultivation. The working classes had no doubt received special attention in these Acts, possibly because it was thought they were less able to take care of themselves than farmers, for instance, were. So far as the tenements now in question fell within section 25, sub-clause x., it was not disputed that sub-clause xx. also applied to them. It had been pointed out by Mr. Crossman that sections 11 (1) (*b*) and 74 (1) (*b*) of the Housing of the Working Classes Acts, which extend the scope of section 25 of the Settled Land Act, 1882, applied only to dwellings, "the building of which in the opinion of the court is not injurious to the estate," and that, therefore, the scope of sub-clause xx. was only extended where (as was not here the case) the dwellings had originally been built with the sanction of the court. But his lordship refused to so limit the operation of the Acts, holding that the use of the present and not the past tense in the qualifying words showed them to apply to cases where it was desired to build dwellings for the working classes and not where it was desired to reconstruct, enlarge, or improve those already built. He therefore held that the proposed works, so far as they related to dwellings available for the working classes, were within the Acts.

Solicitors, *Patersons, Snow, Bloxam, & Kinder*, for *Dibb & Co.*, Leeds; *Pearce & Aldridge*, for *Greenwood, Teale, & Marriner*, Leeds.

Chan. Div. }
Buckley, J. } Nov. 27.

MORRIS v. BAKER. (*a*.)

Practice—Land in possession of receiver—Leave to issue writ for recovery of possession—Writ of possession issued without leave—Injunction.

Leasehold land was in the possession of a receiver appointed by the court on behalf of a mortgagee of the lessee. Leave was given by the court to the lessor to issue a writ against the lessee for the recovery of possession of the land. The lessor obtained judgment and, without obtaining further leave from the court, attempted to execute his judgment by issuing a writ of possession.

Held, that the leave given by the court did not extend beyond leave to obtain judgment, and, consequently, that the lessor could be restrained by injunction from interfering with the possession of the receiver.

(*a*.) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

Motion.

This was an application on the part of the plaintiff in an action of *Morris* v. *Baker* that Thomas Jones and certain other respondents, hereinafter called the Moggridge trustees, who were not parties to the action, might be restrained from disturbing or interfering with the possession of Charles Morris Ayliffe, the receiver appointed in the action, of a certain seam of coal, and from in any way trespassing on the said seam of coal.

Thomas Jones and the Moggridge trustees, who together were entitled to the minerals in question, had by a lease and an agreement for a lease, respectively demised and agreed to demise their undivided shares to the defendants, W. Baker and J. W. Baker, for terms of years not yet expired. The instruments creating the terms contained covenants to pay rent and not to assign without licence from the lessors.

By a foreclosure decree made in the present action on the 26th of March, 1903, it was declared that the plaintiff was to be deemed a mortgagee of the lessees' interest in the minerals, and by an order of the 6th of April, the receiver was appointed.

On the 17th of September the master made orders giving the respondents (who alleged that the lessees had broken their covenants by not paying rent and by assigning without notice, and that the leases were thereby forfeited) leave to issue writs for the recovery of the possession of the property. Writs were accordingly issued in the King's Bench Division against W. Baker and J. W. Baker. They did not enter an appearance, and judgment was entered for the lessors in both actions for possession of the property and the amount of arrears of rent. No notice of these actions was given to the receiver.

On the 16th of October the respondents, without making any further application for leave to proceed against the receiver, took out writs of possession.

On the 3rd November the sheriff's officer purported to give possession of the minerals to an agent for the respondents, but did not in fact do so, the minerals having ever since the 6th of April been in the possession of the receiver or his caretaker.

It was the intention of the plaintiff and the receiver to apply under ord. 12, r. 25, to be added as defendants to the ejectment actions, and also to pursue proceedings for relief against forfeiture.

Under these circumstances the present motion was brought. At the hearing it was arranged that the judgment debts due to the respondents in their King's Bench Division action, should be paid into court to the credit of those actions, that the plaintiff should prosecute his application for relief in the ejectment actions with due diligence, and that the respondents should not in the meantime proceed further with their writs of possession, or sue out fresh ones.

The liability to pay the costs of the motion depended on whether the respondents had acted rightly or wrongly in not obtaining the leave of the court before they took out writs of possession.

Buckmaster, K.C., and *Rowlands*, for the applicant.—The leave obtained by the respondents to bring the ejectment actions only entitled them to pursue the actions to judgment, not to execution. They sued only the lessees, and gave no notice to the receiver, who is entitled, if he can make out his case, to have the judgments set aside, on condition that he procures himself to be added as a defendant in the actions: *Minet* v. *Johnson*, 63 L. T. 507, 39 W. R. Dig. 164. The court in giving leave to bring the actions against the lessees only, meant that the question of the right to possession should be tried as between the lessors and lessees. The proper stage for the court to intervene to protect

the rights of the receiver, would be the interval between judgment and execution. Execution, by means of a writ of possession, which is a proceeding independent of an action to recover possession required the leave of the court. The attempt to enforce the writs of possession was an interference with the receiver which could be restrained by an injunction.

J. K. Young, for the respondent Jones.—There is no authority directly bearing on the point, but the cases appear to suggest that where the leave of the court has once been obtained to bring an action of ejectment in respect of land which is in the possession of a receiver, no further leave is required to enable the plaintiff to enforce his judgment. If it is desired to protect the possession of the receiver, the court may impose terms in the order by which it gives leave to bring the action. If no terms are imposed, the inference is that the receiver does not require protection: *Angel* v. *Smith*, 9 Ves. 335; *Evelyn* v. *Lewis*, 3 Ha. 472; *In re Battersby's Estate*, 31 L. R. Ir. 73. A writ of possession is not an independent proceeding, but follows on, and can only be issued after, a judgment for possession.

Cozens-Hardy, for the respondents, the Moggridge trustees.

Buckmaster, K.C., replied.

BUCKLEY, J.—The whole substance of this motion has been disposed of. All that remained, in view of what the parties agreed, was that I should hear the motion in order to determine who ought to pay the costs. That turns on the construction to be placed on the words "leave to issue a writ for the recovery of possession," which occur in the order of the master of the 17th of September, 1903. The facts are that certain property being in the possession of a receiver, so that there could be no interference with it without the leave of the court, the court was asked to give leave for proceedings in ejectment. That leave was given. The question is whether the leave thus given extended beyond proceeding to judgment, to the issue of a writ of possession. In my opinion it did not. The true way of looking at the matter is this: The court being in the possession of land or chattels by a receiver, is asked to allow proceedings to be taken by one person against another to determine the title. Leave is given. The party who succeeds ought to say to the court, "This is my land, these are my chattels, but the fruits of my victory are in your possession, and I want them." If there is nothing more in the case the court would give leave for possession. But the party is not entitled, as against the receiver, to obtain possession without leave—that is to say, without the consent of the court, in whose possession the property is. Take another case. Suppose that an action is sued to judgment. Does that always in itself give the right to issue execution? The answer is that it does not. When judgment has been obtained the court has, in certain cases, to be approached again, in order to see whether it will give leave to issue execution or whether there are not other circumstances to which the court ought to have regard. It does not follow that because judgment has been obtained, some other person is not entitled to rights in the property in respect of which leave is to be asked to issue execution. It is the duty of the court, while the property is, as it were, *in medio*, to see that the rights of all parties in respect of it are protected. Exactly that state of circumstances arises here. I decide simply that the leave which was given to issue a writ for the recovery of possession did not extend beyond leave to try the question who was entitled to judgment for possession. That is the whole point material to determine who is to pay the costs. I therefore order the respondents to pay the costs.

Solicitors, *Baker, Baker, & Co.; Martyn & Martyn; Waterhouse & Co.*

Chan. Div. } Oct. 29; Nov. 5, 11.
Joyce, J. }

GARNER v. MURRAY & WILKINS. (a.)

Partnership—Dissolution—Insufficient assets to repay capital—Question of adjustment—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-section* (1); *s.* 44.

Where the contributions of partners to the capital were unequal, but each were to share equally in profits; and in the distribution of assets upon a dissolution it was found that there was a deficiency of assets,

Held, that the assets must be applied in paying rateably to each partner what was due from the firm to him in respect of capital, account being taken of the equal contributions to be made by each towards the deficiency of capital.

Adjourned summons.

In pursuance of a declaration to that effect, the partnership subsisting between the plaintiff and defendants was dissolved and a receiver appointed. The capital of the partnership had been contributed in certain uneqal shares, but each partner was to be entitled to one-third of the net profits. There was standing in court to the credit of the partnership a sum of £764 9s. 4d., the balance resulting after all debts and outgoings due from the firm had been paid, and the question now arose how this sum was to be properly distributed.

Mr. Wilkins, one of the partners, was indebted to the firm at the time of taking the certificate of the 29th of July, 1901, in the sum of £263 3s. 1d., and this was treated as irrecoverable. By the certificate of the 29th of July, 1901, the capital as found to be due in respect to the partnership was:

Plaintiff (Garner) £2,500 (eight-ninths); Murray, defendant, £314 3s. 4d. (one-ninth)—total, £2,814 3s. 4d.

The assets (treating Wilkins' debt as irrecoverable) available to repay the £2,814 3s. 4d. due for capital, amount to £1,916 19s. 8d.

The deficiency of capital is accordingly £897 3s. 8d."

The question for the court was, how as between the two partners Garner and Murray, this deficit, due to the default of the third partner (Wilkins) was to be borne.

Younger, K.C., and *W. H. Cozens-Hardy*, for the plaintiff.—Where one partner has contributed more than another, when a distribution of assets at the time of dissolution of partnership takes place, the partner who has made the greater contribution is entitled to be paid the difference between his contribution and that of his partner: *Ross* v. *White*, [1894] 3 Ch. 326, 38 SOLICITORS' JOURNAL 630; Seton on Decrees, vol. 3, p. 2171. Where the contributions were originally equal, but had become unequal by reason of the unequal amounts drawn out by the partners, there is no distinction in principle between that case and the present. Before the defendant Murray can receive anything the plaintiff's loss must be reduced to an equality with that suffered by Murray. The rule in such a case is to begin by equalizing the loss of capital as between the part-

(a.) Reported by ALFRED C. THOMAS, Esq., Barrister-at-Law.

ners: *vide* sections 24 (1) and 44 (*a*) of the Partnership Act, 1890.*

Lindley on Partnership (6th ed.), 601; *Binney* v. *Mutrie*, [1886] 12 A. C. 160, 165, 35 W. R. Dig. 143; *Nowell* v. *Nowell*, L. R. 7 Eq. 538, 17 W. R. Dig. 117; *Ward* v. *Scoles*, 1 Ch. 369; *In re Hodge's Distillery Co.*, 19 W. R. 113, L. R. 6 Ch. 51; *Potter* v. *Jackson*, 28 W. R. 411, 13 Ch. D. 845, were also referred to.

Hughes, K.C., and *Hon. F. Russell*, for defendant Murray.—The word "rateably" in section 44 (*b*) (3)† presumes that all the contributions have not been paid up in full. Where the assets are insufficient to pay everyone in full the partners are to divide them rateably. The true principle of division in this case is for each partner to contribute to the assets an equal share of the deficiency of capital and then divide the whole rateably between them.

Younger, K.C., in reply.

JOYCE, J.—The real question in this case is how, as between two partners, the ultimate deficit, which arises in the partnership assets from the default of a third partner to contribute his share of the capital, is to be borne by them. We have now in the Partnership Act, 1890, a code which defines the mode in which the assets of a firm are to be dealt with in the final settlement of the accounts after a dissolution.

Section 44 is plain. I don't find anything in that section to make a solvent partner liable to contribute for an insolvent partner who fails to pay his share. Sub-section (*b*) of section 44 proceeds on the supposition that contributions have been paid or levied. Here the effect of levying is that two partners can pay and one cannot. It is suggested by Mr. Younger that each partner is to bear an equal loss. But when the section says losses are to be borne equally it means losses sustained by the firm. It cannot mean that the individual loss sustained by each partner is to be of equal amount. There is no rule that the ultimate personal loss of each partner, after he has performed his obligations to the firm, shall be the same as or in any given proportion to that of any other partner. I have to follow the Act, and I see no difficulty in doing so in this case.

In the result I agree in the main with Mr. Russell's scheme. The assets must be applied in paying to each partner rateably what is due from the firm to him, account being taken of the equal contributions to be made by each towards the deficiency of capital.

There is nothing in the authorities or in the passage in Lindley on Partnership to which reference has been made, which is inconsistent with the result at which I have arrived.

Solicitors, *Crowder, Vizard, & Oldham*, for *William Warman*, Stroud; *Balfour Allan, & North.*

* Section 24 (1).—All the partners "must contribute equally towards the losses whether of capital or otherwise sustained by the firm."

Section 44 (*a*)—"Losses, including losses and deficiencies of capital, shall be paid . . . if necessary by the partners individually in the proportion in which they were entitled to share profits."

† Section 44 (*b*) (3) of Partnership Act, 1890.—"The assets of the firm, including the sums (if any) contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner:

"In paying to each partner rateably what is due from the firm to him in respect of capital."

Court of Appeal.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Dec. 10.

WEAVING *v.* KIRK & RANDALL. (*a.*)

Master and servant—Employers' liability—Accident—Compensation—"Undertakers"—"Actual use or occupation"—Warehouse—Making additions to—Factory and Workshop Act, 1901 (1 *Ed.* 7, *c.* 22), *s.* 104—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

The respondents had contracted with the Government to erect certain pigeon-holes or cupboards in a warehouse in Woolwich Dockyard for storing military accoutrements. The warehouse had just been built for the Government by another contractor, and it consisted of two floors each about 25 feet high, the pigeon-holes which were being erected by the respondents being on the upper floor. A workman in the employment of the respondents was killed by an accident while engaged in the work of erecting the pigeon-holes. At that time the lower floor was already occupied for the storage of military accoutrements, and a foreman and two men in the employment of the building contractor were engaged, in the same room where the respondents were erecting the pigeon-holes, finishing doors putting on locks and painting, and the Government by their own workmen were fixing hydraulic cranes at each end of the room. The clerk of the works for the Government was in charge of the work to see that it was properly carried out. In proceedings to assess compensation under the Workmen's Compensation Act, 1897,

Held, that the respondents had the actual use or occupation of a definite portion of the warehouse for the purpose of carrying on the work within the meaning of section 104 *of the Factory and Workshop Act*, 1901, *and were therefore liable as the undertakers within section* 7 *of the Workmen's Compensation Act*, 1897.

Bartell *v.* Gray & Co., 50 *W. R.* 310, [1902] 1 *K. B.* 225, *followed.*

Appeal from a decision of his Honour Judge Addison, at the Woolwich County Court, under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who was in the employment of the respondents, and was killed by an accident arising out of and in the course of his employment.

The respondents, Messrs. Kirk & Randall, entered into a contract with the Government to erect some cupboards or pigeon-holes for the storage of military accoutrements on the upper floor of a warehouse which had just been built for the Government by Messrs. Mundy in Woolwich Dockyard. The warehouse, which occupied a space 150 feet long by 100 feet wide, consisted of two floors, each floor being about 25 feet high. The erection of the building had been completed by Messrs. Mundy, with the exception of some cupboard doors and locks on the upper floor, and the lower floor was already used for the storage of military accoutrements. The Government, requiring some pigeon-holes on the upper floor, entered into the above-mentioned contract with the respondents for their erection. At the time of the accident, the foreman and two men in the employment of Messrs Mundy were engaged in the same room finishing doors, putting on locks, and painting, and the Government, by their own workmen, were engaged at each end of the room in fixing hydraulic cranes. The clerk of the works for the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Government was in charge of the work to see that the men did their duty, and that the contractors complied with the specifications. The premises were locked and unlocked by the person in charge of the dockyard. The keys were kept by the man at the gates. The deceased workman was engaged in erecting the pigeon-holes when he was killed by an accident. His widow brought an action under the Employers' Liability Act, 1880, but the county court judge dismissed the action, and, at the request of the plaintiff, he proceeded to determine the question of compensation under section 1, sub-section 4, of the Workmen's Compensation Act, 1897. In giving his decision he said that the question seemed to turn upon the conclusions of law to be drawn from the above facts. Giving the fullest effect to the decision of the Court of Appeal in *Bartell* v. *Gray & Co.*, 50 W. R. 310, [1902] 1 K. B. 225, and to the observations of the present Master of the Rolls in *Merritt* v. *Wilson, Sons, & Co.*, 49 W. R. 161, [1901] 1 K. B. 35, he was unable to find any user or occupation by the respondents of the warehouse that would make them "undertakers" within the meaning of the Act. That, however, was a matter of law, and if the Court of Appeal could see its way to a contrary conclusion, they would enter judgment for the applicant for £312. He accordingly decided in favour of the respondents.

The applicant appealed.

Ruegg, K.C., and *W. M. Thompson*, for the applicant.—This warehouse was admittedly a factory within the meaning of section 7 of the Workmen's Compensation Act, 1897, and the only question is whether the respondents were the "undertakers" in respect thereof within the meaning of that section. Undertakers in respect of a factory means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895. By section 104 of the Factory and Workshop Act, 1901, an Act which has taken the place of the former Factory Acts, the person having the actual use or occupation of a warehouse, which is a factory, shall be deemed to be the occupier of a factory. *Bartell* v. *Gray & Co.*, 50 W. R. 310, [1902] 1 K. B. 225, shows that the respondents here had the actual use or occupation of this warehouse within the meaning of that section. The applicant is therefore entitled to compensation.

Arthur Powell, K.C., and *W. Addington Willis*, for the respondents.—To make a person an occupier of a factory within the Act he must occupy some defined space in the factory: *Merrill* v. *Wilson, Sons, & Co.*, 49 W. R. 161, [1901] 1 K. B. 35. Further, the occupation must be an occupation of the place as a warehouse; that is, for the purposes for which a warehouse is usually occupied. That was not the case here. The respondents were therefore not the "undertakers," and are not liable to pay compensation. Secondly, this is a question of fact upon which no appeal lies.

They also referred to *Bruce* v. *Henry & Co.*, 2 F. 717; *Low* v. *Abernethey & Co.*, 2 F. 722; *Purves* v. *Sterne & Co.*, 2 F. 887.

COLLINS, M.R.—This is an appeal from the decision of the Woolwich County Court judge, who has placed all the facts of the case before the court. An action was brought by the widow of a workman who was in the employment of Messrs. Kirk & Randall at the time when he was killed by an accident. Kirk & Randall had undertaken a contract to erect pigeon-holes for storing military accoutrements in a warehouse, the building of which had just been completed by another contractor. Kirk & Randall were executing work which was necessary for making the warehouse complete, and they were in such occupation as was essential for carrying out the work which they had to do. The workman was killed by an accident while employed on the work. The question which we have to decide is whether Kirk & Randall are liable to pay the applicant compensation under the Workmen's Compensation Act, 1897, and that resolves itself in this, were Kirk & Randall "undertakers" in respect of this warehouse? The warehouse is admittedly a factory within the meaning of the Act. By section 7, sub-section 2, of the Act "undertakers" are defined as meaning in the case of a warehouse "the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895." That brings us to the Factory and Workshop Act, 1901, which, so far as material to the present case, has taken the place of the previous Factory and Workshop Acts. By section 104 of this latter Act "the person having the actual use or occupation of a dock, wharf, quay, or warehouse or of any premises within the same or forming part thereof . . . shall be deemed to be the occupier of a factory." The question accordingly comes to this: Had Kirk & Randall the actual use or occupation of this warehouse? It seems to me that the answer to that question is supplied by the decision of this court in *Bartell* v. *Gray & Co.* Kirk & Randall had the actual use or occupation of a definite space within this warehouse, and they had that use or occupation for the purpose of carrying out the work which they had undertaken to do. It is said that they did not occupy the place as a warehouse ordinarily is occupied and that therefore they are not within the Act. I hardly think that that is necessary; but even if it were, this warehouse could not exist as a complete warehouse unless those necessary and essential additions which Kirk & Randall were carrying out were made. In my opinion, upon the authority of the decided cases, Kirk & Randall were in actual use or occupation of the warehouse, and were therefore "undertakers" in respect thereof within the meaning of the Act. The applicant is therefore entitled to compensation under the Act. In coming to this conclusion I do so as a matter of law. At the first hearing we thought it was probably a question of fact, and we sent the case back to the learned judge for him to state more in detail what the facts were. He now states that he decided the question as one of law. He has stated the facts fully to us, and he has stated his conclusion of law upon those facts. I cannot agree with the conclusion of law which he has arrived at, and the appeal must be allowed, and we will enter judgment for the applicant for £312.

MATHEW, L.J.—I am of the same opinion. I should have thought that after the case of *Bartell* v. *Gray & Co.* the matter was quite clear, at all events so far as this court is concerned.

COZENS-HARDY, L.J.—I agree. Kirk & Randall had the actual use and occupation of this warehouse for the purpose of carrying out the work which they had contracted to do, and that being so, *Bartell* v. *Gray & Co.* is in point.

Appeal allowed.

Solicitor for the applicant, *T. E. Crocker.*

Solicitors for the respondents, *Treadwell & Aylwin.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Dec. 9.

ATTORNEY-GENERAL v. REGENT'S CANAL AND DOCK CO. (a.)

Inland revenue—Stamp duty—Company—Consolidation of debenture stock—Issue of loan capital—Finance Act, 1899 (62 & 63 *Vict. c.* 9), *s.* 8.

By a local and private Act passed in 1900, *the debenture stocks which had been issued by the defendant company, bearing interest at* 3 *per cent.,* 4 *per cent., and* 4¼ *per cent., were extinguished, and there was created in lieu thereof a new debenture stock bearing interest at* 3 *per cent. Each stockholder received such an amount of the new stock as would yield him the same amount of interest as had been payable in respect of the stock previously held by him. The total amount of the debenture stocks existing before the Act was* £411,852. *The amount of the new debenture stock was* £529,136.

Held, that the defendant company were liable to pay the stamp duty imposed by section 8 *of the Finance Act,* 1899, *on any company who "propose to issue any loan capital."*

Appeal from the judgment of Ridley, J., on a special case stated by consent in an action by the Attorney-General, as informant, claiming duty and penalties under section 8 of the Finance Act, 1899 (reported [1903] 2 K. B. 86, 51 W. R. Dig. 70).

The defendants were a company formed and established in the United Kingdom within the meaning of the above-named section, having been incorporated by the Regent's Canal City and Docks Railway Act, 1882. Between the years 1882 and 1900 the defendants from time to time, under the said Act of 1882 and other Acts in that behalf empowering them, issued, and there was existing at the date of the passing of the Regent's Canal and Dock Act, 1900, debenture stock to the amount of £411,852—viz., £110,000 of 3 per cent. stock, £101,852 of 4 per cent. stock, and £200,000 of 4¼ per cent. stock.

By the Regent's Canal and Dock Act, 1900, after reciting that it was expedient that the debenture stock issued by the company should be consolidated into a single debenture stock bearing a uniform rate of dividend of 3 per cent., it was provided (*inter alia*) as follows:

Section 2.—"Part 3 (relating to debenture stock) and part 4 (relating to change of name) of the Companies Clauses Act, 1863, are, except where expressly varied by this Act, incorporated with and form part of this Act. The new debenture stock by this Act created shall be deemed to be debenture stock created by the company within the meaning of and in accordance with the provisions of part 3 of the Companies Clauses Act. 1863."

Section 3.—"(1) On the 31st day of December, 1900, the following stocks of the company shall be by this Act cancelled and extinguished (that is to say): The three per centum debenture stock, the four per centum debenture stock, the four-and-a-quarter per centum debenture stock. (2) On the said 31st day of December, 1900, there shall be by virtue of this Act without further or other authority created in lieu of the stocks extinguished by this Act debenture stock of the company (hereinafter referred to as new debenture stock) of such nominal amount as may be necessary for giving effect to the provisions of this section. (3) Every holder of any of the stocks by this Act extinguished shall be entitled to and shall receive in substitution for every one hundred pounds of such stock held by him and so in proportion for every fraction of one hundred pounds new debenture stock as follows (that is to say): In the case of holders of existing three per centum debenture stock, the same nominal amount of new debenture stock. In the case of holders of existing four per centum debenture stock and of four-and-a-quarter per centum debenture stock respectively, new debenture stock to such nominal amount as at the rate of three per centum will yield to the holder in cash the same amount as the amount of the interest now payable in respect of the existing debenture stock held by him. (4) The new debenture stock shall bear the dividend of three per centum per annum."

The amount of new debenture stock which was required to carry out the provisions of the said Act was £529,136, and debenture stock to this amount was inscribed in the names of the persons entitled thereto under the said Act, and certificates in respect of the same were given in exchange for the old certificates.

Section 8 of the Finance Act, 1899, provides as follows: "(1) Where any local authority, corporation, company, or body of persons formed or established in the United Kingdom propose to issue any loan capital, they shall before the issue thereof deliver to the commissioners a statement of the amount proposed to be secured by the issue. (2) Subject to the provisions of this section, every such statement shall be charged with an *ad valorem* stamp duty of 2s. 6d. for every £100, and any fraction of £100 over any multiple of £100 of the amount proposed to be secured by the issue, and the amount of the duty shall be a debt to her Majesty." Sub-section 4 imposes penalties for failure to comply with the section. By sub-section 5, the expression "loan capital" in this section means, *inter alia*, any debenture stock.

The questions for the opinion of the court were: (1) Whether the defendants had under the said Act proposed to issue, or issued, any loan capital, and, if so, to what amount? (2) Whether a statement of the whole or any part of the new debenture stock was deliverable by the defendants to the Commissioners of Inland Revenue under section 8, sub-section 1, of the Finance Act, 1899, and, if so, of what amount? (3) Whether the defendants were liable to pay to his Majesty the sum claimed, or any and what part thereof?

Ridley, J., was of opinion that the defendants had not proposed to issue any loan capital within the meaning of section 8 of the Finance Act, 1899, and that the stamp duty imposed by that section was not payable.

The Crown appealed.

Sir Robert Finlay, A.G., Sir Edward Carson, S.G., and *Rowlatt,* for the Crown.

Danckwerts, K.C., and *A. M. Talbot* (*Loehnis* with them), for the defendants.

The following cases were cited: *Midland Railway Co.* v. *Attorney-General,* 50 W. R. 433, [1902] A. C. 171; *Attree* v. *Hawe,* 9 Ch. D. 337.

COLLINS, M.R.—The question in this case is whether the Regent's Canal and Dock Co., by doing what has been authorized to be done by their private Act of 1900, have brought themselves under the obligation which is imposed by section 8 of the Finance Act, 1899, on a company which proposes to issue any loan capital. At the time of the passing of the private Act the company had created debenture stocks at different rates of interest—viz., 3 per cent., 4 per cent., and 4¼ per cent. By the new arrangement authorized by the Act there has been substituted

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

for the then existing debenture stock a debenture stock at the uniform rate of 3 per cent. The rate of interest has thus been lowered, but the amount of the stock has been correspondingly enlarged. From the figures it appears that the total amount of the previously existing debenture stocks was £411,852, and that the amount of the new debenture stock is £529,136. This means that the indebtedness of the company has been increased. The result of the operation, therefore, is that one debenture stock has been substituted for three classes of debenture stock, one uniform rate of interest has been substituted for three different rates of interest, and a larger indebtedness has been substituted for the old indebtedness. The debenture stockholders now hold a new debenture stock. Yet it is argued that this company is not a company of whom it can be said that they have proposed to issue loan capital. There can be no doubt that this debenture stock is loan capital, and the persons who hold it are possessors of new stock. How is it possible in fact to put into persons' hands stock which was not existing before without an issue? I cannot see. It seems to me that all the conditions which are involved in an issue are fulfilled in this case. I think that this case is in substance similar to *Midland Railway Co.* v. *Attorney-General*, though that was a case under the Stamp Act, 1891, and there is a difference between the wording of that Act and the wording of the Finance Act, 1899. There the company had altered the nominal amount of their capital by converting various classes of stock, preference and ordinary, into stocks of a larger amount bearing a correspondingly lower rate of interest. This court thought, and the House of Lords thought also, that, though nothing had been added to the working capital of the company, the company came under an obligation to pay duty on "an increase of the amount of the nominal share capital" of the company under section 113 of the Stamp Act, 1891. In the present case, by the carrying out of the arrangement authorized by the company's private Act, stock has come into the hands of persons who did not hold that stock before, and it seems to me that the company did propose to issue loan capital, and have therefore come under the obligation to pay duty under section 8 of the Finance Act, 1899. I cannot agree with the judgment of Ridley, J. The Crown waiving the penalties, there will be judgment for the Crown for duty and interest.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

High Court of Justice.

Chan. Div. }
Farwell, J. } Dec. 11.

In re CLARK'S ESTATE.
MCKECHNIE *v.* CLARK. (*a.*)

Will — Construction — Personalty — Local situation — Bequests of property in United Kingdom and in South Africa—Separate trusts and trustees—South African debtors by specialty and simple contract—Shares in South African companies transferable both there and in London—Certificates at London bank.

For the purpose of construing a will which disposes of "personalty in the United Kingdom" in one way, and "personalty in South Africa" in another way, the debts owing to testator, whether on simple contract or by specialty, are to be considered as locally situated where the debtors are, the distinction made between simple contract and specialty debts in relation to probate duty not holding good in questions of construction.

In construing such a will, shares in companies constituted according to the law of a South African state, but having offices both there and in London, in either of which places transfers can be registered and certificates issued, are to be considered as locally situated in that one of the two countries in which the share certificates are kept at the date of testator's death.

Originating summons by an executor for the determination of questions as to the construction of a will.

By his will dated in 1890, William Gordon Clark, after giving certain pecuniary legacies, devised and bequeathed all his real estate in the United Kingdom, and all the residue of his personal estate and effects whatsoever within the United Kingdom (all which real estate and the residue of personal estate he thereinafter included in the expression "residuary estate") to his wife, his son Douglas, and the plaintiff, Donald McKechnie the elder, whom he thereinafter called his home trustees, upon certain trusts for the benefit (in the events which happened) of his wife, his two sons Douglas and Colin, and his daughter; and he devised and bequeathed all his real and personal property, estate, and effects in Natal, the Orange Free State, and elsewhere in South Africa to his said son Douglas and his friends N. M. McKechnie and Donald McKechnie the younger (who were thereinafter referred to as his foreign trustees) in trust for his said two sons.

The two trusts were distinct the one from the other.

The will conferred powers of sale on the foreign trustees with regard to the South African property, and the testator declared that their receipts for any moneys, stocks, funds, shares, or securities which should be paid or transferred to them by virtue of that his will should effectually discharge the persons paying or transferring the same from liability to see to the application thereof; and that his home trustees should not be bound to see to or inquire into any matters relating to the sale, collection, getting in, and conversion of any of his said property in South Africa, but that his foreign trustees should exclusively be responsible therefor. The persons named as executors were the same at those called home trustees.

The testator died in 1902, domiciled in England and possessed of considerable personal property, as to which the doubt arose whether it was included in the gift of residue of personal estate and effects within the United Kingdom or in the gift of personal property, estate and effects in South Africa; and a declaration on this point, as also on the question out of which property the funeral and testamentary expenses and pecuniary legacies were to be paid, was sought by the present summons, which was taken out by Donald McKechnie the elder, one of the executors, the beneficiaries under the respective trusts being made defendants.

Of the property mentioned in the summons a decision was ultimately required in regard to the following items only: Debts by simple contract due to the testator in respect of his London mercantile business from persons carrying on trade in South Africa: Specialty debts, being bonds of the Port Elizabeth Waterworks Co.: Shares in gold mining and other companies constituted under the laws of the late South African Republic, and having

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

their directors and principal offices in the Transvaal, though they had offices in London, where transfers could also be registered and certificates issued. The shares were bought on the London Stock Exchange. The above-named bonds, which were payable to bearer, and the certificates for the said shares, were all, at the date of the testator's death, deposited with his London bankers.

Mark Romer, for the plaintiff.

Upjohn, K.C. (*Clayton* with him), for the defendant Mrs. Clark (the widow) and her infant daughter (beneficiaries under the home trust), cited *Attorney-General* v. *Bouwens*, 4 M. & W. 171; *Attorney-General* v. *Dimond*, 1 Cr. & Jer. 356; *Stern* v. *The Queen*, 44 W. R. 302, [1896] 1 Q. B. 211; *Attorney-General* v. *Hope*, 1 C. M. & R. 530; *Guthrie* v. *Walrond*, 31 W. R. 285, 22 Ch. D. 573.

Jenkins, K.C., and *MacSwinney*, for the testator's sons (beneficiaries under the foreign trust), cited *Nisbett* v. *Murray*, 5 Ves. 149; *Attorney-General* v. *Higgins*, 22 H. & N. 339, 5 W. R. Dig. 227; *In the Goods of Wm. Ewing, deceased*, 6 Prob. D. 19; *Arnold* v. *Arnold*, 2 M. & K. 365; *Tyrone* v. *Waterford*, 8 W. R. 454, 1 D. F. & J. 613, 628.

FARWELL, J.—This testator has unfortunately used words which give rise to a great deal of difficulty: "I devise and bequeath all my real estate in the United Kingdom and all the residue of my personal estate and effects whatsoever in the United Kingdom (all of which real estate and residuary personal estate is hereinafter included in the expression where hereinafter used of 'my residuary estate') unto"—and then he mentions three persons whom he calls his "home trustees." He then proceeds: "I give, devise, and bequeath all my real and personal property, estate, and effects in Natal and the Orange Free State and elsewhere in South Africa"—in another way, and he appoints certain "foreign trustees" for that purpose. Then this declaration is relied on: "And I declare that the receipts of my foreign trustees for any moneys, stocks, funds, shares, or securities which shall be paid or transferred to them by virtue of this my will shall effectually discharge the persons paying or transferring the same from liability to see to the application thereof, and that my home trustees shall not be bound to see to or inquire into any matters relating to the sale, collection, getting in, and conversion of any of my said property in South Africa, but that my foreign trustees shall exclusively be responsible therefor"—and then there is an appointment, as executors, of the home trustees only.

Now, the testator had, amongst other property, bonds of the Port Elizabeth Waterworks Co. (numbered 33 in the schedule to the summons), and it is only those bonds, and certain shares to be mentioned presently, that I have to deal with now, the other items having been disposed of in the course of the argument.

With regard to the bonds, it is conceded that if they were simple contract debts the rule is, in construing a will, that the debts, so far as they can have a locality at all, are to be considered to be located where the debtor is, and I do not see, for this purpose, any ground for drawing a distinction between a bond and a simple contract debt. For fiscal purposes no doubt a distinction may be drawn between the two, but there does not appear to be any reference to the construction of the will on that point in the case of *Guthrie* v. *Walrond*, 31 W. R. 285, 22 Ch. D. 573, and it appears that Fry, J., did not intend to draw any distinction, or that there was any distinction drawn for this purpose; but that so far as there was any locality in question it was merely where to sue the debtor.

Then there is this question, which I feel considerable difficulty about. The testator was possessed of shares in a number of South African companies, *i.e.*, companies constituted according to the law of the Transvaal or of the Orange Free State. Those companies all have offices in London as well as in South Africa, with boards of directors and officers for the purpose of conducting the business and the issue of shares and certificates here, as well as in South Africa. So far as regards any locality or situation of the shares, it is impossible to say whether South Africa or England has the greater claim to be regarded as a guide to the court as to what the testator meant by the words he used. I am asked to construe the will, really, as if the words were not "my real and personal estate in the Orange Free State and elsewhere . . . " but as if they were "all my real and personal estate and shares in the companies situated" there, but that is not what the words cover. I have got to find out the locality of the personal estate, whether English or South African. The first thing I have to deal with is a share, an impalpable thing, represented by a certificate, without which no transfer can take place. The actual active transfer can be done equally effectually in South Africa as in England, and the only conceivable distinction I can see in any shares so far as regards the point of locality is the possession of the certificate which, for this purpose, is essential to complete the title to the shares. So far as I can see that is the only thing I have to go on. There is no distinction between the locality of shares in this country, and therefore I hold, so far as the certificates of the shares in these companies were in England, where the companies have offices in London and power of transfer as well as in South Africa, that they pass under the gift of property situated in England, and not in South Africa. There will be a declaration that the simple contract and bond debts due from South African debtors are part of the South African property, but that the shares in South African companies which are transferable both here and in South Africa, and of which the certificates are in London, are English property. As to the other question, the testator's funeral and testamentary expenses and the pecuniary legacies, and also his debts (as to which last the will contains no directions for payment) must be paid out of the English property—the use of the word "residue" being, in my opinion, an indication of such intention. The costs, as Mr. Jenkins does not press his objection, will be borne in moieties by the two funds.

Declaration accordingly.

Solicitors, *Minet, Harvie, May, & Co.*, for plaintiff and for the beneficiaries under the foreign trust; *Vanderpump, Son, & Wood*, for beneficiaries under the home trust.

Chan. Div. } Dec. 3.
Buckley, J. }

In re BAKER (DECEASED).
BAKER *v.* BAKER. (*a.*)

Will—Forfeiture—Construction—"Become payable"—Equitable charge—Cancellation of charge.

B., being entitled under a will to a life interest in a share of the testator's estate, executed a document

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

charging his interest with the repayment to the lenders of a sum advanced. The will contained a clause that B. should not have power to dispose of his share by way of anticipation, and that if he did anything whereby his share, or any part therof, "would become payable to or vested in some other person," it was to go to his son. Upon becoming aware of the forfeiture clause, and before any payment of capital or interest had been made by B., under the charge, B., and the lenders cancelled it.

Held, that some part of B.'s share became payable to other persons immediately upon the execution of the charge; that the forfeiture took effect, and that the subsequent cancellation made no difference.

George Baker, by his will made in September, 1896, gave his residuary estate to his trustee upon trust to pay one-fourth shares to a daughter and to a son Walter for life, and another such share to another son Arthur, and the remaining one-fourth share to his son Henry during his life, and after Henry's decease upon certain trusts in favour of his wife and children as therein mentioned. And on the death of either the testator's daughter or son Walter their shares were to be added to the shares of Arthur and Henry. After these dispositions, the will continued as follows: "Provided always, and I hereby declare that neither my daughter, or my son Walter or Henrys shall have power to dispose of their share or any part thereof by way of anticipation, and in the event of either of my two sons becoming bankrupt or doing anything whereby their said share or some part thereof would become payable or vested in some other person (whichever of the said events shall first happen), then I direct that the share of such son shall be payable to his son during his life."

The testator died in November, 1896, and Walter Baker, his son, died in 1897.

An action was commenced in 1898 to administer the estate, and in 1899 the usual judgment was given.

In February, 1903, Henry Baker borrowed £4 10s. and signed the following document addressed to the lenders: "In consideration of your advancing to me this day the sum of £4 10s. (four pounds ten shillings) I hereby charge all my interest in the estate of my late father, George Baker, with the repayment to you of the said sum with interest thereon until repayment, at the rate of five pounds per cent. per annum."

In March, 1903, he borrowed of the same persons a further sum of £15, and signed another document addressed to them as follows: "In consideration of your advancing to me this day the sum of £15 (fifteen pounds sterling), I hereby charge all my share, estate, and interest, after the rate of five pounds per centum per annum in the estate of my late father, George Baker, with the repayment to you of the sum of twenty pounds on the 24th of September, 1903, and with interest after the rate of five pounds per centum per annum on the sum of twenty pounds after the 24th day of September, 1903, until the day of repayment."

Evidence was given that at the time of signing the above documents Henry Baker had forgotten the fact of the forfeiture clause in the will. Upon his attention being called to it, on the 21st and 24th of July, 1903, respectively, before any payments of interest or capital had been made or anything had been done, under the documents of charge, he and the lenders cancelled them.

The present summons came on with the further consideration of the action, and was taken out in the action to have it determined whether in consequence of the above documents of charge Henry Baker's share and interest in the estate of the testator had become forfeited.

A. H. Jessel, for Henry Baker and the trustees.—The interest of Henry Baker did not become either "payable to or vested in" the mortgagees. The words of the clause are not "might" but "would" become payable; "would" means "will": *Ex parte Dawes*, as decided by Cave, J., 17 Q. B. D. 275, 282, the case being decided by the Court of Appeal on another point. But even if the memorandums of charge would otherwise have offended against the clause, the forfeiture was prevented by the cancellation (*Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1, 40 W. R. Dig. 280; *In re Loftus-Otway*, 43 W. R. 501, [1895] 2 Ch. 235), as nothing ever became actually due and payable to the mortgagees. *Seymour* v. *Lucas*, 8 W. R. 599, 1 Dr. & Sm. 177, is also in favour of this view. In the case of *Hurst* v. *Hurst*, 31 W. R. 327, 21 Ch. D. 278, there was a gift over upon the property being "charged," which is not the case here.

Wrangham, for the children of Henry Baker.

BUCKLEY, J.—The will states that Henry Baker shall not have power to dispose of his share or any part thereof by way of anticipation. It is true that there is no gift over in so many words upon that event, and that a man cannot be restrained from anticipation without a gift over; but I think those words have some bearing upon the construction of the clause. The question is whether a forfeiture has been incurred. I think that it has. The thing we have to ascertain is whether there was a moment when Henry Baker gave someone else a right to receive part of his share. In my opinion, at the moment when, in February and March respectively, he executed these charges, he gave to the mortgagees a right to receive in payment of their advances parts of his share. Mr. Jessel has been driven to argue the case as if the language of the clause had been become payable "in any event." If that view were right, then even if Henry Baker had assigned his share absolutely, yet it might not have caused a forfeiture if the share had been reassigned to him before any moneys became payable from the estate in respect of it. That would be an extravagant contention. The right to receive part of the share having been once given, the fact that the persons to whom the right was given subsequently released it had no effect upon the question, and I hold that the clause of forfeiture took effect.

Solicitors, *Aird, Hood, & Co.; Robert J. Clark.*

C. C. R.
(Lord Alverstone, L.C.J., and Wright, Kennedy, Darling, and Phillimore, JJ.) — Nov. 27.

REX v. TURNER. (a.)

Criminal law — Undischarged bankrupt — Obtaining credit to extent of £20 or upwards—Misdemeanour—Maximum punishment—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *ss.* 11, 13, 14—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 31.

By the Bankruptcy Act, 1883, *s.* 31, *it is provided that "Where an undischarged bankrupt, who has been adjudged bankrupt under this Act, obtains credit to the extent of £20 or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act*, 1869, *and the provisions of that Act shall apply to proceedings under this section."*

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Held, that the maximum punishment for an offence under the above section is imprisonment with hard labour for one year, as the section refers to the class of misdemeanours mentioned in section 13 *of the Debtors Act,* 1869, *and not to the class mentioned in section* 11 *of that Act.*

Case stated for the Court for Crown Cases Reserved.

This was a case stated by F. A. Bosanquet, K.C., Common Serjeant of London.

The prisoner was tried and convicted before the learned judge on an indictment under section 31 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) for obtaining credit exceeding £20 without disclosing that he was an undischarged bankrupt. That section provides that a person committing such an offence may be punished as if guilty of a misdemeanour under the Debtors Act, 1869 (32 & 33 Vict. c. 62).

Section 11 of the Debtors' Act specifies a number of acts for which a person adjudged bankrupt is liable to be imprisoned with hard labour for any time not exceeding two years.

Section 13 specifies certain cases in which any person on conviction thereof shall be guilty of a misdemeanour for which he is made liable to be imprisoned with hard labour for a period not exceeding one year.

The learned judge sentenced the prisoner to be imprisoned with hard labour for fifteen months subject to the question whether he was liable to be punished as if guilty of a misdemeanour under section 11 of the Debtors Act, 1869. If the prisoner was only liable to be punished under section 13 the sentence was to be reduced to twelve months' imprisonment with hard labour.

Section 31 of the Bankruptcy Act, 1883, provides that: "Where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the amount of twenty pounds and upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act, 1869, and provisions of that Act shall apply to proceedings under this section."

E. F. Lever, for the prisoner.—Section 31 of the Bankruptcy Act, 1883, does not refer to misdemeanours mentioned in section 11 of the Debtors Act, 1869, but to a misdemeanour of the class mentioned in section 13, the maximum punishment for which is one year's imprisonment with hard labour. The Common Serjeant was therefore wrong in sentencing the prisoner for a longer period than one year.

He referred to *Reg.* v. *Dyson*, 42 W. R. 526, [1894] 2 Q. B. 176.

Guy Stephenson, for the prosecution.—The Common Serjeant was entitled to pass a sentence of fifteen months' imprisonment upon the prisoner. The offences provided for in section 11 of the Debtors Act, 1869, are cognate offences to those provided for in section 31 of the Bankruptcy Act, 1883. The former section deals with "any person adjudged bankrupt," and the latter section with a person "who has been adjudged bankrupt." Section 11 deals with offences committed only by a bankrupt, whilst section 13 deals with offences committed by "any person," whether he has been adjudged bankrupt or not.

Lord ALVERSTONE, L.C.J.—In this case the prisoner was indicted and convicted under section 31 of the Bankruptcy Act, 1883, which provides that an undischarged bankrupt convicted thereunder "may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act, 1869." There is nothing on the face of section 31 of the Bankruptcy Act, 1883, to show to which of the sections of the Act of 1869 it refers, but when you look at the three sections, 11, 13 and 14 of the latter Act, it seems to me that there is an indication that the lesser punishment is the right one. If there is nothing to guide one, the general rule is that the lesser punishment ought to be taken as the right one. I think, though, that there is here something to guide one. Section 11 of the Act of 1869 deals with specific offences in the actual conduct of the bankruptcy. Section 13 deals with the case of a person who, in incurring any debt or liability, has obtained credit under false pretences, or by means of any other fraud. Section 31 of the Bankruptcy Act, 1883, makes the offence a misdemeanor, even though there is no intent to defraud, because the mere non-disclosure of the bankruptcy constitutes the offence. In my opinion this section is very kindred to section 13 of the Act of 1869. I think, by reference to the class of offence, section 13 is much more analogous to section 31 than section 11 is, and that the prisoner was only liable to a maximum punishment of twelve months' imprisonment with hard labour. The sentence, therefore, must be reduced to twelve months' imprisonment with hard labour.

WRIGHT, J.—I am of the same opinion.

KENNEDY, J.—I am of the same opinion.

DARLING, J.—I am of the same opinion.

PHILLIMORE, J.—I agree.

Judgment accordingly.

Solicitor for the prisoner, *H. R. Newson.*

Solicitor for the prosecution, *Solicitor to the Treasury.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) July 9, 17, 1903.

REX v. PARKE. (*a.*)

Contempt of court—Practice—Offence triable at assizes only—Power of High Court to commit for contempt—Judicature Act, 1873, *ss.* 16, 29.

Where preliminary proceedings having been begun in a petty sessions court for an offence which was only triable at assizes, and before the person charged was committed for trial, there was published comment in a newspaper tending to interfere with the fair trial of the charge, it is within the power of the High Court to commit the publisher for a contempt of court, the assize court being by sections 16 *and* 29 *of the Judicature Act,* 1873, *constituted a part of the High Court.*

This was the hearing of a rule *nisi* calling upon S. H. Parke to show cause why he should not be committed for contempt of court.

The facts of the case and the arguments sufficiently appear from the judgment.

Danckwerts, K.C., and *C. W. Mathews*, showed cause against the rule.

Lush, K.C., and *Randolph*, in support of the rule.

WILLS, J., read the judgment of the court, which was to the following effect: One S. H. Dougal was, on the 19th of March, brought up before the Saffron Walden Petty Sessions charged with forgery, and remanded without any evidence being taken. He was again brought up on the 2nd of April, and

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

remanded, after some evidence, till the 8th of April. Articles appeared in the *Star* newspaper, of which the defendant is the editor, on the 19th, 20th, 21st, 23rd, 24th, 26th, and 27th of March, some of which contained statements undoubtedly very much to the disadvantage of Dougal. To take one instance only. In the issue of the 20th of March, before any evidence had been given in the case, it was stated that on the 27th of January an affiliation order had been made against him; that a remarkable story of immorality had been disclosed; that he had admitted a conviction for forgery in December, 1895, and that he had been sentenced to twelve months' imprisonment with hard labour. It is unnecessary to go through the various articles complained of, but they were unquestionably calculated to produce the impression that, apart from the charges then under inquiry, he was a man of bad and dissolute character.

On the 7th of April the rule now under consideration was granted by this court calling on the defendant to show cause why he should not be committed for contempt of court. After many subsequent hearings Dougal was committed for trial to the Essex Assizes on charges of forgery and murder. True bills were found in respect of all the charges. The only indictment actually tried was for murder, and, as the prisoner was convicted, the others were not proceeded with.

The important question has been raised whether the High Court has jurisdiction in such a case; and it has been argued by Mr. Danckwerts, on behalf of the defendant, that there can be no such jurisdiction, because at the time of the publication of the articles complained of there was no proceeding actually pending in any court but the petty sessional court; that the jurisdiction to punish the publishers of articles of this kind is confined to cases in which at the moment of publication there is some cause actually depending in the High Court, and that the High Court cannot deal by way of attachment for contempt with interferences with the due course of justice in any court other than itself.

It may be conceded that the jurisdiction to commit for contempt of court is confined to contempt of the court exercising the jurisdiction. Upon the wider and more general question whether this court will treat in this fashion inroads upon the independence of inferior courts we propose to say a few words towards the close of this judgment. As far as the present case is concerned, it does not seem to us to arise. By the Judicature Act, 1873, ss. 16 and 29, the court of a commission of assize is made a branch of the High Court. The crime of forgery of which Dougal was accused, a forgery cognizable for the purposes of the petty sessional inquiry at Saffron Walden, could not in the regular course of things be tried anywhere but at the Essex Assizes, and therefore, if a committal should take place at all, it must be to those assizes.

It has been argued that publication of articles of the kind in question cannot be treated as contempt of the assize court unless the committal has taken place or a bill been found, for then only (it is urged) is there a case pending in the assize court, and then (it is also urged) the jurisdiction ought to be exercised by that court itself. A moment's consideration, it seems to us, is sufficient to dispose of such a proposition. The reason why the publication of articles like those in this case is treated as a contempt of court is because their tendency, and sometimes their object, is to deprive the court of the power of doing that which is the end for which it exists—viz., to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression "contempt of court." If it be once granted that such is the nature of the offence, what possible difference can it make whether the particular court, which is thus sought to be deprived of its independence and its power of effecting the great end for which it is created, be at that moment in session or even actually constituted or not? It is perfectly certain that by law it will and must be constituted, and that when constiuted it and it alone can take cognizance of the particular offence which is the subject of the preliminary inquiry. The wrong can hardly be the less because the purpose or tendency of the act complained of is that the assize court never shall have undisturbed power to fulfil its functions satisfactorily. The High Court exists always. To so act beforehand that one of its branches—which, although it does not at the moment exist, yet must according to the immemorial custom, and now also by statutes and rules having the same effect, come into existence—shall be hampered and hindered in the effectual discharge of its duties as soon as it is constituted, if called upon to try a particular case which it is, at all events, proposed to bring into that court, is surely an offence against the High Court itself. Looking, therefore, to the principles upon which this jurisdiction rests, and to the mischief to prevent which it exists, we can have no doubt that it is properly invoked in the present case. Great stress has been laid by Mr. Danckwerts upon an expression which has been used in judgments upon questions of this kind, that the remedy exists where there is a cause pending in the court. We think undue importance has been attached to it. It has been the fact in very nearly all the cases that there has been a cause actually begun, but the expression, quite natural under the circumstances, accentuates the fact, not that it has been begun, but that it is not at an end. That is the cardinal consideration. It is possible to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased.

We proceed shortly to notice the authorities upon which reliance has been placed and which we have been able to obtain from the Crown Office. It will be observed that they are almost all of quite recent date. That is what might be expected. Before the Law of Libel Amendment Act, 1888, the publication of proceedings before magistrates preliminary to committal was of doubtful legality: see note to *Rex* v. *Fisher*, 2 Camp. 563, in 11 Revised Reports 799, from which it appears that doubts had begun to be cast upon the older doctrine as early as 1858. It was considered, at least until 1858, that the inevitable tendency of such publication was to have the case tried in the minds of persons who might be jurors, before they came into court: *Rex* v. *Fisher*, 2 Camp. 563; *Rex* v. *Lee*, 5 Esp. 123. Since that time, till after 1888, only one case is recorded in which the publication of such reports or of extraneous matters connected with them has been brought under the notice of the courts. Modern journalism, with its ceaseless thirst for matter which may interest its readers, is a thing of very recent growth; and when the publication of the preliminary proceedings was unlawful or of doubtful legality, not only was the occasion wanting for the publication of many things which since that Act have given rise to complaint, but the unlawfulness of the publication of the proceedings was a standing warning to editors and publishers which was not likely to be overlooked. The only old authority that has been cited to us (apart from those which have been spoken of as

dealing with cases actually pending in court) is *Rex* v. *Burchett*, 1 Strange 567, in which it is said that the Court of King's Bench never interferes with contempts of inferior courts. That case is an authority so far as it goes, rather upon the question of the general jurisdiction of the Court of King's Bench in its character as the superintending authority over inferior courts, than upon the question we are dealing with; and the circumstances of that case are such that, except for the general proposition stated, it can have little bearing upon any question likely to arise in any other case.

We come, therefore, at once to the somewhat numerous series of cases which have arisen in quite modern times. The earliest is reported in 2 Times L. R. 351, heard in 1886 before Lord Coleridge, L.C.J., and Hawkins, J. Certain persons had been summoned to appear at Bow-street on the 13th of February, 1886, on a charge of inciting to riot. The proceedings were adjourned and pending the adjournment *Punch* published a woodcut and letterpress headed "Sneaking Sedition"; a rule was applied for to call upon the printer and publisher of *Punch* to show cause why he should not be committed for contempt of court. The Court of Queen's Bench refused the rule, Lord Coleridge saying (as reported) that he had never heard it even suggested that this court could imprison a man for "contempt of court committed in another place"—an obviously incorrect expression not at all likely to have been used by Lord Coleridge. The case was within the jurisdiction of the Central Criminal Court and the trial of the persons summoned took place there. The fact that the Central Criminal Court had become by virtue of the Judicature Act of 1873, ss. 16 and 29, a branch of the High Court was not called to the attention of the court.

The next case in order of time was *Ex parte Hermann*. The applicant had been brought before the police-court at Marlborough-street with a view to her committal to the Central Criminal Court on a charge of murder. The *People* newspaper on the 1st of April, 1894, contained a statement that she had been tried and acquitted in 1890 on a similar charge and contained a fairly accurate account of what had happened on that occasion when the Common Serjeant had held that there was no evidence against her. An application to commit the editor and publisher of the *People* was heard before Wright and Collins, JJ. The question of jurisdiction was raised but not insisted upon, and the matter was allowed to drop on the defendants undertaking to pay the costs of the application. The case is reported only in the newspapers of the day under the name of *Rex* v. *Armstrong* (see *The Times* of 9th May, 1894). We have had the papers in the Crown Office looked up and the above statement of facts may be relied upon. Mr. Danckwerts has satisfied us that the Central Criminal Court stands upon precisely the same footing for the present purpose as the assize courts, but that fact does not appear to have been brought to the notice of the court. Wright, J., is reported to have said that although he could find no case in point, he should hesitate long before coming to the conclusion that this court had no jurisdiction in such a case.

The next case was in January, 1895, when a rule was made absolute against one Stead and others. One of the defendants was fined, but as in that instance an indictment had already been removed by *certiorari* into the King's Bench it has no hearing upon the present discussion: *R.* v. *Stead*, [1896] 11 Times L. R. 492.

Equally little relevance has the case of *Reg.* v. *Payne*, [1896] 1 Q. B. 577, in March, 1896, when a rule granted against the editor and publisher of the *Huntingdonshire Post* for comments on a case under committal was discharged on the merits—no question having been raised as to the jurisdiction.

On the 21st of December, 1895, Wills and Wright, JJ., refused a rule in respect of comments in a newspaper on a case of one Crane who had been committed to the Central Criminal Court, on the ground on want of jurisdiction. In this case also it was not called to the attention of the court that the judges at the Central Criminal Court sat under commissions identical with those which constitute the assize courts, and it was assumed that they sat under the Act of 1834 by which the Central Criminal Court was established (4 & 5 Will. 4, c. 36) and not under the commissions required by that Act: see Law Journal newspaper, 4th January, 1896.

In May, 1896, a rule was refused on the merits in respect of comments on a case in which two persons named Milsom and Fowler, who had been committed to the Central Criminal Court on a charge of murder. No question as to the jurisdiction was raised.

In January, 1897, Wright and Bruce, JJ., granted a rule in respect of an article in the Brecon and Radnor County Times upon the case of one Williams who stood committed for trial to the assizes. The same judges in the same term allowed the rule to be discharged on the defendants undertaking to pay the costs of the applicant as between solicitor and client. The question of jurisdiction does not seem to have been raised: *Reg.* v. *Felgate*, 19th January, 1897.

On the 26th of January, 1897, a rule was refused by Wright and Bruce, JJ., against the same defendants for an article in the same paper. It is not reported, but there can be no doubt that it was refused on the merits and not on any question of jurisdiction.

On the 28th of April, 1899, this court then consisting of Lord Russell, L.C.J., and Darling and Channell, JJ., granted a rule for comments on a case of one Mary Ann Ansell, who had been committed to the Hertfordshire Assizes on a charge of murder. The rule, however, was for some reason, which we cannot trace, not drawn up. Probably, as in the late case of *Rex* v. *Newton*, it was supposed to be a matter between the parties only and was compromised without the leave of the court.

We are informed that there may have been other cases on the civil side of the court of which there is no record in the Crown Office. If it is so, they would probably be cases in which comments had been made affecting proceedings in matters pending on the civil side, and, if so, would afford no assistance in the present discussion.

It will thus be seen that there have been only two cases in which the question of jurisdiction was effectively raised—in each instance with respect to cases which, if tried at all, would have been tried at the Central Criminal Court. In both cases the court assumed that the Central Criminal Court was a separate and independent court with which this court had nothing to do. We think that view is erroneous, for the reasons given by Mr. Danckwerts, and which we adopt. In neither case was there any serious argument on the subject of jurisdiction, and we think, therefore, that very little assistance can be gathered from the string of cases which have just been mentioned, or from the case in 1 Strange. For what they are worth they tell rather against than for the general jurisdiction of this court to protect inferior courts from attacks of this kind on their independence and usefulness.

On the other hand, very serious and important considerations tend the other way. Many inferior tribunals are not courts of record, and therefore have

no means of checking practices of the kind with which we are dealing. Many of them sit only at long intervals, and before they can do anything to interfere with such offences against public justice, all the mischief possible may have been effectually done. This court exercises a vigilant watch over the proceedings of inferior courts, and successfully prevents them from usurping powers which they do not possess or otherwise acting contrary to law. It would seem almost a natural corollary that it should possess correlative powers of guarding them against unlawful attacks and interferences with their independence on the part of others. It is said with respect to them, as has been said with respect to the present case, that there is a remedy by criminal information or indictment. The latter is unsatisfactory on account of the necessary delay; though it has been made use of (see *Rex* v. *Fisher*, 2 Camp. 563, anno 1811) where the defendant had published in a paper called the *Day* a sensational report of the statements made before a magistrate previous to committing a prisoner for trial at the Admiralty Sessions or in the Court of King's Bench, as the parties might think fit. Criminal information is cumbrous and is also liable to great delay. It has no doubt been occasionally resorted to, as in the case of *Rex* v. *Williams*, 2 L. J. (O. S.) K. B. 30 (November, 1823), where John Thurtell had been committed to the assizes on a charge of murder, and a theatrical exhibition was held by the court to be calculated to interfere with the fair trial of his case; in *Rex* v. *Lee*, 5 Esp. 123 (anno 1804), where the defendants had published a statement of the contents of depositions taken before the magistrate on a charge of murder; and in *Rex* v. *Fleet*, 1 B. & Ald. 379 (anno 1818), where the defendant had published the evidence given before a coroner's jury with comments unfavourable to a party accused of murder: see also *Reg.* v. *Gray*, 10 Cox 184 (1865), an important Irish case. In England no case of a criminal information for a matter of this kind is to be found in the books since *Rex* v. *Williams*, cited above, in 1823. There are, however, serious objections to the proceeding by way of criminal information. Apart from those which had been pointed out before, it is usual in cases of criminal information for the court to be satisfied that the applicant is a person to whom the privilege of filing an information in the name of the Attorney-General may safely and properly be granted, and although this condition has been dispensed with in the cases above mentioned, the court ought to be chary of departing from so wholesome a rule.

On the other hand there are not wanting expressions in the books which point in the other direction. The jurisdiction, as has been shown, has been actually exercised whether *per incuriam* or rightly in several of the cases cited. The Court of King's Bench is one to which every criminal case which may be the subject of indictment is liable upon proper material to be removed. One frequent ground of removal is that prejudice exists in the natural locality of trial, and it may well be that it has a direct interest and duty in repressing practices whose influence for evil would extend though perhaps in a less measure to itself should it be called upon to try a case removed from another court. But we purposely abstain from pronouncing any opinion upon this general question, and prefer to leave it entirely open when the occasion shall arise, and at the present moment confine ourselves to saying with Wright, J., that we should hestitate long before casting any more doubt than may already exist upon the capacity of this court to deal by proceedings for contempt with cases in which attempts are made to pollute the stream of justice, and to interfere with its proper and unfettered administration by courts which possess no adequate means of protecting themselves in this respect.

In the particular instance before us it appears that Mr. Parke was not himself the author of the articles complained of, nor was he aware that they had been written or were about to be published. His superintendence, however, must have been of a very lax and perfunctory character, as the articles were published in no less than seven issues of his paper extending from the 19th to the 27th of March, both days inclusive; and as the first of the series was one which grossly transcended all possible limits of propriety in such matters, and transcended them in a peculiarly mischievous fashion by stating a number of facts extremely damaging to the prisoner which could never be given in evidence against him on his trial, and upon the publication of which any reasonable sense of justice would have induced the editor to take serious notice of with regard to his subordinate, he cannot be acquitted of great negligence in allowing such violations of the law to be repeated time after time, and we think he ought to pay a substantial fine, which we fix at £50. And our order is that he pay that sum as fine and that he be imprisoned in the custody of the court in Brixton Gaol until the fine be paid. We make no order as to costs, as looking to the matters brought to our notice in the application recently heard against the solicitor who took the present proceedings we can hardly doubt that the real object of the motion was to obtain for Dougal a sum of money by way of compromise—an abuse of the process of this court to which we feel bound to put a stop.

Rule absolute.

Solicitor for complainant, *Arthur Newton.*

Solicitors for defendant, *Lewis & Lewis.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) July 7, 1903.

SMITH v. SIBRAY, HALL, & CO. (a.)

Factory—Overtime—Part of factory in which overtime employment allowed—"Warehouse not used for any manufacturing process or handicraft"—Factory and Workshop Act, 1901 (1 *Ed.* 7, *c.* 22), *s.* 49, *Schedule II., clause* 4.

By Schedule II., clause 4, *of the Factory and Workshop Act,* 1901, *overtime is allowed in "any part of a factory (whether textile or non-textile) or workshop which is a warehouse not used for any manufacturing process or handicraft, and in which persons are solely employed in polishing, cleaning, wrapping, or packing up goods."*

A part of a factory which is used at any time during ordinary hours for a manufacturing process or handicraft is not a "warehouse" in which overtime is allowed within the meaning of the above clause, and persons may not be employed in overtime therein, even though no manufacturing process or handicraft is being carried on therein during such overtime.

Case stated by the stipendiary magistrate for the City of Sheffield.

The complainant, the appellant, was an Inspector of Factories and Workshops.

Two complaints were laid against the defendants, the respondents, as to two women, Wood and Colley.

One of the complaints or informations alleged

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

that on Friday, the 19th of December, 1902, the respondents, Messrs. Sibray, Hall & Co. (Limited), were occupiers of a certain factory within the meaning of the Factory and Workshop Act, 1901, in the City of Sheffield, and that on the said date a woman named Wood was employed after eight o'clock in the evening contrary to the provisions of the said Act.

The other information was in the same terms as to Colley.

The two complaints were heard on the 16th of January, 1903. They were founded on certain provisions of the Factory and Workshop Act, 1901. The respondents were on the date and at the place alleged the occupiers of a factory. The factory was used for the manufacture of silver and silver plate. They were engaged almost entirely in the manufacture of silver work, and manufactured electro-plated goods only upon special orders, and their work upon electro-plated goods was not more 2½ per cent. of their total work.

At the hearing it was proved that on the 19th of December, 1902, two factory inspectors visited the respondents' works or factory at about 9 p.m., and found Wood and Colley at work there along with some other women, as to whom no complaints were made. It was complained that these two women were at work on a vase and lid, one of them on the vase and the other on the lid, and that each of them was burnishing, because each was using a small hand tool, which seemed to be a burnishing tool, and they appeared to the inspectors to be burnishing, and the cup and the lid looked to them as if they had been burnished.

Another small hand tool called a picking tool appeared to have also been in use by them, for the purpose of picking off dirt from the object they were working on.

In this case ordinary time was one of the times mentioned in section 26 of the Factory and Workshop Act, 1901, that is, 6 a.m. to 6 p.m., or 7 a.m. to 7 p.m., or 8 a.m. to 8 p.m., except for Saturdays.

The ordinary time in the respondents' factory was 8 a.m. to 8 p.m. at the time when the complaints arose.

The two women gave evidence, as also the company's secretary, and a manager and two manufacturers who had large works.

The use then being made of the tools appeared to have been partly in picking bits of dirt out and partly in saving cruel work for the fingers in rubbing.

It appeared that by some persons all processes up to the wrapping and packing are called manufacturing processes or handicrafts, so that all cleanings and polishings would be so called by some; though all do not appear to be looked on as such processes or handicrafts in Schedule II. (4) of the Factory Act, 1901.

It also appeared that the room in which the two women were at work was known as the warehouse or warehouse department of the works, and that burnishers usually worked in it, though not after 8 p.m., and not on the evening as to which the complaints were made.

It was contended by the appellant that, inasmuch as women were from time to time employed in that part of the factory up to eight o'clock in the evening in the manufacturing process of burnishing and not solely in polishing, cleaning, wrapping or packing up goods, that part of the factory was not a warehouse within Schedule II., clause 4.

The second schedule to the Factory and Workshop Act, 1901, is as follows: "Factories and workshops in which overtime is allowed: (4) Any part of a factory (whether textile or non-textile) or workshop which is a warehouse not used for any manufacturing process or handicraft, and in which persons are solely employed in polishing, cleaning, wrapping or packing up goods."

The learned magistrate came to the conclusion that burnishings done in silversmiths' factories and all such like burnishings in non-textile factories in ordinary time were excluded by Schedule II. (4) of the Act from the processes allowed by it in its overtime; but he was of opinion that when the burnishings, though carried on in the warehouse or warehouse department, were carried on there in ordinary time only, and not in Schedule II. (4) overtime, the two times must be looked at separately, and that the carrying them on there in ordinary time did not prevent the warehouse or warehouse department from being within the meaning of Schedule II. (4) a place where overtime might be worked, as being a place "not used for any manufacturing process or handicraft," because the persons then using such warehouse were solely employed in polishing, cleaning, wrapping or packing up goods. He therefore dismissed the summonses.

The question for the opinion of the court was as follows: "If the court is of opinion that the burnishing which was done in the defendants' factory or warehouse in ordinary time was a polishing or cleaning allowable for Schedule II. (4) overtime; or if the court is of opinion that it was not allowable but did not affect the Schedule II. (4) overtime, because it was done in ordinary time only, the two complaints are to stand dismissed on the ground that the offence complained of has not been committed. If the court is of opinion that the burnishing was not allowable for Schedule II. (4) overtime, and that doing it in ordinary time where the Schedule II. (4) overtime was done affected the working done there in Schedule II. (4) overtime, although it had been done in ordinary time only and was not done when the Schedule II. (4) overtime was being done, the dismissal on the ground that no offence was thereby committed is to be held erroneous in point of law, and the offence charged is to be held to have been committed, and the two complaints are to stand dismissed on the ground that the offence charged has been committed, but they have been dismissed on these particular accounts without convictions under section 16 of the Summary Jurisdiction Act, 1879."

H. Sutton, for the appellant.—The magistrate was wrong. The words "not used for any manufacturing process or handicraft" mean not used at any time at all for any manufacturing process or handicraft; they must not be taken to mean not being used for any manufacturing process or handicraft at the time the overtime work is being done. Burnishing is a manufacturing process, and if it is carried on in the ordinary business hours, that part of the factory where it is so carried on cannot possibly be said to be a "warehouse not used for any manufacturing process" within the meaning of Schedule II. (4), and overtime cannot be allowed in it for any purpose whatever. If persons are employed therein at any time in any other operation than "polishing, cleaning, wrapping, or packing up goods" it is not a warehouse within the clause. The intention of the Legislature was to limit not only the time of the employment, but also the place in which the employment is carried on. To hold otherwise would enable persons engaged in manufacturing processes easily to evade detection by an inspector when carrying on their manufacturing process during overtime.

J. A. Slater, for the respondents.—The decision of the magistrate was right. Assuming "burnishing" to be a "manufacturing process," this room was a place where packing up could be properly carried on in overtime. Clause 4 is somewhat ambiguous, and it was open to the learned magistrate to find as he

has done. The Legislature intended to say that if the room is not at the time being used for a manufacturing process or handicraft, then overtime work may be carried on therein. The words "not used" mean not used for the purpose of any manufacturing process or handicraft at the time the "polishing, cleaning, wrapping, or packing up goods" is going on. To hold otherwise would make it impossible for anyone who carried on a manufacturing process in a single room, ever to carry on any overtime employment.

H. Sutton replied.

Lord ALVERSTONE, L.C.J. — I think that the decision of the learned magistrate was wrong, and that the case must be remitted to him. It is not necessary, I think, to define exactly what overtime means. There are two views. It may mean any employment of a woman between eight o'clock and ten o'clock at night, or it may mean the employment of a woman who has already on the same day worked twelve hours. In this case it is admitted that the only justification for employing these women at the time of the inspector's visit was that they were employed in overtime as contemplated by the Act. Now, overtime is allowed by section 49 of the Factory and Workshop Act, 1901, in the non-textile factories and workshops and warehouses specified in the second schedule to the Act. That schedule, after enumerating a number of non-textile factories and workshops in which overtime is allowed, proceeds in clause 4 as follows: "Any part of a factory (whether textile or non-textile) or workshop which is a warehouse not used for any manufacturing process or handicraft, and in which persons are solely employed in polishing, cleaning, wrapping, or packing up goods." The contention by Mr. Sutton, on behalf of the factory inspector, is that those words "not used for any manufacturing process or handicraft" are a description of the room or place in which the limited employment mentioned later may be carried on; in other words, that they mean in a part of the factory which is never used for a manufacturing process or handicraft. The contention by Mr. Slater, on the part of the manufacturer, is that "not used" means not so used at the time when overtime was being worked. I do not say the words are not open to either construction. It is possible to construe them as "not used at the time," or it is possible to construe them as "never been used." It is quite plain, however, that something more is intended than the actual work which the people are doing at the time, because you have a limit as to the things people may do in overtime—namely, "polishing, cleaning, wrapping, or packing up goods," and in addition to that overtime must be worked in a part of the factory not used for any manufacturing process or handicraft. Is it more in consonance with factory legislation that that should mean a building which is at no time of the day used for that purpose, or a building that is not used for that purpose during the time overtime is worked? I think the view that has been presented by Mr. Sutton is correct. I think upon the point of view of evasion that it is desirable that the place in which the permitted employments are to be carried on during the overtime hours should be a place where there would not be any difficulty of detection and where there would be no facility of evasion. The inspector is not always there. He only comes at times, and perhaps not at very frequent intervals. There may be cases in which, if the work is being carried on in the place where the manufacturing processes are being carried on, the workmen may glide from one work to another without possibility of detection. Another point has been mentioned. It may be that, for sanitary reasons, it may not be desirable that the particular overtime employment, "polishing, cleaning, wrapping, or packing," should be carried on in rooms where manufacturing processes have in ordinary time been carried on. Looking at the legislation as a whole, it seems to me that in addition to the employments that are limited for overtime, the Legislature has also limited the places which shall be used; and that the words "not used for any manufacturing process or handicraft," especially when you remember it refers to textile and non-textile warehouses, point to the character of the place. I think that if the Legislature had meant to say that the overtime employment was permissible if the place was not at the time used for any manufacturing process or handicraft, we should find language to that effect. Therefore I come to the conclusion that this was a place in which the working of overtime was not justified, on the ground that it was a place that was used for manufacturing processes or handicraft during the ordinary working hours.

WILLS, J.—I am of the same opinion. I think it is perfectly clear, when the matter comes to be fairly considered, that the employment of women and young persons is permitted only for specified periods which, subject to an exception which I will mention presently, in each of the cases mentioned consist of twelve hours—6 to 6, 7 to 7, 8 to 8, according to the time at which work begins. Then, after a woman has worked the period of twelve hours, I should think that overtime begins. It is difficult to say that overtime must be from 6 to 8, or from 7 to 9, or from 8 to 10, seeing that it must vary with regard to each set of persons according to the time they come. But it is not necessary to decide that. That is the view that occurs to me as to what is meant by "overtime." Nine o'clock at night, which was the time of the inspector's visit, must from any point of view be overtime. It is an hour after the latest period which is allowed, and, therefore, in any point of view it must be overtime. Then the only question is whether the respondents, the employers, come within the exception in Schedule II., clause 4. It seems to me that the grammatical meaning of the language, though it may be interpreted in either of two ways, as my lord has pointed out, is much more consonant with the view that that part of the building which is called a warehouse is not at any period to be used for other purposes than those of "polishing, cleaning, wrapping, or packing up." Many reasons may be given for that. One thing is perfectly clear—that it is a general section applying to non-textile factories, and that, therefore, the argument derived from the suggestion that in this particular instance it was not more objectionable to do this overtime work in that part of the factory where a manufacturing process had been carried on previously that day, than to do it in a warehouse which is used for nothing else than work of the description allowed to be performed in overtime to my mind goes for nothing, because there may be many other trades in which, if the circumstances were present to one, one could say at once that there was very good reason why the prohibition should exist against the same room being used for the two purposes at different times of the day. It is clear also that evasion may be facilitated—I do not say in this particular case, because in this particular case, after what we have been told by the learned magistrate, I do not see that it would make any difference, but still there must be many cases in which evasion would be facilitated—by allowing a double set of operations to take place in the same room. Therefore, I think Mr. Sutton is

right in his argument upon the meaning of the section

CHANNELL, J.—I agree. It seems to me Schedule II. (4) may mean a warehouse not used at a particular time for a particular purpose, and in which persons are solely employed for that particular purpose; or, on the other hand, it may mean a warehouse not habitually used for a manufacturing process, and in which persons are not at other times so employed. As between those two meanings I had a good deal of difficulty at first in understanding why the Legislature in protecting women from being employed after particular times of the day, and for more than a certain number of hours, should have said, although they may be employed after certain hours "in polishing, cleaning, wrapping, and packing up," yet they must not be employed even in that work unless it is in a place solely used for that purpose. With regard to the words "not used," I first thought the proper interpretation would have been to say that they meant not used at that time; but Mr. Sutton has given two reasons in support of the other construction, either of which may be sufficient. One is that many manufacturing processes (and I agree with my brother Wills it does not matter whether this manufacturing process is one of them or not) may be of such a character that it is important that the room in which they are carried on should not be used for more than a certain number of hours. Then in addition there may be this reason, and I think this is the more important reason—that if you allow this place in which this work after eight o'clock at night may be carried on by women to be the same place in which manufacturing processes are carried on, and in which, therefore, the apparatus for the carrying on of those manufacturing processes will be present, it is impossible to prevent evasion, because the moment the inspector looks in, all the people, who a minute ago have been doing the manufacturing process, will be found doing the other process; and, therefore, if the Legislature allowed the two things to be done in the same place, it would be impossible to prevent that evasion. I think what is meant is not only that women must not be employed after eight o'clock at night in other than specified work, but also that the place used for that specified work must not at any time be used for any manufacturing process or handicraft.

Appeal allowed; case remitted.

Solicitor for the appellant, *Solicitor to the Treasury.*

Solicitors for the respondent, *Gibson & Weldon*, for *S. J. Newson*, Sheffield.

K. B. Div.
(Lord Alverstone, L.C.J., and Channell, J.) May 28, 1903.

REX *v.* BEER. (*a.*)

Corporation—Municipal corporation—Borough councillor — Election of bankrupt — Disqualification — Quo warranto—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 87—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 32—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 9.

Section 32 *of the Bankruptcy Act*, 1883, *provides that "Where a debtor is adjudicated a bankrupt he shall . . . be disqualified for . . .* (d) *being elected to or holding or exercising the office of mayor, alderman, or councillor," and by section* 9 *of the Bankruptcy Act*, 1890, *such disqualification shall not exceed five years from the date of discharge.*

B., the defendant, was elected a borough councillor, and subsequently to the time prescribed for presenting a petition against his election it was discovered that prior to the date of his election he had been adjudicated a bankrupt, and that he had received his discharge less than five years previous to the election.

Held, that in order to oust the defendant from his office as councillor he must be proceeded against by an information in the nature of a quo warranto, *calling upon him to show by what authority he claimed to hold and exercise the office, and not by way of* mandamus.

The remedy by way of quo warranto *is not taken away by section* 87 *of the Municipal Corporations Act*, 1882, *where a disqualified person is* de facto "*holding*" *the office.*

Rule *nisi* for an information of *quo warranto* calling on the defendant, George Beer, to shew by what authority he held the office of a councillor for the Castlebar Ward of the Borough of Ealing.

The following are the facts of the case:

On the 27th of April, 1899, the defendant wss adjudicated a bankrupt, and on the 12th of July of the same year an order of the court was made suspending his discharge for two years and six months, the order to take effect as from the 12th of January, 1902.

On the 1st of November, 1902, an ordinary election of councillors for the said borough was held, at which the defendant was proposed and seconded for the office of councillor for the said Castlebar Ward, in the said borough, and he was declared by the returning officer at the said election to have been elected to the said ward. No petition was presented against his election within the time limited by section 88 of the Municipal Corporations Act, 1882—namely, within twenty-one days of the election.

On the 28th of January, 1903, a rule *nisi* for a *mandamus* was obtained calling upon the Mayor of Ealing to show cause why he should not hold an election of a councillor for the aforesaid ward on the ground that the defendant on the 1st of November, 1902, the date of his election, was disqualified for being elected to, or holding, or exercising the office of a councillor by reason of his having been adjudicated a bankrupt; that his disqualification had not ceased or been removed and that therefore no election had been held for the said ward within the time prescribed by the Municipal Corporations Act, 1882.

On cause being shown on the 24th of May, 1903, the rule *nisi* for a *mandamus* was discharged on the ground that, as the defendant was *de facto* holding the office, the office could not be said to be vacant, and therefore no election could be legally held, and that consequently a writ could not go directing the Mayor of Ealing to hold an election. The court, however, granted a rule *nisi* calling upon the defendant to show cause why an information in the nature of a *quo warranto* should not be exhibited against him to show by what authority he claimed to hold and exercise the office of a councillor for the said ward.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), provides as follows:

Section 32. "(1) Where a debtor is adjudicated a bankrupt he shall, subject to the provisions of this Act, be disqualified for . . . (*d*) being elected to or holding or exercising the office of mayor, alderman, or councillor.

"(2) The disqualifications to which a bankrupt is subject under this section shall be removed and cease if and when (*a*) the adjudication of bankruptcy

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

against him is annulled; or (*b*) he obtains from the court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part."

The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), section 9, provides as follows:

"No disqualification arising by virtue of section thirty-two of the principal Act shall exceed a period of five years from the date of any discharge which may have been, or may hereafter be, granted under and by virtue of the principal Act or of this Act. . . ."

The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50) provides as follows:

Section 39. "(1) If the mayor or an alderman or councillor (*a*) is declared bankrupt . . . he shall thereupon immediately become disqualified and shall cease to hold the office." (3) "Before a person becomes so disqualified by being declared a bankrupt . . . as aforesaid, the disqualification as regards subsequent elections shall . . . cease on his obtaining his order of discharge . . ."

Section 73. "Every municipal election not called in question within twelve months after the election, either by election petition or by information in the nature of a *quo warranto* shall be deemed to have been to all intents a good and valid election."

Section 87. "(1) A municipal election may be questioned by an election petition on the ground . . . (*c*) that the person whose election is questioned was at the time of the election disqualified; . . ." "(2) A municipal election shall not be questioned on any of those grounds except by an election petition."

Section 225. "An application for an information in the nature of *quo warranto* against any person claiming to hold a corporate office shall not be made after the expiration of twelve months from the time when he became disqualified after election. . . ."

Danckwerts, K.C. (*Loehnis* with him), showed cause.—Proceedings by way of *quo warranto* will not lie in this case. The disqualification arising from bankruptcy existed at the date of the election, and therefore by section 87 of the Municipal Corporations Act, 1882, the election cannot be questioned on the ground that the defendant at the time of the election was disqualified except by an election petition: *Reg.* v. *Mayor, &c., of Welshpool*, 35 L. T. 594, 25 W. R. Dig. 108; *Reg.* v. *Morton*, 40 W. R. 109, [1892] 1 Q. B. 39. In the last-mentioned case A. L. Smith, J., says: "It is, however, clear that proceedings by way of *quo warranto* are abolished by the 87th section of the Municipal Corporations Act, 1882, in cases which come within that section, or, in other words, where a petition will lie, *quo warranto* will not."

Macmorran, K.C. (*R. Cunningham Glen* with him), in support of the rule.—The remedy by way of *quo warranto* is not in this case done away with by section 87 of the Municipal Corporations Act, 1882, except where the election itself as distinguished from the holding of the office is questioned. The point here really turns upon the construction of section 32 of the Bankruptcy Act of 1883. That section is clear in its terms. It says that a debtor who has been adjudged bankrupt shall be disqualified for being elected to or holding or exercising the office of a councillor, and that disqualification is extended by the Act of 1890 to five years from the date of discharge. If such a person be elected the election may be questioned by election petition, but if it is not questioned within twenty-one days he is *de facto* elected and holds the office, and before another person can be elected to the office the disqualified person must be made to vacate it, and this can only be done by proceeding against him by way of *quo warranto*.

He cited *De Souza* v. *Cobden*, 39 W. R. 454, [1891] 1 Q. B. 687, and *Reg.* v. *Mayor of Chester*, 4 W. R. 14, 25 L. J. Q. B. 61.

Lord ALVERSTONE, L.C.J.—This is a case of interest and difficulty. The case at first was for a *mandamus* to the mayor of this municipal corporation to hold an election for the office of a borough councillor, on the ground that the defendant was not qualified for the office because at the time of his election he was still disqualified as having been adjudicated a bankrupt. It was then argued that *mandamus* would not lie because the office was already full, and therefore no election could legally be held, and, further, that by virtue of section 87 of the Municipal Corporations Act, 1882, the proceedings to decide the validity of the election ought to be by way of election petition. The court was satisfied that *mandamus* would not lie. We therefore suggested that a rule *nisi* for a *quo warranto* might issue, and we would hear the argument upon that question. Not without doubt, I have on that argument come to the conclusion that the remedy by *quo warranto* has not been taken away by the course of legislation on this subject.

The first section it is necessary to refer to is section 12 of the Municipal Corporations Act, 1882, which provides that "a person shall be disqualified for being elected and for being a councillor if and while he (*a*) is an elective auditor or a revising assessor, or holds any office or place of profit other than that of mayor or sheriff, in the gift or disposal of the council; or (*b*) is in holy orders, or the regular minister of a dissenting congregation; or (*c*) has directly or indirectly by himself or by his partner any share or interest in any contract or employment with, by, or on behalf of the council," and then there are certain provisoes as to the latter disqualification. These are disqualifications both at the time of and after the election, and bankruptcy is not named as one of them. Then comes section 39, which says: "If the mayor, or an alderman or councillor (*a*) is declared bankrupt, or compounds by deed with his creditors, or makes an arrangement or composition with his creditors, under the Bankruptcy Act, 1869, by deed or otherwise . . . he shall thereupon immediately become disqualified and shall cease to hold office." That section, it is to be observed, deals with the case of bankruptcy after the election, and not before or at the time of the election. Now, section 41 provides that "if a person acts in a corporate office without having made the declaration by this Act required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall for each offence be liable to a fine not exceeding £50, recoverable by action." That deals with the penalties for acting if disqualified either under section 12 or section 39. Then comes section 87, on which the main argument against the rule is based in this case. It provides "A municipal election may be questioned by an election petition on the ground . . . (*c*) that the person whose election is questioned was at the time of the election disqualified." And further that "a municipal election shall not be questioned on any of those grounds except by an election petition." I think that section makes the point good that for any of the causes mentioned in that section the proper remedy is by way of election petition, and that therefore the remedy by *mandamus* is taken away. No such petition has been presented in the present case, and the time limited by section 88 for presenting such a petition is past. But is *quo warranto* also taken away? Now, section 73 provides that "every municipal election not called in

question within twelve months after the election, either by election petition or by information in the nature of a *quo warranto*, shall be deemed to have been to all intents a good and valid election," and section 225 provides "an application for an information in the nature of a *quo warranto* against any person claiming to hold a corporate office shall not be made after the expiration of twelve months from the time when he became disqualified after election." Both those sections seem to me to recognize that for some purposes *quo warranto* was contemplated. We have to consider the point whether *quo warranto* is taken away in cases where a person who is not qualified is holding an office. When I read the case of *Reg.* v. *Chester Corporation*, 5 E. & B. 531, where Lord Campbell, C J., says, at p. 538: "Where a man is *bonâ fide* in office his title is not to be tried by *mandamus* but by *quo warranto*," speaking for myself, I think if it was intended by the Municipal Corporations Act, 1882, to take away the remedy by *quo warranto* in a case like the present, I should have expected to find more distinct words in the statute. I cannot see why disqualifications that arise under section 12 of that Act should not be questioned by *quo warranto*, nor can I see why the disqualification of bankruptcy should not fall within the category of continuing disqualifications to which *quo warranto* applies. Section 32 of the Bankruptcy Act provides that where a debtor is adjudged bankrupt he shall, subject to the provisions of the Act, be disqualified for (*a*) "being elected to or holding or exercising the office of mayor, alderman, or councillor." The words of that section point to election to the office, and to holding or exercising the office. Now, in section 12 of the Municipal Corporations Act it was not necessary to deal with the exercise of the office, because section 41 of the Act makes a person liable to penalties if he exercises the office without being qualified. The word "holding" in section 32 of the Bankruptcy Act, 1883, is equivalent to the word "being" in section 12 of the Municipal Corporations Act, 1882, and section 32 is a statutory declaration that a bankrupt cannot hold the office whether duly elected or not. In my judgment, that is a question that can be raised by *quo warranto* though not by *mandamus*, and the rule therefore for the *quo warranto* must be made absolute.

CHANNELL, J.—I am of the same opinion. The question, to my mind, turns on the construction of section 32 of the Bankruptcy Act, 1883, and section 12 of the Municipal Corporations Act, 1882. The other questions are questions of election law, and most of them are well settled. It is a well-settled principle that after an office is full *de facto*, then, although the holder is disqualified, there cannot be a *mandamus*, but *quo warranto* will lie. It is necessary to proceed by *quo warranto* to get the holder out of the office before proceeding to apply for a *mandamus* to hold a new election. I think that applies to this case, and shows that it was right to discharge the rule for the *mandamus*. As to the rule for a *quo warranto*, it is clear that the defendant was disqualified at the time he was elected, and therefore his election might have been questioned by petition. That being so, there cannot be a *quo warranto* to question his election, because by section 87 of the Municipal Corporations Act, 1882, it is necessary for the purpose of questioning his election to proceed by petition. But if, in addition to his disqualification from being elected, he is also disqualified from holding the office, then the position is that there is an office being held *de facto* by an unqualified person, and the proper method of questioning that is by *quo warranto*, because a petition does not apply to that. The whole question is whether a man who is still disqualified at the time of his election by reason of section 9 of the Bankruptcy Act, 1890, is disqualified from holding office, or whether he is only disqualified from holding it when the bankruptcy takes place after his election. That depends, of course, on section 32 of the Bankruptcy Act, 1883. That section imposes several disqualifications on a bankrupt, and as to the office of mayor, alderman, or councillor with which we are here concerned, it disqualifies him from being elected to, holding, or exercising the office. If this section was only intended to apply to bankruptcies occurring subsequent to election, then it was unnecessary, as that is provided for by section 39 of the Municipal Corporations Act, 1882; but if it means that a bankrupt is prohibited both from being elected, and also from holding or exercising the office if elected—if that is the true meaning of the section, as I think it is, then all the rest follows.

The rule, therefore, for the *quo warranto* must be made absolute.

Rule absolute for quo warranto.

Solicitors for defendant, *Gadsden & Treherne.*

Solicitors in support of rule, *Woosnam & Smith.*

Solicitor for Mayor of Ealing, *William Ruston.*

Prob. Div. & Adm. Div. Admiralty. } April 6, 1903.

"THE PORT CALEDONIA" AND "THE ANNA." (*a*.)

Ship—Salvage—Exorbitant terms demanded—Agreement quashed by court.

While two large sailing vessels were weather-bound in Holyhead Harbour, one of them dragged her anchors and came in dangerous proximity to the other. The master of the dragging vessel hailed a tug, but the master of the tug demanded £1,000, and would take nothing less before rendering assistance. The master of the sailing vessel offered £100, but rather than foul the other ship agreed to pay £1,000, and he was towed into a position where he held on to his anchors. The owners, master, and crew of the tug brought an action against both vessels, their cargoes and freights, upon the agreement in the one case and for a salvage award in the other.

The Court quashed the agreement, on the ground that it was an exorbitant and an inequitable one, which was improperly forced upon the master of the sailing vessel, and therefore could not be sustained. It ordered a sum of £200 to be paid, and gave costs on the county court scale. The action against the other vessel the court dismissed with costs, it being of opinion that no salvage service had been rendered to her by the tug.

Action.

The plaintiffs were the owners, master, and crew of the steam screw tug *Sarah Jolliffe*, a vessel of 299 tons gross, valued at £12,000. The defendants were the owners of the sailing vessels *Port Caledonia* and *Anna*, their cargoes and freights.

The facts, in so far as they do not appear in the judgment, were shortly as follows:

About 9.30 a.m. on the 1st of March, 1903, *The Port Caledonia*, a steel four-masted barque of 2,426 tons gross, on a voyage from San Francisco to Queenstown, was weather-bound within the Holyhead breakwater. Her value was about £15,000, and that of her cargo of grain £21,715, and freight at risk £4,417, making in all £41,132. *The Anna* was also a four-masted barque of 2,663 tons gross, bound from

(*a*.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Tacoma to Queenstown with grain, her value being £16,000, her cargo £20,906, and freight at risk £5,000, making in all a total of £41,906. The master of *The Port Caledonia*, seeing that his vessel was dragging down upon *The Anna*, signalled to the master of *The Sarah Jolliffe*, "What will you shift us for?" The master of the tug answered, "One thousand pounds." The master of *The Port Caledonia* offered in reply £100, but finding that the tug would do nothing unless £1,000 were agreed to, he gave the order to the tug to take hold of the ship.

Aspinall, K.C., and *Bateson*, for the plaintiffs.

Pickford K.C., and *Balloch* for the owners of *The Port Caledonia*, contended that it was not necessary to show in this court the amount of duress that would be required at common law to set aside an agreement on that ground, and that it was the duty of the Admiralty Court to set aside such an inequitable agreement and to award such a sum as would fairly recompense the plaintiffs for the services they had rendered.

Laing, K.C., and *Head*, for the owners of *The Anna*.

BUCKNILL, J., in delivering judgment, said *The Anna*, a large four-masted barque of over 2,000 tons register, and laden with a cargo of wheat, was obliged by the weather to take refuge in Holyhead Harbour, where she had been anchored, and where she was entitled to remain as between herself and any other ship not absolutely driven into the neighbourhood by the exigencies of the gale. In other words, other vessels were bound to see that they did not give her a foul berth. Then *The Port Caledonia* came in, also weather-bound. Coming there for refuge, she was brought by her pilot to a position which was a perfectly proper one in the circumstances as they then existed. She also was a large four-masted barque apparently about the same size as *The Anna*, and had a cargo of approximately the same weight of wheat. These two vessels were lying inside the breakwater of Holyhead Harbour when in consequence of the south-westerly gale, *The Port Caledonia* in the early morning of the day in question began to drag her anchors, and being at first in a position of about three ships' lengths from *The Anna*—that is, three ships' lengths clear between the stern of the one and the bow of the other—she dragged about two ships' lengths towards *The Anna*. That is according to the log and according to the case for the defendants. According to the case for the plaintiffs the vessels were heading south-west, which was the direction of the wind, and *The Port Caledonia* had dragged until she was slightly on the starboard bow of *The Anna*, with a distance of only twenty to thirty feet between them. In that condition of things—that is to say, the two vessels being in the position that *The Port Caledonia* had dragged her anchors to the extent of at least two ships' lengths—the master of *The Anna* very properly gave warning to the master of *The Port Caledonia* that if he dragged further and got foul of his ship he should hold the owners of *The Port Caledonia* responsible, and there is no doubt that *The Port Caledonia* would be giving *The Anna* a foul berth if she remained there. The master of *The Port Caledonia*, finding himself in that position, signalled first for a tug and then for a pilot, and the tug and the pilot both arrived. Up to that time I have no fault to find with the tug. The pilot went on board and the tug alongside. I may as well say at once that I find as a fact *The Port Caledonia* was nothing like as near *The Anna* as the master of the tug would have me believe. I accept the evidence of the master of *The Port Caledonia* and of the master of *The Anna* as to the distance between these two thips, as nearly as they can give it, and of the assistant lighthouse keeper at Holyhead, an intelligent man who gave his evidence very fairly and very well. Now, *The Port Caledonia* wanted to be shifted. She had dragged and she might drag again, although I find as a fact that at the time the tug came alongside of her she was firm to her anchors and was not dragging; but there was always a possibility that she might drag, and if she had dragged with the wind south-west and remaining in that quarter serious consequences might have ensued. She probably would have got foul of the other ship, and they might, both of them, have got adrift, and if the wind had remained in the south-west they might have got on the rocks; but that is just what did not happen. The wind did not remain in the south-west; it got round to the west-north-west, and at last to the north-west. Shortly after the tug got alongside the wind was W.N.W., and from that direction there would have been no danger to the two ships. Then came the question, What was the tug master to get, and what was the master of *The Port Caledonia* to offer for the tug's help? The tug master said—I hope there are not many tug masters who would say it—that he wanted £1,000 or no rope. I stopped him before he gave an answer to a question which was put to him by counsel for *The Port Caledonia*, because if he had given a certain answer I am sure his owners would not have allowed him to remain in their employ, but he did say, "I should not have let them go on the rocks. I should have let them break each other adrift, and when they were adrift have gone to their assistance, but not unless they gave me the £1,000." I shall not attempt to describe what the Elder Brethren and I think of conduct like that. Language could not be too strong. It was most reprehensible conduct, and, I will add, cowardly. But the master of *The Port Caledonia*, finding himself in a difficulty, promised to give a thousand pounds for the tug's services, which I value at very much less. The tug having without much difficulty put a hawser on board held *The Port Caledonia* up so that she could get her anchors. The tug did her work very well. I have no fault to find with that. I am advised that it would have taken some time for those on board *The Port Caledonia* to get in her chain by the manual labour which would have had to have been used, there being no steam power. In all the tug was engaged about one hour and forty-five minutes. What she did do she did well. There was no danger to the tug, as the wind had moderated. The case has been described as one of towage, but the owners of barque have admitted that the plaintiffs are entitled to a salvage award. With the £1,000 agreement on one side and that which I think was the value of the services on the other, I have to ask myself whether the bargain that was made was so inequitable, so unjust, and so unreasonable that the court cannot allow it to stand. The first question to consider is, what was the position of the two persons who made the agreement? The position was this. One man was in a position to insist upon his terms, and the other man had to put up with it. He could not help himself. He says in his letter to his owners: "He demanded £1,000 to take me away. I offered him £100 or to leave it to the owners, but he would not agree, so I agreed to give £1,000 rather than foul *The Anna*." He appreciated the possibility of fouling *The Anna* if the weather had remained bad and if the wind had remained in the south-west, neither of which things happened. So he found himself obliged to give way to a person who would not move him, and who would have allowed him and *The Anna* to drift towards the rocks, and who would, I think, have seen them go there

without putting a hawser on board unless he got a promise of £1,000.

I have expressed my opinion about this matter. This opinion is shared by the Elder Brethren, and I hold that this agreement cannot be allowed to stand, and I set it aside. I hope that those who perform such grand services in tugs from time to time in worse weather than this, and in peril of their own lives save property around the coast, will note that this court will keep a firm hand over them if they attempt to do what was done in this case. This was an inequitable, extortionate, and unreasonable agreement, and I think that the services rendered will be well rewarded by the sum of £200, and with county court costs.

Now, with regard to the claim against *The Anna*. *The Anna* was not, in my judgment, at any time in such a position as that a prudent master would have thought it right and fit or to be his duty to call upon a tug to take *The Port Caledonia* away from him. His own letter shows that. I have asked the Elder Brethren this question in the language of the decisions which are well known: Would he as a prudent man have found himself called upon in the position in which he then was with regard to himself and *The Port Caledonia* to engage a tug to take *The Port Caledonia* from the place where she was? And the answer is "No," because there was no danger, or very little danger, and not that sort of danger which allows towage to be turned into salvage. By easing away his own cables he could have increased, as he said, the distance between the two ships; but there was no reason to believe, as the wind was moderating and getting more westerly, that there would be any necessity to do that. In his letter to his owners he said: "I do not consider *The Anna* was in danger as regards *The Port Caledonia* when the gale was blowing. She was 100 yards from our jibboom and we were ready to pay out more cable if required." Then again he says, "The *Port Caledonia*, which had dragged to within about 100 yards towards us, had to engage a tug to avoid a collision later on; but that cannot concern *The Anna*." I am reading a translation, and I do not know exactly the idea that was passing through the master's mind; but I think I may say that his idea was that if the wind had got round to a dangerous quarter again and had blown with a force which would have made it impossible for *The Port Caledonia* to have done what she did before then, if steps were not taken there might have been a collision between the two ships. There, was, therefore, appreciable danger which made it necessary that as far as *The Port Coledonia* was concerned she should not continue to give *The Anna* what she had done—namely, a foul berth; but *The Anna* was in no danger, according to the language of the master in his letter to his owners. The result is that there will be judgment against *The Port Caledonia* for £200 with county court costs, and there will be judgment for *The Anna* with costs.

Solicitors for the plaintiff, the owners of *The Sarah Jolliffe*, *Neave & Bretherton*, for *H. J. Holme*, Liverpool.

Solicitors for the defendants, the owners of *The Port Caledonia*, *Thos. Cooper & Co.*

Solicitors for the defendants, the owners of *The Anna*, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer, L.J.) — Jan. 25.

SNEADE v. WOTHERTON BARYTES AND LEAD MINING CO. (LIMITED). (a.)

County court—Practice—Remitted action—Claim in contract exceeding £100—Amendment of writ by claiming a sum not exceeding £100—Jurisdiction to remit—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

In an action of contract in the High Court the amount endorsed on the writ exceeded £100. Subsequently the plaintiff obtained leave to amend the writ by claiming a sum not exceeding £100.

Held, that the amended writ must be taken as the writ originating an action in which a sum not exceeding £100 was claimed, and that there was therefore jurisdiction to remit the action to the county court under section 65 *of the County Courts Act*, 1888.

Appeal from an order of Bucknill, J., at chambers.

In an action in the High Court the claim indorsed on the writ was for £138, the price of goods sold and delivered. The defendants in their statement of defence pleaded (*inter alia*) the Statute of Limitations. The plaintiff subsequently applied for leave to amend the indorsement on the writ by striking out all the items of the claim except the last one for £24, and for an order under section 65 of the County Courts Act, 1888, that the action should be remitted for trial to the county court. The master gave the plaintiff leave to amend the indorsement on the writ as asked for, upon payment of all costs thrown away by the amendment, but refused to remit the action to the county court. On appeal by the plaintiff against the refusal to remit, Bucknill, J., made an order remitting the action to the county court. The defendants appealed from the order to remit.

Disturnal (*S. R. C. Bosanquet* with him), for the defendants.—The action being an action of contract and claiming a sum exceeding £100, there is no jurisdiction to remit it to the county court under section 65 of the County Courts Act, 1888. The reduction of the claim by "payment, an admitted set-off, or otherwise" to a sum not exceeding £100 means a reduction before action brought: *Foster* v. *Usherwood*, 26 W. R. 91, 3 Ex. D. 1; *Hodgson* v. *Bell*, 38 W. R. 325; 24 Q. B. D. 525; *Dierken* v. *Philpot*, 49 W. R. 703, [1901] 2 K. B. 380. The reduction in this case took place after action brought.

Randolph, for the plaintiff.—The writ in the action having been amended by claiming only £24, it must be taken as if the writ was originally indorsed for a claim for that amount. The action is now to be considered as an action for £24. For instance, leave to amend a writ by adding a new claim is not given if the amendment will defeat a defence of the Statute of Limitations to that claim. That shows that the amended writ is to be considered as the original writ in the action. The action therefore claims a sum not exceeding £100, and there is jurisdiction to remit.

Bosanquet, in reply.—If the order to remit is right, it is a mode of avoiding the effect of the former decisions upon the point, which the court will not allow.

COLLINS, M.R.—The facts in this case are somewhat peculiar, and are not covered by any of the authorities which have been referred to. The action

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

was brought in the High Court to recover a sum exceeding £100. After the proceedings had continued for some time the plaintiff applied for leave to amend the indorsement on the writ by abandoning all the items of claim except £24, and to have the action remitted to the county court under section 65 of the County Courts Act, 1888. The master allowed the amendment to be made upon the plaintiff paying all the costs thrown away thereby, but refused to order the action to be remitted to the county court. The plaintiff appealed from this last part of the order, and the learned judge ordered the action to be remitted. The defendants appeal to this court, contending that the judge had no jurisdiction to remit the action under section 65. That section provides that "where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed £100, or where such claim, though it originally exceeded £100, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding £100," it shall be lawful for either party to the action to apply for an order that the action be tried in the county court, and the judge shall, unless there is good cause to the contrary, order the action to be tried accordingly.

It has been held in a series of decisions that when the writ is indorsed with a claim for a sum exceeding £100, a reduction after action brought of the amount claimed by "payment, an admitted set-off, or otherwise" to a sum not exceeding £100 does not give the court jurisdiction to remit the action to the county court. It was held in those cases that "payment, an admitted set-off, or otherwise" mean a reduction of the claim before action. It is contended that those decisions apply to the present case. Here, however, there has been no reduction of the claim by payment, an admitted set-off, or otherwise, since action brought. There has been by amendment of the writ a substitution of £24 for £138 in the claim indorsed thereon. The writ as amended remains the writ in the action, and must be taken to be the commencement of the action. That is the reason why the question of allowing an amendment should always be carefully considered by the court, and if allowed proper terms ought to be imposed. The amendment here has been allowed on proper terms, and the amended writ must be taken as the original writ in the action and as initiating an action in which a sum of £24 is claimed. It is therefore an action in which a sum not exceeding £100 is claimed, and it can be remitted to the county court under section 65. It is just the sort of action that ought to be remitted. It seems to me that it would be pressing the decisions beyond what is right if we were to hold that they apply to this case. An amendment of the indorsement on the writ so as to reduce the sum claimed is not the same thing as a reduction, after action brought, of the amount claimed by payment, an admitted set-off, or otherwise. There was therefore jurisdiction to remit the action.

ROMER, L.J.—I am of the same opinion for the same reasons.

Appeal dismissed.

Solicitors for the plaintiff, *Pritchard, Englefield, & Co.*, for *J. P. Court*, Liverpool.

Solicitors for the defendants, *Woosnam & Smith*, for *G. H. Morgan*, Shrewsbury.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Nov. 18, 19; Dec. 21.

NICHOLAS v. RIDLEY. (a.)

Mortgage—Tacking—Transfer—Covenant to pay as collateral security—Construction of transfer deed.

Certain lands were mortgaged to secure £1,500. The equity of redemption in the said lands was, with other property, subsequently mortgaged to secure £2,500. The £1,500 mortgage security was transferred to the £2,500 mortgagee. The tenant for life of all the mortgaged property was a party to the deed of transfer, and thereby covenanted to pay the £1,500, subject to a proviso that, as between himself and the owners of the mortgaged property, his covenant was to be only a collateral security, but notwithstanding the mortgagee was to be at liberty to enforce either security.

The representatives of the mortgagee brought an action against the representatives of the tenant for life to recover the amount due upon their securities, and claimed to be entitled to tack the latter mortgage to the earlier one.

Held, by Romer *and* Stirling, L.JJ. (Vaughan Williams, L.J., dissentiente), *that on the true construction of the deed of transfer the tenant for life was, as between himself and the mortgagee, a principal and not a surety. Consequently there was no restriction on the rights of the mortgagee in dealing with his securities, and the plaintiffs were entitled to tack the later to the earlier mortgage.*

This was an appeal from a decision of Byrne, J.

The facts were as follow:

By an indenture dated the 2nd of July, 1821, one Richard Ridley mortgaged certain copyholds to one William Stringer to secure £1,500 and interest. Richard Ridley died not later than 1830.

By another indenture dated the 21st of April, 1842, George Ridley mortgaged the equity of redemption of the copyholds comprised in the mortgage of the 2nd of July, 1821, and certain additional real estate, to one William Nicholas to secure £2,500 and interest,

In March, 1874, Samuel Ridley was tenant for life of all the real estate comprised in the securities of 1821 and 1842, and was paying interest on the said sums of £1,500 and £2,500, on the former to the personal representatives of William Stringer, who was dead, and on the latter to William Nicholas.

On the 21st of March, 1874, the security of 1821 was transferred to William Nicholas on payment by him of the £1,500. The deed of transfer, to which Samuel Ridley was a party, contained the following recital: "And whereas the said Law and Carder [the personal representatives of Stringer] having required payment of the said sum of £1,500, the said William Nicholas at the request of the said Samuel Ridley, party hereto, has agreed to pay to the said Law and Carder the said sum of £1,500, upon having such transfer as is hereinafter mentioned of the said principal sum of £1,500 and interest and the securities for the same, and upon having the payment of the said principal sum and interest further and collaterally secured by the covenant of the said Samuel Ridley (party hereto) hereinafter contained."

The deed also contained the following covenant for payment of the £1,500 by Samuel Ridley and proviso: "And he, the said Samuel Ridley, party hereto, doth hereby for himself, his heirs, executors, and administrators, covenant with the said William Nicholas, his executors and administrators, that he the said Samuel Ridley, party hereto, his heirs, executors,

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

or administrators, or other the person or persons for the time being entitled to the equity of redemption of the said premises will pay to the said William Nicholas, his executors, administrators, or assigns, on demand by him or them the said sum of £1,500 or so much thereof as shall for the time being remain unpaid and all interest which shall be due thereon. Provided nevertheless that as between the said Samuel Ridley, party hereto, his heirs, executors, and administrators, estate and effects on the one part and the said copyhold premises and the owner or owners for the time being of the said copyhold premises on the other part, the said copyhold premises shall be considered as the primary fund for the payment of the said principal sum and interest, and the covenant of the said Samuel Ridley, party hereto, shall be only a collateral security to the said William Nicholas, his executors, administrators, and assigns, for the payment of the said principal sum and interest, but that notwithstanding the said William Nicholas, his executors, administrators, or assigns, shall be at liberty to resort to either means for procuring or enforcing the payment of the said principal sum and interest or any part or parts thereof respectively in preference to such other means." The personal representative (if any) of Richard Ridley was not a party to this deed of transfer.

William Nicholas died in 1882, and Samuel Ridley died in 1896.

The present action was brought by the representatives of William Nicholas against the representatives of Samuel Ridley. They claimed an account of what was due to them for principal and interest on the said mortgage securities; a declaration that they were entitled as against the defendants to tack their said mortgage security for £2,500 to that for £1,500; payment by the defendants of what should be found due on the £1,500 mortgage; and foreclosure or sale.

Byrne, J., found that the plaintiffs were entitled to tack their securities and gave judgment in their favour accordingly.

The defendants appealed.

Rowden, K.C., and *Marcy*, for the appellants.—The plaintiffs are not entitled to tack their two securities as against Samuel Ridley, who was a surety for only one of them, and we, as his representatives, have the rights of a surety against the plaintiffs—that is to say, upon payment of the £1,500 and interest by us, we are entitled to have assigned to us the securities held by the plaintiffs in respect of the £1,500 mortgage and to stand in the place of the plaintiffs as to them. Byrne, J., held that he was bound by *Farebrother* v. *Wodehouse*, 5 W. R. 12, 23 B. 18, but that case was decided on the authority of *Williams* v. *Owen*, 13 Sim. 597, which had really been overruled by *Bowker* v. *Bull*, 1 Sim. N. S. 29; and *Farebrother* v. *Wodehouse* has been doubted on this ground.

We also rely on the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5; *Forbes* v. *Jackson*, 30 W. R. 652, 19 Ch. D. 615; *In re Kirkwood's Estate*, L. R. Ir. 1 Eq. 108; and *In re Sass*, 44 W. R. 588, [1896] 2 Q. B. 12.

Levett, K.C., and *A. T. Murray*, for the plaintiffs.—It is true that a surety can stand in the place of his creditor, but it has never been held that he can deprive the creditor of any of his rights. This is really what the defendants are claiming to do here, and we submit that such a claim is inconsistent with the terms of the deed of 1874.

They cited *Harburg India Rubber Comb Co.* v. *Martin*, 50 W. R. 449, [1902] 1 K. B. 778; and *Fitzgeral* v. *Dressler*, 7 C. B. N. S. 774.

Rowden, K.C., replied.

Cur. adv. vult.

Dec. 21.—VAUGHAN WILLIAMS, L.J., stated the facts, and continued: Byrne, J., held that the plaintiffs were right in their contention and that as mortgagees they could at the same time enforce payment under the covenant and set up a right to tack against the right of the surety to a transfer of securities.

Byrne, J., in thus deciding, considered himself bound so to do by reason of the decision in *Farebrother* v. *Wodehouse*.

Now before this question as to the right of the defendants to a transfer of the securities can arise, it is necessary first to decide whether Samuel Ridley did under the deed of 1874 either become a surety or become entitled to a right to have a transfer of securities or payment such as a surety would have.

This would be mainly a question of the construction of the deed of 1874, but one will have also to take into consideration the facts recited in that deed to which I have already referred. The short result of those facts is that at the time of the execution of that deed, which is a deed for the transfer to William Nicholas of the mortgage for £1,500, secured on the Manor of Claverley, Samuel Ridley was as tenant for life entitled to the equity of redemption of that manor, and William Nicholas, the transferee, was at that time second mortgagee of the same premises under a mortgage to secure the payment of a principal sum of £2,500.

It is also recited in the said deed that the persons in whom the first mortgage of £1,500 was vested, "having required payment of the said sum of £1,500, the said William Nicholas at the request of the said Samuel Ridley, party hereto, has agreed to pay to the said persons the said sum of £1,500 upon having such transfer as is hereinafter mentioned of the said principal sum of £1,500 and interest and the securities for the same, and upon having payment of the said principal sum and interest further and collaterally secured by the covenant of the said Samuel Ridley, party hereto, hereinafter contained."

It is argued that in this state of things Samuel Ridley, being the tenant for life of the equity of redemption, and therefore deeply interested in preventing a foreclosure, could not claim that he took upon himself merely as surety the obligation to pay the £1,500 mortgage debt. It is said that he incurred this obligation as tenant for life for the purpose of protecting his interest as such, and that the recited fact that Nicholas, at the request of Samuel Ridley, agreed to pay off the persons then entitled to a first mortgage is consistent with the obligation being taken by Samuel Ridley as tenant for life for the protection of the estate and inconsistent with the obligation being taken as surety. Now, for my own part, if there was nothing else in the deed militating against this view, I should be inclined to construe the deed so as to negative the obligation being taken by Samuel Ridley as surety or under conditions which gave him the right to a transfer of securities on payment of the £1,500, notwithstanding the fact that undoubtedly Samuel Ridley did by entering into the covenant take upon himself the personal liability which did not previously rest upon him. I cannot, however, accede to the argument that because the mortgage of 1821 contained no covenant for redemption by the mortgagor it is impossible that under the deed of 1874 the position of Samuel Ridley should be that of a surety.

It is necessary, therefore, to further examine the deed of 1874, and the most material portion is the proviso which runs thus: [His lordship read the covenant and proviso, and continued:]

Primâ facie this proviso should relate to a subject-matter which could be controlled by the contract of

the covenantor and the covenantee, and this is true even in relation to that part of the proviso which is governed by the words "as between the said S. Ridley, party hereto, his heirs, executors, and administrators, estate and effects, and the said copyhold premises and the owner or owners for the time being of the said copyhold premises on the other part," for Ridley and Nicholas cannot by their covenant control the relations of Ridley and the owners for the time being of the mortgaged estate otherwise than by an agreement *inter se*.

Now what is it that the parties to the deed contract shall be the effect of the deed as between Ridley and his estate and effects on the one hand and the copyhold premises (the mortgaged premises) and the owners for the time being on the other hand. It is that as between Ridley and the owners of the copyhold premises for the time being the copyhold premises shall be considered as the primary fund for the payment of the principal sum and interest, and that the covenant of Ridley shall be only a collateral security to Nicholas for the payment of the principal and interest. But it is plain that by their mere covenant Ridley and Nicholas cannot affect the relations of Ridley to persons who are not parties to the deed nor representatives of parties to the deed. Now how can the contracting parties bring this about by anything that they can do, and in what possible state of things that can be contemplated as arising can Ridley and Nicholas have to consider the copyhold premises as the primary fund or the covenant as collateral security to Nicholas for the payment of principal and interest as between Ridley and the copyhold premises and the owners for the time being? It seems to me that this occasion for thus considering the copyhold premises and the covenant can only arise if it is sought at the instance of Ridley to enforce the mortgage security against the copyhold premises as the primary fund in a case where Ridley has paid under his covenant which the parties to the deed agree shall as against the owners for the time being of the mortgaged estate be considered as collateral security.

Now let us see how the proviso continues. It goes on, "But that notwithstanding" Nicholas, his executors, administrators, or assigns, should be at liberty to resort to either means for procuring or enforcing the payment of the principal sum and interest or any part or parts thereof in preference to such other means. What does that mean? "But that notwithstanding what"? I think it means notwithstanding the fact that the parties to deed have agreed that as between Ridley on the one hand and the copyhold premises and the owners for the time being on the other hand the copyhold premises were to be the primary fund and the covenant merely collateral security, yet Nicholas was to be entitled to enforce his remedies in any order he might choose.

This might be quite easily expressed as between Ridley and Nicholas without any mention of the relation of Ridley to the copyhold premises or the owners for the time being. I think that the more reasonable interpretation to put upon this proviso is to say that it means, although Ridley is to have the rights of a surety as against the copyhold premises and the owners for the time being, yet this is not to prejudice the right of Nicholas to enforce his securities, primary and collateral, in any order he may choose. If this is the true meaning, I do not see how it can be carried out—*i.e.*, How Ridley, as between himself and the copyhold premises and the owners for the time being can effectively make the copyhold premises the primary security or treat the covenant as collateral security—unless Nicholas upon payment of of the principal and interest was bound to assign to Ridley the £1,500 mortgage.

It cannot be said that principal and interest in this proviso means the £2,500 as well as the £1,500, nor do I think that it could be said that either the request of Ridley to Nicholas to pay off the £1,500, or the interest of Ridley as tenant for life, makes it wrong to give this construction to the proviso.

This construction, in my judgment, makes it unnecessary to consider the question raised in *Farebrother* v. *Wodehouse* and other cases as to how far the rights of a surety may prejudice the right of a mortgagee to tack or consolidate, or how far the rights of the mortgagee to tack or consolidate may prejudice the right of the surety who pays off the mortgage debt to have the benefit of the mortgage securities. The relative rights of the parties in this deed are, in my judgment, defined by the deed of 1874 itself when properly construed. The observations which I have made as to the request of Ridley and his interest as tenant for life apply equally to the objection that until Ridley gave the collateral covenant no one had incurred any personal liability to pay the principal and interest, but the land itself was the only security.

I think that this appeal should be allowed on the grounds which I have mentioned, which were not argued or discussed before Byrne, J.

ROMER, L.J., concurred in the judgment delivered by Stirling, L.J.

STIRLING, L.J.—The question on this appeal is whether (as the learned judge in the court below has held) the plaintiffs have the right as against the defendants to tack a security dated the 21st of April, 1842, to a security which bears date the 2nd of July, 1821, and was by a deed dated the 21st of March, 1874, transferred to William Nicholas, the testator of the plaintiffs. To the last-mentioned deed, one Samuel Ridley, the defendants' testator, was a party, and thereby covenanted for the payment of the principal and interest secured by the deed of the 2nd of July, 1821. The defendants allege that Samuel Ridley joined in the deed as a surety, and that they, as his representatives, having paid the principal and interest in question, are entitled to all the rights of sureties, and in particular to have a transfer to themselves of the securities for the debt so paid in the hands of the plaintiffs.

The deed of the 2nd of July, 1821, was a mortgage by one Richard Ridley to William Stringer of certain copyholds to secure £1,500 and interest.

The deed of the 21st of April, 1842, was a mortgage by one George Ridley to William Nicholas of the equity of redemption of the copyholds comprised in the deed of the 2nd of July, 1821, and of certain additional real estate by way of security for the sum of £2,500 and interest.

In March, 1874, Samuel Ridley, already mentioned, was tenant for life of all the real estate comprised in the securities of 1821 and 1842, and the security of 1821 had become vested in two persons named J. H. Law and J. Carder. The circumstances which led to the execution of the deed of 1874 are thus stated in the last of the recitals contained in that instrument: [His lordship read the recital, and continued:] Nothing further is known with reference to the transaction, which on the face of the deed itself was not one of suretyship on the part of Samuel Ridley in the ordinary sense in which that term is used—viz., as denoting an engagement to answer for the debt of another person. The debt of £1,500, for which the security was originally given, was contracted by Richard Ridley in 1821, and he died not later than the beginning of 1830. It does not appear whether he left any personal estate out of which the persons entitled to his real estate might, according to the law in force, have required payment of his debt. If such

personal estate existed in 1830, it is highly improbable that it was available in 1874. Further, it does not appear whether in March, 1874, there existed any legal personal representative of Richard Ridley; if there was such a representative he was no party to the deed of the 21st of March, 1874, or the transaction of which that was the result and embodiment. So far as that transaction is stated in the recital it seems to be one in which Samuel Ridley took on himself the obligations of a principal debtor rather than a surety; but the true nature of his liabilities and rights must be determined upon a consideration of the terms of the whole deed. Now, on this point the most relevant parts of the deed are the covenant for payment and the proviso by which it is followed. The covenant is that of a person taking on himself the obligations of a principal debtor; if any of the rights of a surety were given to Ridley, he obtained them by the first two clauses of the proviso. These clauses are, according to the ordinary grammatical construction of them, governed by the introductory words "as between the said S. Ridley, party hereto, his heirs, executors, and administrators, estates and effects, on the one part, and the said copyhold premises of the other part," and whatever rights he thereby acquired exist only as thereby limited. This appears to be made quite clear by the third clause of the proviso, viz., "but that notwithstanding, the said William Nicholas, his heirs, executors, administrators, and assigns, shall be at liberty to resort to either means for procuring or enforcing payment of the said principal sum and interest or any part or parts thereof respectively in preference to such other means," so that Nicholas thereby reserved to himself and his representatives full right to deal with the security acquired by the deed of the 21st of March, 1874, as he saw fit.

The effect of the whole proviso therefore appears to me to be that Samuel Ridley preserved as against remaindermen whatever rights he might have on paying the principal sum of £1,500 to resort for recoupment to the property of those remaindermen, but as between himself and Nicholas was a principal and not a surety. The legal consequence which flows from this relationship is thus stated by Lord Selborne in *Duncan Fox & Co.* v. *North and South Wales Bank*, 29 W. R. 863, 6 App. Cas. 1, p. 11: "If, so far as the creditor is concerned, there is no contract of suretyship, if the person who has (in fact) made himself answerable for another man's debt is, towards the creditor, no surety but a principal, then I think that the creditor would not be subject to those special obligations which were disclosed by Lord Truro in *Owen* v. *Homan*, 3 Mac. & G. 370, and would not generally have his power of dealing with his securities circumscribed and restricted in the manner described by Wood, V.C., in *Newton* v. *Chorlton*, 1 W. R. 266, 10 Hare 646, and by Lord Romilly and the Lords Justices in *Peare* v. *Deacon*, 5 W. R. 702, 793, 24 Beav. 186, 1 De G. & J. 461." The case of *Newton* v. *Chorlton* is a leading authority in support of the rights claimed by the plaintiff in the present action.

In my opinion the defendants have not established that their testator was entitled to the rights of a surety as against William Nicholas, the plaintiffs' representative, and consequently this appeal ought to be dismissed.

Solicitors, *Chester & Co.*, for *A. H. Thorne-Pudsey*, Trowbridge; *Sole, Turner, & Knight*, for *Cooper & Haslewood*, Bridgnorth.

High Court of Justice.

Chan. Div. }
Byrne, J. } Jan. 28.

In re FOX.
WODEHOUSE *v.* FOX. (*a.*)

Will—Construction—Advancement—Duty to account.

A testator's will gave his widow a power of appointing his residuary estate among his children, and also contained advancement and hotchpot clauses. Four children survived him. During his widow's lifetime, advances, which purported to be made under the advancement clause, were made to one of the children. The widow, by her will, appointed the estate among her children equally.

Held, that the hotchpot clause had no application, and that there was no intention that the advanced sums should be brought into account by the advanced child.

This was an adjourned summons taken out by the trustees of the will of Charles Fox, who died on the 20th of October, 1883, to determine whether, according to the true construction of the will, the sum of £705, advanced to his son Raymond Fox, out of the said Raymond Fox's share, should be brought into hotchpot.

By his said will, testator bequeathed his residuary estate upon trust to pay the income to his widow for life, and, on her death, to his children (naming them) or other issue, as his wife should by will appoint, and, in default, among the children living at his death. There was a proviso for hotchpot and an advancement clause.

Four children survived the testator, of whom Raymond Fox was one.

Two sums, amounting in all to £705, were advanced to Raymond Fox during his mother's lifetime, both of which purported to be advances made under the power of advancement contained in testator's will.

By her will, dated the 22nd of June, 1898, testator's widow recited the power of appointment under testator's will and appointed the estate in equal shares among all her children, settling the shares of the two sons, but leaving those of the two daughters unsettled. Raymond Fox's share was settled on him for life and afterwards on his children. Two codicils were added, neither of which affected the question here raised. The widow died on the 9th of July, 1901. The four children survived her.

Humphreys, for the trustees.

Crossfield, for Raymond Fox.—The amount of these advances was to all intents and purposes withdrawn from the settlement: *In re Gosset*, 19 Beav. 529, 4 W. R. Dig. 88; *Lawrie* v. *Bankes*, 6 W. R. 244, 4 K. & J. 142.

Harman, for the three children.

BYRNE, J.—It is argued that this son Raymond ought to bring into account a sum equivalent to the advances so as to equalize the shares of the children. The hotchpot clause has no reference to the matter, and there is no general equity that a person who has been advanced should repay the sum advanced in such circumstances as these. The question really is whether, looking at the appointment which has been made, there was an intention that such advancement share should be brought into account. *In re Gosset*, where the will contained a power of appointment and a power of advancement and a hotchpot clause which was not applicable to the latter, makes it clear that such advancement share is taken out of the settle-

(*a.*) Reported by PERCY WINFIELD, Esq., Barrister-at-Law.

ment altogether. And in *Lawrie* v. *Bankes* it was held, there having been an advancement made to purchase a commission in the army for an infant, who sold the commission three months afterwards, that the proceeds of the sale, in the absence of fraud, belonged to the infant, although the trustees' object in exercising the power had failed *ab initio*.

Looking at the will of this lady, I can find nothing upon it which would induce me to say that she has made an appointment of what at that time constituted her husband's estate, so as to ensure the bringing of the amount of the advances into account.

There is nothing unreasonable in the decision I have come to, for it is always in the power of the appointor to appoint so as to ensure that an advance shall be brought into account. As I read her will the widow intended to appoint the funds so that Raymond should not be liable to account for the £705.

Solicitors, *Gribble, Oddie, Sinclair, & Johnson*, for *Osborn, Ward, Vassall, & Co.*, Bristol; *C. E. S. Whitford*.

Chan. Div.
Swinfen Eady, J. } Jan. 20, 26.

In re KING.
TRAVERS *v.* KELLY. (*a.*)

Will—Testamentary expenses—Settlement estate duty—Finance Act, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *sub-section* 1.

A mere direction in a will that the executors are to pay testamentary expenses out of residue, does not extend to settlement estate duty and is not an express provision that it is not to be borne by the settled property within the meaning of sub-section 1 *of section* 19 *of the Finance Act*, 1896 (59 & 60 *Vict. c.* 28).

Originating summons.

John King, the testator, who died on the 26th of March, 1899, by his will, gave to each of his sons, J. W. King and H. M. King, a legacy of £12,000 "free of all duties," and to his daughter A. M. C. King (now the defendant A. M. C. Kelly) and two other sons a legacy of £20,000 each, the expression "free of all duties" not being repeated in the case of the last mentioned legacies. The will then directed that the legacy of £20,000 given to the testator's daughter should be retained by the trustees appointed by the will and held upon the same trusts as the daughter's share of residue. The testator further devised his residuary real and personal estate upon trusts for conversion, and directed that out of the proceeds of sale the trustees should pay his funeral and "testamentary" expenses and debts and legacies and the legacy duty thereon, and should stand possessed of the residuary trust funds in trust for his daughter A. M. C. King, and two younger sons, A. H. King and A. P. King. The will then contained a settlement of the daughter's share of residue for the benefit of herself and issue.

The summons was issued by the plaintiffs, the executors and trustees of the will, to determine whether the settlement estate duty, upon the daughter's legacy of £20,000, and upon her share of the residue settled upon her, which had been paid by them, should be chargeable to the residuary estate or should be borne by the settled property.

Stuart J. Bevan, for the plaintiffs.

George Lawrence, for the legatees, A. M. C. Kelly and E. V. A. Kelly.—The settlement estate duty on the legacy and share of residue settled on Mrs. Kelly and Mr. Kelly should be paid out of residue; settlement estate duty is a testamentary expense under the will because it is but a form of estate duty which is a testamentary expense. It is the duty of the executors to pay the settlement estate duty, and since it is their duty it must be an executorship expense which is not distinguishable from a testamentary expense.

He cited *In re Leveridge, Spain* v. *Lejoindre*, 50 W. R. 205, [1901] 2 Ch. 830; *In re Clemow, Yeo* v. *Clemow*, 48 W. R. 541, [1900] 2 Ch. 182; *In re Treasure, Wild* v. *Stanham*, 48 W. R. 696, [1900] 2 Ch. 648; *In re Sharman, Wright* v. *Sharman*, 49 W. R. 555, [1901] 2 Ch. 280; *Sharp* v. *Lush*, 27 W. R, 528. 10 Ch. D. 468; *In re Prince, Godwin* v. *Prince*, 47 W. R. 25, [1898] 2 Ch. 225; *In re Dixon, Penfold* v. *Dixon*, 50 W. R. 203, [1902] 1 Ch. 248; *In re Maryon Wilson, Wilson* v. *Maryon Wilson*, 48 W. R. 338, [1900] 1 Ch. 565.

J. Rolt, for the residuary legatees.—Settlement estate duty must, under the Finance Act, 1896, s. 19, sub-section 1, be paid out of the settled property unless the will contains an express provision to the contrary. Estate duty on real estate is not a testamentary expense because the executor is not bound to pay it in order to obtain probate; nor is it analogous to probate duty, which the executor formerly had to pay before probate. A testamentary expense is one which the executor is bound to incur as incidental to the proper performance of his duty as executor; he only pays settlement estate duty for the convenience of the revenue authorities, and is made accountable for the payment of it before payment of the property on which it is chargeable. In this respect his duty is similar to his duties with regard to legacy duty, for which he is also accountable. Testamentary expenses cannot include legacy duty. The duty should be borne by the settled property, as the will contains no direction to the contrary.

He cited *In re Lewis, Lewis* v. *Smith*, 48 W. R. 426, [1901] 2 Ch. 176; *In re Duke of St. Albans, Loder* v. *Duke of St. Albans*, 49 W. R. 74, [1900] 2 Ch. 873; *In re Maryon Wilson*.

Cur. adv. vult.

Jan. 26.—SWINFEN EADY, J., after stating the facts as above: Mrs. Kelly contends that the executors and trustees ought to pay out of residue the settlement estate duty on the £20,000 legacy and share of residue, settled on her and her issue; the owners of the other two-thirds shares of residue contend that the duty must be borne by the settled property. Having regard to the provisions of section 19, sub-section 1, of the Finance Act, 1896, the settlement estate duty must be paid out of the legacy and share of residue, unless the will contains an express provision to the contrary; the gift "free of all duties" does not apply to the £20,000 legacy. Reliance was, however, placed upon the direction in the will to pay "testamentary" expenses out of residue, and it was urged that the case of *In re Leveridge, Spain* v. *Lejoindre*, decided that settlement estate duty was "estate" duty; and that *In re Clemow, Yeo* v. *Clemow*, decided that estate duty was included in a direction to pay testamentary expenses, and therefore that settlement estate duty was a "testamentary" expense and ought in the present case to be paid out of residue. It was, however, pointed out by Kekewich, J., in *In re Clemow*, that estate duty upon personal property takes the place of probate duty, and *In re Treasure, Wild* v. *Stanham*, the same judge stated that the previous decision was based solely on the reasoning that, as payment of estate duty was essential to obtaining a grant of probate, that

(*a.*) Reported by H. STEPHEN, Esq., Barrister-at-Law.

duty must be considered as much a testamentary expense as any other payment necessarily or properly incurred by the executors for that purpose. It is clear that probate duty was a "testamentary" expense. [His lordship cited *Davies* v. *Fowler*, L. R. 16 Eq. 308.] On the other hand, it has been held that estate duty on real estate is not a testamentary expense, as executors are not bound to pay it in order to obtain probate (*In re Sharman, Wright* v. *Sharman*). Settlement estate duty is not payable in order to obtain probate, sub-section 2 of section 19 of the Finance Act, 1896, allowing in every case six months after death within which it may be paid, and in my opinion it has no analogy to probate duty. Then how can settlement estate duty be considered a "testamentary" expense? In *Sharp* v. *Lush* Sir George Jessel said that he could not distinguish between executorship expenses and testamentary expenses, and that executorship expenses were expenses incidental to the proper performance of the duty of executor, in the same way as testamentary expenses were, neither more or less. After burying the deceased the first duty of the executors is to prove the will, and formerly the probate duty was, and now the estate duty on personal property is, a payment which must be paid before probate can be obtained, as it must be paid on delivering the Inland Revenue affidavit or affidavit made for probate; the settlement estate duty is not then payable, although the executor is accountable for it, and he must accordingly see that it is paid before parting with the legacy or share of residue or assenting to the bequest; but in like manner the executor is accountable for and liable to pay legacy duty on retaining or paying legacies, and certainly it cannot be contended that a direction in a will to pay "testamentary" expenses would extend to legacy duty on legacies not otherwise expressed to be given free of legacy duty. In *In re Lewis, Lewis* v. *Smith*, it was held that a direction in a will to pay "testamentary expenses including all duties payable by law out of my estate," did not include settlement estate duty; again, in *In re Duke of St. Albans, Loder* v. *Duke of St. Albans*, where the will contained a direction to pay funeral and testamentary expenses and debts, legacies, and annuities out of residue, and charged the real estate with any deficiency, it was held by Stirling, J., that the settlement estate duty on certain contingent legacies which were to be treated as settled must be borne by the legatees in accordance with *In re Maryon Wilson*. In my judgment, a direction to pay testamentary expenses does not extend to settlement estate duty, and therefore the will in question does not contain any express provision within the meaning of the Finance Act, 1896, s. 19, sub-section 1. The duty must be borne by the settled property.

Solicitors, *Sole, Turner, & Knight; Arthur H. King.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) — Dec. 15.

HORAN (*Appellant*) *v.* HAYHOE (*Respondent*). (*a.*)

Inland Revenue—Tax on "male servant"—Apprentice—Lad apprenticed to be trained as riding groom—Customs and Inland Revenue Act, 1869 (32 & 33 *Vict.* c. 14), *s.* 19 (3).

By an indenture of apprenticeship the respondent agreed to teach B. to be a riding groom. The term of the contract was seven years. The respondent undertook to find B. in clothing, food and lodging, and to pay him certain wages, and B. undertook to obey all lawful orders given him by the respondent. B. was engaged for the greater portion of each day in the performance of duties which would, if he were merely engaged otherwise than under the said contract, render a licence necessary for him as a male servant. An information under section 19, *sub-section* 3, *of the Customs and Inland Revenue Act*, 1869, *was preferred by the appellant against the respondent for employing B. as a male servant without taking out a licence. The magistrates dismissed the information, being of opinion that the contract was one of apprenticeship, and that B. was an apprentice and not a male servant within the Act.*

Held, that the decision of the magistrates was right, and that the words of the Act were not sufficient to bring the case within it.

This was a case stated by justices sitting at Newmarket, in the county of Suffolk.

On the 27th of February, 1903, an information was preferred by the appellant, an Inland Revenue officer, under 32 & 33 Vict. c. 14, against the respondent, for that he on the 22nd of January, 1903, at Newmarket did employ without a licence a certain male servant for the employing of whom a licence was required by the statute.

At the hearing of the information no witnesses were called, but the case was argued upon the following admissions:

1. That the person described in the information as a male servant was one Thomas Baldwin.

2. That the said Baldwin was bound to the respondent for a period of seven years under a contract dated the 25th of May, 1897, of which a copy was annexed to and formed part of the case.

3. That the said Baldwin was engaged for the greater portion of each day in the performance of duties which would, if he were merely engaged otherwise than under the aforesaid contract, render a licence necessary for him as a male servant.

4. That the terms and covenants of the contract had since the 25th of May, 1897, been faithfully and honestly carried out and fulfilled by the parties thereto respectively.

5. That the respondent was the employer of the person above mentioned.

The contract was an ordinary apprenticeship contract, whereby, in consideration of the covenants and agreements therein contained, Baldwin, the apprentice, bound himself to serve his master, Alfred Hayhoe, a trainer of horses, from the 25th of May, 1897, for the term of seven years, and the master agreed that during such period he would teach and instruct the apprentice in the arts of a training groom and of riding, and would provide him with food and lodging, and pay him certain stated wages during the last five years of the term, and also would pay the apprentice one-half of any moneys which should be received by the master for fees earned by the riding of the apprentice in races or trials, after deducting a proportionate share of the expenses (if any) that might be incurred in collecting the same.

Upon behalf of the appellant it was contended that the contract had for its main and primary, if not for its sole object, the hiring and service of Baldwin and not his teaching, and consequently that Baldwin was a male servant within the meaning of the statute and not an apprentice, and that even if the contract was an indenture of apprenticeship, Baldwin was a male servant within the meaning of the statute.

On behalf of the respondent it was contended that the contract was an indenture of apprenticeship, and that Baldwin was an apprentice and not a male servant within the meaning of the statute.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The magistrates found as a fact that the contract was one of apprenticeship, and were of opinion that Baldwin was not a servant within the meaning of the statute, but an apprentice, and they accordingly dismissed the information.

The question for the opinion of the court was whether upon the above facts the magistrates had come to a correct determination in point of law.

The Customs and Inland Revenue Act, 1869, by section 18, enacts that an annual tax of fifteen shillings shall be paid for "every male servant."

By section 19 (3) it is provided that "the term 'male servant' means and includes any male servant employed either wholly or partially in any of the following capacities; that is to say . . . groom, postillion, stable-boy, or helper in the stables . . ." The word "apprentice" does not appear in this sub-section.

Sir E. Carson, S.G. (*S. A. T. Rowlatt* with him), for the appellant.—The question in this case is whether this boy is a servant within the definition in the Customs and Inland Revenue Act, 1869, which enacts that an annual tax shall be paid for "every male servant." Section 19 (3) defines the expression "male servant" as including any male servant employed wholly or partially as, *inter alia*, groom, stable-boy, or helper in stables. This boy, it is admitted, was engaged the greater portion of the day in duties which, if he were engaged otherwise than under this contract, would render a licence necessary. Therefore we have it that he was performing the duties of a stable-boy, and he therefore comes within the definition of "male servant." [Lord ALVERSTONE, L.C.J.—Does this Act refer to apprentices at all?] No, not at all. By the contract it is agreed that the boy shall serve his master faithfully and obey all his lawful commands whenever required, and under the contract he did stable-boy's work and received wages for doing that work. It cannot make any difference if, in addition to acting as a servant to his master, he is apprenticed to him and is doing the work in order to learn his business. He is still a servant. The history of the previous Acts relating to apprentices shows that they were treated as servants, and they were specially mentioned therein. The present Act is the first one in which apprentices are not mentioned. They were mentioned in the prior Acts to avoid their coming under an exemption as regards servants in trades or callings by which the master got his living; when that general exemption was dropped it became unnecessary to mention the word apprentice.

He referred to 17 Geo. 3, c. 39, ss. 2 and 4; 21 Geo. 3, c. 31; 25 Geo. 3, c. 43; 38 Geo. 3, c. 41; 42 Geo. 3, c. 37; and 43 Geo. 3, c. 161, Schedule C, r. 4.

Scott-Fox, K.C. (*Hodgson* with him), for the respondent.—Looking at the Act of 1869 alone, one asks oneself for what purpose the word "servant" is put in if it is intended to have no meaning beyond that of the word "person." The earlier Acts referred to taxed all sorts of persons, but generally excluded traders. The scope of recent legislation is to tax merely servants who are appendages of an establishment. The tax is a tax merely upon servants, and not a tax upon apprentices. First, the man must be a servant, and, next, he must perform the duties which are enumerated in section 19 (3), or similar duties, by whatever name he may be called; that is to say, if he does the duties of a footman, and if he is also a servant, you will not excuse him by calling him a private secretary. He must first of all, however, be a servant. There is in the statutes a distinction between "person" and "servant," and where a statute means to include "apprentices" it uses the word "person." In the present case the boy is an apprentice and not a servant. The main object of the contract in this case is that the boy shall receive instruction; the definition of an apprenticeship contract is that the main object of it is that one party is to teach and the other to learn. The justices have found as a fact, having regard to the contention before them on behalf of the appellant, that the primary or sole object of the contract was the hiring and service of the boy, that this contract was an apprenticeship contract. The only way a person can be taught a trade is by his doing the work of that trade under the direction of his master. The meaning of the word "servant" in the statute is the ordinary meaning of the word "servant" in the English language. If a man be asked "how many servants" he keeps, that means servants whose business it is to serve him, and not persons towards whom he has a duty of teaching. [Lord ALVERSTONE, L.C.J.: Has this point never arisen before?] No; certainly not since the Act of 1869.

Sir E. Carson, S.G., replied.

Lord ALVERSTONE, L.C.J.—The facts in this case, I think, are not sufficient to bring the particular employee within the taxing Act. I think it is at any rate a wholesome principle, which has often been recognized, that taxing Acts must be distinct and fairly reasonably clear as to what objects are intended to be taxed. I confess the general impression produced upon me by the earlier statutes was that they did think it necessary to insert provisions to bring apprentices within an enumeration of servants practically identical with this. For instance, one of the earlier Acts says: "The aforesaid duties shall extend to apprentices other than apprentices who were compulsorily forced upon the masters." Therefore, so far as the earlier legislation helps us at all—and I do not think it helps us very much—I think it does not assist the contention of the Solicitor-General, for the Crown. If we look at the statute 16 & 17 Vict. c. 90, which is practically the same for this purpose as 32 & 33 Vict. c. 14, I think there was a reason for using the word "servant," and that under ordinary circumstances the person to be taxed was to have the relation of servant to the master. That is not conclusive, because, as the Solicitor-General has properly pointed out, though he may be called by another name, yet, if he does wholly or partially perform those duties, he may still come within the word "servant." That, I think, leads one to the final point as to what this contract was. A contract such as this, is not necessary for the mere hiring of a groom, and I think, in all probability, although the Solicitor-General said the contract was in the interest of the trainer—so that the lad might not go away if he became a good rider—there is quite as much to be said on the other side that it is in the interest of the lad so that he may be kept a sufficient time to enable him to learn his work properly if he turns out slow to learn or not industrious. I think the way the magistrates have put it is right (although, I understand, they had no evidence before them), that they regard this contract as a contract of apprenticeship, meaning that the real object was a contract that the boy should be taught to be a riding groom, and not merely to be a stable-boy and employed as a stable-boy for seven years. That being so, I think the decision is right, and that the words of the taxing Act are not sufficient to bring the boy employed under this agreement within the charging section simply because in the ordinary course of his training he does what he must do in order to learn his business—namely, perform the duties of a groom for a con-

siderable part of the day. I therefore think the appeal ought to be disallowed.

LAWRANCE, J.—I agree.

KENNEDY, J.—I agree. It seems to me on the whole, in construing this taxing Act, the contract of apprenticeship may not improperly be relied upon as supporting the decision of the magistrates.

You have to find a person who is a male who is doing certain classes of work and certainly doing that work as a servant to a master, in order to bring him within the Act. Now, supposing one asks an apprentice whether he is doing so, he would say, "I am not a servant, I am an apprentice." He would not mean that as an apprentice he may not be doing this class of work to a certain extent, but he would mean that his relationship to his employer is one of apprenticeship and not of service, carrying with it special incidents, and as a particular and distinctive incident that of being entitled to education, as well as to board or wages which a master pays his servant. Unless the Act makes it clear that it not merely includes a male person who is employed in these capacities, but also includes a person who is an apprentice as distinguished from a servant in the nature of the contract between them, I think it fails to include persons in the position of this young man in this case.

Appeal dismissed with costs.

Solicitor for the appellant, *Solicitor to Inland Revenue.*

Solicitors for respondent, *Ruston, Clark, & Ruston*' for *A. H. & A. A. Ruston*, Newmarket.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) July 17, 1903.

COOPER *v.* HAWKINS. (*a.*)

Crown—Prerogative—Highways—Locomotives—Speed of—Locomotives Act, 1865 (28 & 29 *Vict. c.* 83), *s.* 4.

The Crown is not bound by an Act of Parliament, unless it is expressly or by necessary implication named therein.

Held, that a driver of a locomotive belonging to the Crown, and acting under the orders of the Crown, was not subject to the Locomotives Act, 1865, *and was not liable to a penalty for exceeding the rate of speed fixed by section* 4.

Case stated by five justices of the petty sessional division of Odiham, in the county of Southampton.

The appellant appeared before the justices sitting at Aldershot within the said division on the 12th of March, 1903, on an information laid by the respondent charging that he, on the 26th of February, 1903, did unlawfully drive a certain locomotive propelled by steam along a certain public highway there situated—to wit, Wellington-avenue—at a greater speed than two miles an hour—to wit, at a speed of about three miles an hour, contrary to section 4 of the Locomotives Act, 1865 (28 & 29 Vict. c. 83).

The following facts were proved or admitted before the magistrates:

The appellant was a civilian and had for six and a-half years been, and then was, employed and paid by his Majesty's Secretary of State for the War Department on behalf of his Majesty, with the rating of leading engine driver. The respondent was a superintendent of police in the Hampshire constabulary stationed at Aldershot.

On the 26th of February, 1903, at about 5.30, the appellant was driving a locomotive with one truck attached along Wellington-avenue, in the town of Aldershot, at a speed of over three miles an hour.

The locomotive was the property of his Majesty, and appellant was driving the locomotive in the course of his duty as such servant as aforesaid, and in accordance with the instructions of his superior officer, the coal in the truck being required for use that night in the balloon factory. If the appellant and the locomotive were subject to the provisions of section 4 of the Locomotives Act, 1865, then the appellant was guilty of an offence under that section. It was contended on behalf of the appellant that the said section did not apply to the appellant as being a servant of the Crown, or to the locomotive as being the property of his Majesty and being driven in manner aforesaid in the service of his Majesty.

The justices were of opinion that the section applied to the appellant and the locomotive, and convicted the appellant.

The question of law for the opinion of the court was whether upon the facts stated above the justices ought to have acquitted the appellant.

Sir E. Carson, S.G. (*Rowlatt* with him), for the appellant.—The magistrates came to a wrong decision. Unless there is express mention of the Crown in the Act of Parliament it is not bound by it.

He cited *R.* v. *Cooper*, 3 T. R. 46; *Hornsey Urban District Council* v. *Hennell*, 50 W. R. 521, [1902] 2 K. B. 73; *Gorton Local Board v. Prison Commissioners.**

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

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* GORTON LOCAL BOARD OF HEALTH (Apps.) *v.* PRISON COMMISSIONERS (Resps.).

(Before DAY and WILLS, JJ., June 17, 1887.)

CASE stated by the stipendiary magistrate for Manchester, raising the question whether the respondents, who were the Prison Commissioners, were bound to conform to a bye-law which had been made by the local authority of the district of Gorton, which was a suburb of Manchester.

Previously to the year 1877 the corporation of Manchester, as a prison authority, had bought a plot of land and before 1877 a prison was erected on the plot which, however, did not cover the whole plot.

Under and by virtue of section 5 of the Prison Act, 1877, the prison was transferred to and vested in one of the principal Secretaries of State, but the legal estate therein, by virtue of section 48 of the Act, was to be deemed to be vested in the Prison Commissioners and not in the Secretary of State, but to be disposed of by such commissioners in such mode as the Secretary of State with the consent of the Treasury might direct.

By an agreement under seal in April, 1880, the corporation (*inter alia*) granted and confirmed certain rights and privileges to the Prison Commissioners and defined the limits of the prison.

The plot of land was within the district of the Gorton Local Board, which was duly incorporated pursuant to the Public Health Acts. The bye-laws of the local board were made under the powers conferred by the Local Government Act, 1858, and had been duly certified and approved pursuant to the provisions thereof.

One of the bye-laws (No. 26) provided that "No new houses shall be occupied until the house drainage has been made and completed, nor until such house has been certified by the local board or their officer authorized to give such certificate after examination to be in every respect fit for human habitation in his or their opinion"; and by another bye-law a penalty was imposed for breach of the bye-laws.

The 12th bye-law contained an exception as follows: "The following buildings and works shall be exempt from the operation of these bye-laws: common gaols, prisons, houses of correction, and places of confinement connected therewith and other public buildings belonging to justices of the peace."

In the year 1886 the Prison Commissioners decided to erect two blocks of houses with other buildings and appurtenances on the triangular plot of land capable of being used as twenty separate dwellings. Such houses were intended for and were used as officers' quarters for the use of the prison, and were

Russell, K.C. (*G. W. Ricketts* with him), for the respondent.—Where the Act is for the benefit and protection of the public there is a clear implication the Crown should be bound.

He cited Comyn's Digest, title Parliament, R, 8; Bacon's Abridgment, title Prerogative, E, 5.

No reply was called for.

Lord ALVERSTONE, L.C.J.—Upon the general question of when statutes should or should not be held to bind the Crown, I do not think I can add anything to what I said in the *Hornsey case*, a judgment concurred in by my brothers Darling and Channell, and in which I tried, as far as I could, to see what authorities bore upon the matter that were really of importance. I do not see any reason to express myself differently to the way in which I expressed myself at p. 81 ([1902] 2 K. B.) in that judgment, which was approved of by my brothers Darling and Channell.

If it should be thought necessary to report this case, I think it is very important that those parts of the judgment in the *Gorton case* (see foot-note) which have been read—I mean the judgments of Day, J., and my brother Wills, J.—should be reported, because I think they are of very great value upon this question. They proceed upon rather different considerations to those which we had before us in the *Hornsey case*, and I think that they are a very valuable contribution to the law on this matter if it be not considered to be sufficiently plain.

Therefore, upon the general question of what statutes do or do not bind the Crown, I do not wish to add anything. I do not overlook that which I ventured to refer to in that particular case, that there may be general provisions of a public character which may bind the Crown; and the point, if any point of difficulty arises, in this case is that which Mr. Russell has contended for—that section 4 of this Act, being a section prohibiting the use of a locomotive upon a road above two miles an hour, must be held to be enacted for the public safety, and therefore the object of the Act being to protect the public, on those principles to which he has referred, ought to be held to bind the Crown. Without in any way throwing the least doubt upon what I have said or what I have endeavoured to repeat, I cannot myself regard such a section as this as coming within that category. If I compare it with the provision which was the subject of consideration in the *Gorton case*, this section seems to be far less of that character of section than the one then under consideration—namely, that the building should not be used

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occupied by prison officers No plans had been submitted to the local board of these officers' quarters before the erection. After their erection the local board applied to the governor of the prison to inspect the officers' quarters for the purpose of ascertaining if they were fit for habitation pursuant to the 26th bye-law. No inspection of these quarters by the local board had been made or permitted to be made by the governor or the Prison Commissioners. Each and all of them had refused to give such permission, and denied the right of the local board to require compliance on their part with its bye-laws. [The position of these quarters in relation to the prison was then described in the case.] Rent was paid by the officers occupying the quarters, but the amount thereof was sometimes fixed with reference to the amount of salary received. The officers for whom quarters were provided in these houses were required by the Prison Commissioners to reside there for the better discharge of their official duties.

The local board took proceedings against and summoned the Prison Commissioners for having erected these houses or buildings before obtaining a certificate from the local board, as required by the 26th bye-law.

The magistrate held that the Prison Commissioners were officers under the direct control and acting by the authority of the Secretary of State, who represented the Crown, and that the triangular plot of land, was vested or deemed to be vested in the commissioners for the purposes of the Crown, and that, as the Crown was not named in the Public Heath Acts, the bye-laws of the local board did not apply. He also found that the triangular plot and the buildings erected on it formed part of the prison within the meaning of the Prison Act, 1865, and of the 12th of the bye-laws, and he accordingly dismissed the summons.

The questions for the opinion of the court were (1) whether there was evidence that the triangular plot and the buildings thereon formed part of the prison as defined by the Prison Act, 1865, s. 4, and the Prison Act, 1877, s. 60; (2) whether, the land and buildings being vested in the Prison Commissioners for the use of the Secretary of State for public prison purposes, the bye-laws were applicable thereto; and (3) whether, under the circumstances above set forth, penalties for breach of the bye-laws could be enforced against the Prison Commissioners.

Charles, Q.C., and *Heywood*, for the appellants.

The *Attorney-General* (*Sir Richard E. Webster, Q.C.*) and *R. S. Wright*, for the respondents.

The parts of the judgment dealing with the question whether the plot of land and the buildings thereon formed part of the prison are omitted.

DAY, J.—This is an appeal from a decision of the magistrate at Manchester, who held, upon a summons taken out by the Gorton Local Board against the Prison Commissioners, that the Prison Commissioners were not liable to a penalty by reason of their having erected certain buildings for the purposes of habitation without a certificate from the officer of the local authority at Gorton. The question which is raised upon this appeal is, first of all, whether these buildings, these houses, are a prison or part of the prison, and therefore within the exception provided by No. 12 of these local bye-laws. And, secondly, it has been argued before us that, whether these buildings constitute a prison or not, they are not within the jurisdiction, if I might so say, of the local authority, and are not even within the scope of these bye-laws, because they are not within the provisions of the Public Health Act, or within the competence, therefore, of the local board under its bye-laws. The first question which has been argued, and the one which I will deal with first, is whether these houses constitute a prison or a portion of a prison. [His lordship held upon this point that the houses were in no sense part of the prison within the meaning of the bye-laws; and after stating that he was merely considering the word "prison" within the meaning of these bye-laws, said: "I am clearly of opinion that, having regard to the situation of these houses, and the use that is made of these houses, and the object of the houses, they cannot in any sense be said to be a prison, or part of a prison."] So far on that point my decision would be in favour of the local authority, and, if the matter rested there, I should be of opinion that the magistrate had arrived at a wrong decision, and that his decision ought to be reversed. But upon the other point I entertain a different opinion; I entertain the same opinion that was entertained by the magistrate in reference to what was argued before him. I am clear that, having regard to this second point, the decision of the magistrate must be upheld. It is clear to my mind that this is State property It is property belonging to the State, and it is property, therefore, in my judgment, over which the local authority can have no control whatever. It is property provided by the Crown, if I may use that expression, for the purposes of the Crown, and it is occupied by the servants of the Crown, and, in my judgment, that property is to be entirely under the control of the Crown, and is not to be controlled by local authority. There is certainly in the Public Health Act no express mention of the Crown, so as to bind the Crown; and there is certainly no necessary implication that the Crown itself is to be bound. In the absence of express words the Crown is not to be bound, nor is the property of the Crown to be affected except by necessary implication. There are many cases in which such implication does necessarily arise, because otherwise the legislation would be unmeaning; and to give it meaning you are obliged to consider that it is intended to apply to the Crown. That is what I understand by "necessary implication." Here the Crown is not mentioned, and no necessary implication of any sort or kind arises; and it is clear that the Crown, by its officials, is quite competent to provide for the sanitary condition of these houses. It is quite competent to do all that it thinks fit in the matter, and the State is not to be controlled—that is, to my mind, a matter of the greatest public interest—in the disposition of the property entrusted to the State for State management, by any local authority whatever. I am clearly of opinion that on this second ground the decision of the magistrate must be upheld, and the appeal dismissed.

WILLS, J.—I am of the same opinion. I do not think that this building is part of the prison. [His lordship dealt with that point, and proceeded:] But then comes a far more important and far more serious question—namely, whether the bye-laws were intended to apply at all to property held

unless properly inspected by a sanitary authority. To my mind it is quite obvious when you are dealing with a statute which gives power to a local authority to make bye-laws and regulations, and which limits the speed of these locomotives to two miles an hour, there are many considerations which might make it a proper thing for such a regulation to be passed under ordinary circumstances, besides the paramount importance of public safety. Speaking only for myself, I do not think that that section, looking at its language and its objects and at the power the local authorities had to vary it, can be said to be a general enactment of the character to which Mr. Russell referred.

That being so, what are the facts in this particular case? I had better read paragraph 5 that I may not accidentally misstate them, or state them in other words than the magistrate has found them. "The locomotive so driven by the appellant as aforesaid was the property of his Majesty and the appellant was driving the said locomotive in the course of his duty as such servant"—that was as an authorized driver—"and in accordance with the instructions of his superior officer." Now, I wish myself to emphasize that which has been pointed out by the learned Solicitor-General in his argument, that no question of nuisance arises here, no question of anything being done which was unnecessary, and no question of an individual act by the driver apart from the performance of his duty as a servant of the Crown, using the property of the Crown and under the direction of the Crown. Therefore the personal element of what a man may be charged with, either civilly or criminally, in consequence of his own conduct, in my opinion cannot be justly and properly raised in this case, which I think has been most fairly argued by Mr. Russell. He does contend that, in order to justify the conviction there must be a prohibition against the use of a locomotive by anybody, including the Crown authorities, and a locomotive belonging to the Crown, at a speed above two miles an hour. If that is the proposition, I think that this statute is not one which binds the Crown; and that, in a case which negatives any suggestion of individual conduct constituting the offence, which solely comes before us with reference to the use of a Crown locomotive by a Crown servant in the performance of military duties, as being a breach of the statute, we ought to hold that the section does not prohibit that act and does not bind the Crown in that sense.

I think it is not necessary to say at length, but it

for public purposes in the manner and under the circumstances under which this property is held, whether by the Secretary of State or by the Prison Commissioners. I leave that ambiguous purposely, because, notwithstanding Mr. Wright's very definite statement that they are vested in the Prison Commissioners, there seems to me to be room for considerable doubt upon that matter, if it were material. But in my judgment it is not material. One has to look at the substance of the thing; and, whether the legal estate be in the Prison Commissioners or in the Secretary of State, it is clear that this is property of the Crown in the sense in which that expression has always been used when questions of this kind arise as to rateability of property, or as to other incidents and burdens upon property in respect of which the Crown may claim exemption because it is the Crown. And it seems to me clear that it is property which is held by either the Secretary of State or the Prison Commissioners as State property, and in that sense it is Crown property. It is property held and administered by the Crown for the service of the public. In my judgment, however anxious one may naturally be, and ought to be, to confine the application of the prerogative within its legitimate limits, it seems to me that it is clear, from authority and from principles which are established beyond all cavil and dispute, that the Crown is not bound, unless it is expressly or by necessary implication named; and, of course, necessary implication is exactly the same thing as being expressly named, except in the mode of expression. It comes to the same thing and effects the same end as the express mention of the Crown. How can it be said here that there is a necessary implication of the Crown being bound? It is not necessary, as it seems to me, for the very purposes of the public health and public good, which are intended to be served by the Public Health Act, that this jurisdiction should be vested in the local board. In the year 1865 substantially the same legislation with regard to the possibility of the enactment of bye-laws by local boards was in existence, and in the year 1865 was passed this Prison Act, which enacts, amongst other things, by section 26, that the Secretary of State "may approve of the plans submitted to him with or without modification, or may disapprove of the same." And there is no doubt that the subject-matter to which these plans may relate is large enough to cover such buildings as these. There is, therefore, a great, high, and responsible officer of State in whom is vested the discretion of approving or disapproving of such plans, and in whom was vested that discretion at a time when these bye-laws, and many other bye-laws of a similar character, must have been in force under the Local Government Act of 1858. Can anybody suppose that it was intended that the approval of the Secretary of State should not be effectual, and that because the *locus in quo* was situated within the area of the jurisdiction of a local board, although the Secretary of State approved the plans, the plans which he approved of should not be followed out. It seems to me something like an absurdity to suppose such a thing, and there is certainly as much reason in supposing that the Legislature would give credit to the Secretary of State that he would do his duty and would see that the great interests of the health of the public were regarded, as in supposing that the local board in each district would do its duty. The protection of the public is as complete and as effectual under the approval or disapproval of the Secretary of State as it would be under the approval or disapproval of the local board. That was the state of things down to 1875. In 1875 the present Public Health Act was passed, and that repealed all the prior legislation. It may be true that legislation took, in a certain sense, a fresh departure in point of form from that period; but can anybody, who is familiar with the course of legislation and the history of these Public Health Acts, suppose that, simply because the Act of 1875 is subsequent to the Prison Act of 1865, it was intended that there should be any change wrought in the effect of legislation in this respect? It seems to me to be quite impossible, and it seems to me that the Public Health Act of 1875 leaves untouched this prior legislation applicable to prisons in general; and although this place was not popularly a prison, yet it certainly was, under the Prison Act of 1865, a prison subject to the provisions of that Act; and it seems to me that it is impossible to suppose that it was intended to take away from the Secretary of State that jurisdiction which he had before, finally and authoritatively and effectually, to approve, if he chose, of the plans which were to be submitted to him. It is suggested by Mr. Charles, and one was naturally struck with the argument at first, that we find a particular saving clause with regard to some portion of the rights of the Crown in section 327 of the Public Health Act, and therefore that it may be presumed that all other exceptions of the Crown were intended to be done away and to be given up. I think that when one comes to look at the nature of the Public Health Act generally, and especially when one has regard to the considerations which I have already dealt with with regard to specific matters and the fact of an approval being already vested in the Secretary of State under exactly similar legislation, it is impossible to suppose that the saving clause, although limited as it is, was meant to give up everything else. It is always a question of circumstances, and it is often a question not quite free from difficulty, whether a particular clause is put either in an Act of Parliament or in any other instrument *ex majori cautelâ*, or whether it is put in for the purpose of limiting the application of its provisions, which otherwise might be supposed to extend beyond its own limits. It is seldom easy to say without a good deal of consideration which class of interpretation ought to be put upon it. It seems to me that, looking at the very great alteration which would be made in the status of Crown property all over the kingdom, if we were to hold that this exception of the rights of the Crown was intended to give up everything else, it cannot be supposed that that really was the intention. I think that that clause was put in simply *ex abundanti cautelâ*, and not in order to express that that was the sole common law right of the Crown which would be preserved. For these reasons it does not become necessary to express any opinion as to whether the Prison Commissioners or the Secretary of State would be formally the proper persons to bring before the magistrates, if there were anybody to be brought before the magistrates, because I am of opinion that these proceedings cannot in any shape succeed against the Crown, or against the Prison Commissioners, or against anybody concerned in this matter.

is perfectly obvious there must be many occasions when in the performance of military duties it would be absolutely necessary for locomotives to be driven at a greater speed than two miles an hour. I only mention that, not for the purpose of enforcing the argument, but of pointing out why there is no general public principle why such a section, so worded and giving such powers as it does, should be held to bind the Crown.

I am therefore of opinion that this appeal ought to be allowed and the conviction quashed.

WILLS, J.—I am entirely of the same opinion. I cannot help thinking that the fact that the section would, at the will of the local authorities, subject the persons who are engaged in the performance of duties of this kind to liabilities which at the time this Act was passed could not be known or foreseen is a strong argument against the supposition that the Crown consented beforehand to allow itself to be bound by an Act of Parliament, which provided for bye-laws which might be imposed by local authorities afterwards. I do not know that there is any decision on that point. I rather think there is not. I know that in factory cases the question has arisen from time to time. And I happen to know that some years ago the London County Council wanted to apply their bye-laws as to streets to the buildings which had been built on the Chelsea Hospital property, and the Crown objected, and said it was not bound by bye-laws of that kind, and I know that the London County Council gave way. Therefore it is a kind of question which has arisen, and as to which it seems to me that the fact of there being a power for a local authority to make bye-laws is a strong argument, I do not say it is conclusive—there may be other considerations which outweigh it—but it is a strong argument against holding that the Crown is bound by the section which contains such provisions.

Then I agree with my lord that this is not one of those enactments of paramount importance to public safety, which require that a great public department should be responsible if its servants in the performance of their duty, and acting under orders, should exceed the rate of speed which is provided for. I cannot help thinking that many of the considerations which were relied upon in the judgments of my brother Day and myself in the *Gorton case* (see footnote) are quite correct in principle and are founded upon very sound reasons. I cannot help thinking that they apply here, and apply, it seems to me, with rather more than usual force, because this is an Act of Parliament which, if it binds the Crown, must bind all the great departments of State, no matter what they are, and therefore must bind the military department. Now, the military department is of that character that to have this kind of interference with it might hamper the services of that portion of the army which was then required exceedingly. Occasionally soldiers are required—not as performing in one sense military duties, although under military command—to perform civilian duties and to act as good citizens by helping to put down disturbances and to keep the peace. Under such circumstances there may be a very paramount necessity for great speed being used in the conveyance of materials, and of what is wanted for the performance of the duties which they are ordered to undertake in order simply to preserve the public peace. An army cannot exist, at least it cannot exist for any useful purpose, without there being opportunities for manœuvring and practising, which could not be carried out on any large scale if regulations of this kind were to be enforced and to hamper them at every turn in the performance of their duty.

It seems to me, therefore, that this is not an enactment which ought to be held to bind the Crown.

Of course that does not exhaust the case, because it might perfectly well be that though the Crown is not bound by the enactment, and though the man was driving an engine which belonged to the Crown and to nobody else, yet the act of over-driving might be his own personal act. It might be under such circumstances as my brother Channell suggested—viz., that of the man being drunk or in a condition in which he certainly would not be performing a public duty, and was not acting in accordance with superior orders; but in this case certainly that consideration does not arise. When I heard paragraph 5 of the case read I certainly understood, and I do not see any reason to depart from that understanding now, that it stated that the excess of speed was in conformity with orders. It may be that they were not orders specifically to go more than three miles an hour, but he was told, as I read it, that the coal was to be conveyed before nightfall to a particular place, and as I understand the paragraph to mean, or else there is no meaning in it, it was necessary in order that that should be done that he should go at a pace which exceeded the limits imposed by the local bye-law. If so, this is a case beyond all doubt in which the act of the man is the act of the Crown. If so, there cannot be any question, assuming that we are right in holding that this section does not bind the Crown, that the conviction was wrong.

CHANNELL, J.—I am of the same opinion, and have nothing to add.

Appeal allowed.

Solicitor for the appellant, *Solicitor to the Treasury.*

Solicitors for the respondent, *Robbins, Billing, & Co.*, for *Baker*, Winchester.

C. C. R.
(Lord Alverstone, L.C.J., and Wright, Kennedy, Darling, and Phillimore, JJ.) — Nov. 27.

REX v. ROUSE AND BURRELL. (a.)

Criminal law—Evidence—Statement by prisoner that prosecutor is a liar—"Imputations on the character of the prosecutor"—Cross-examination of prisoner as to character—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (f) (*ii.*).

At the trial of a prisoner upon an indictment he was called as a witness, and in his cross-examination counsel for the prosecution asked him whether a statement made by the prosecutor was the truth or an invention. In reply, the prisoner said: "No; it is a lie, and he is a liar."

Held, that the answer of the prisoner was not such as to "involve imputations on the character of the prosecutor" within the meaning of section 1 (f) (*ii.*) *of the Criminal Evidence Act,* 1898, *so as to render the prisoner liable to be asked in cross-examination, and be required to answer, questions as to any previous convictions or as to his bad character.*

Case stated for the opinion of the Court for Crown Cases Reserved.

This case was tried before the Hon. John De Grey, sitting as chairman of the Suffolk Quarter Sessions at Ipswich.

The prisoners were indicted for conspiring together with other persons unknown, by means of various

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

false pretences, &c., to induce Thomas John Wright to sell to the prisoner Burrell a certain mare.

In the prosecutor's evidence he stated that in April, 1902, the prisoner Rouse offered to buy the mare of him on credit for the sum of £19.

The prisoner Rouse was called, and in his cross-examination was asked by counsel for the prosecution, "Did you ask the prosecutor to sell you the mare in April for £19, or has he invented all that?" The prisoner replied, "No; it is a lie, and he is a liar."

Counsel for the prosecution then proposed to ask the prisoner if he had not been in trouble before.

Counsel for the defence objected that on the mere statement that the prosecutor was a liar, evidence as to the character of the prisoner was inadmissible, there being no other attack made on the prosecutor or his witnesses.

The learned chairman admitted the evidence, and the prisoner Rouse replied that he had been convicted of being quarrelsome, that he had been before the magistrates for drunkenness, and fined fifteen shillings or £1 for breaking a window.

The prisoners were convicted and sentenced, Rouse to one month's imprisonment with hard labour, and Burrell to three months' imprisonment with hard labour.

The learned chairman made no allusion to Rouse's character in summing up the case, and he did not consider that the answers that he gave as to his character had any effect upon the issue.

If the court should be of opinion that the evidence was improperly admitted, then the conviction was to be quashed; if otherwise it was to be affirmed.

Section 1 of the Criminal Evidence Act, 1898, provides that: "Every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings. . . Provided as follows: . . . (*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

"(i.) The proof that he has committed or been convicted of such offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

"(ii.) He has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

"(iii.) He has given evidence against any other person charged with the same offence."

Ernest E. Wild, for the prisoner Rouse.—The evidence was improperly admitted. The fact that, in the opinion of the learned chairman, the prisoner's answers to the questions as to his character had no effect upon the issue is immaterial to the question: *Reg.* v. *Gibson*, 35 W. R. 411, 18 Q. B. D. 537; *Reg.* v. *Saunders*, [1899] 1 Q. B. 490, 47 W. R. Dig. 46. The question put to the prisoner whether he had been in trouble before is clearly one which cannot be asked unless it comes within section 1 (*f*) of the Criminal Evidence Act, 1898. The answer that the prisoner made was nothing in the "nature or conduct of the defence such as to involve imputations on the character of the prosecutor" within this section. The nature or conduct of the defence means the general trend of the defence. This answer was given in answer to a question which provoked such an answer. [Lord ALVERSTONE, L.C.J.—I don't see at present why it is anything more than negativing the charge. Suppose he had said, "It is not true, but I would rather not say what the prosecutor is."] Or suppose he had said that that was a question for the jury. In *Reg.* v. *Marshall*, 63 J. P. 36, where the charge was one of rape, and the defence was consent, Day, J., admitted evidence of bad character, but such evidence was wrongly admitted. [The Court here stopped the learned counsel.]

A. W. Bagge, for the prisoner Burrell, was not called on.

Walter Stewart, for the prosecution.—The case does not disclose all that transpired. If the answer given by Rouse had been an isolated answer it might only amount to an emphatic way of saying "Not guilty," but that was not the fact. The case does not deal with the whole of the facts as they came out at the trial. [Lord ALVERSTONE, L.C.J.—We can only deal with the case as stated. It does not appear that any other attack was made upon the prosecutor or his witnesses.] That being so, I am not able to argue the case further.

Lord ALVERSTONE, L.C.J.—Having regard to what Mr. Stewart has said, it is important that it should be made quite plain that we are giving our decision on the statement of the case before us, and not laying down any general rule. We cannot go outside the case. Here all we have to decide is whether such an answer as is put before us in the case is sufficient to allow cross-examination as to character. The facts in the particular case were these: The prisoners were indicted for conspiring to obtain a mare by false pretences. The prosecutor having stated that Rouse had offered to buy the mare on credit for £19, Rouse, when he came up to give his evidence, was asked the question, "Did you ask the prosecutor to sell you the mare in April for £19, or has he invented all that?" to which he replied, "No; it is a lie, and he is a liar." Of course if the words "or has he invented all that" referred to other matters, different questions might arise. All we have to deal with, however, is the answer as stated in the case. I think that the answer was only an emphatic way of saying "Not guilty," and therefore by itself was not sufficient to bring the case within section 1 (*f*) (ii.) of the Act. The defence in a criminal case necessarily involves the allegation that the charge is not true, and a denial of the charge itself is not sufficient to allow cross-examination of the prisoner as to character. This evidence having been improperly admitted, the conviction of both prisoners must be quashed.

WRIGHT, J.—I am of the same opinion.

KENNEDY, J.—I concur.

DARLING, J.—I am of the same opinion. To my mind, merely to deny the facts alleged by the prosecutor is not necessarily an attack on the prosecutor's character. Here, when asked in cross-examination whether the prosecutor had invented all his story, Rouse did no more than he had a right to do—namely, in an emphatic way, deny the truth of the charge. He merely said of one man what the Psalmist in his haste said of all.

PHILLIMORE, J.—I agree. I think it would be very dangerous to allow a sort of general question to be put in cross-examination, "Is it all invention?" and then, when the prisoner, desiring to make good his defence, allowed himself to say more than was necessary, to follow that up by cross-examination of the prisoner as to past conduct. It would practically be doing away with the Act of Parliament.

Upon the case as stated I am of opinion that these convictions must be quashed.

Both convictions quashed.

Solicitors for the prisoners, *Dubois & Williams*, for *Chamberlin & Taylor*, Lowestoft.

Solicitors for the prosecution, *White, Borrett, & Co.*, for *Westhorpe, Cobbold, & Ward*, Ipswich.

House of Lords.

From C. A. (Ireland). July 3, 1903.

FULLERTON AND ANOTHER *v.* PROVINCIAL BANK OF IRELAND. (*a.*)

Mortgage—Equitable mortgage—Deposit of title deeds with letters—Subsequent mortgage—Registration—Priority—Consideration—Irish Registry Act (6 *Anne*, c. 2).

Equitable charges on land are within the Irish Statute of Anne (6 *Anne*, c. 2).

S., whose account with the respondent bank was overdrawn, was being pressed by their manager to reduce his overdraft. At that time S. had contracted to purchase an estate, and S. undertook by letter to lodge the deed of conveyance, when executed, with the bank for the purpose of securing his overdraft, and further wrote for forbearance and that he would put his account in order. Later on, in 1895, *the estate was conveyed to S., subject to a mortgage (as to which there was no question), and he shortly afterwards deposited the conveyance with the respondent bank without further memorandum, and no registration of letters or any other document was made. The charge of the appellants (trustees of S.'s marriage settlement) was created by a deed of mortgage dated and registered in* 1896. *The appellants had no notice of the bank's transaction with S.*

Held, that forbearance was for a reasonable time extended to S., who expressly or impliedly asked for it, and that the letters amounted to a valid charge in equity which attached to S.'s interest in the estate when the property was conveyed to him, and constituted a transfer of his interest by way of security to the bank; that this was a conveyance within the Registration Act (6 *Anne*, c. 2), *and not having been registered must be postponed to the appellants' registered mortgage.*

Alliance Bank *v.* Broom, 2 *Dr. & Sm.* 289, *approved.*

Decision of the Court of Appeal in Ireland, sub. nom. In re Stevenson's Estate, [1902] 1 *Ir. Rep.* 23, *reversed.*

Appeal from a judgment of the Court of Appeal in Ireland (FitzGibbon and Holmes, L.JJ., Walker, L.J., dissenting), reversing that of Meredith, J., *sub. nom. In re Stevenson's Estate*, [1902] 1 Ir. Rep. 23.

The facts appear in the judgments of their lordships.

J. O. Wylie, K.C., D. Henry, K.C., and *R. E. Osborne* (all of the Irish bar), for the appellants.

The Solicitor-General for Ireland (*J. H. Campbell, K.C.*), *J. Gordon, K.C.*, and *G. W. Walker* (all of the Irish bar), for the respondents.

Lord MACNAGHTEN.—The point raised by this appeal is a short point, and not, I think, one of any great difficulty. The appellants and the respondents are both equitable incumbrancers on certain property in Westmeath known as the Portlemon estate, and there is a contest for priority between them. The Portlemon estate has now been sold. But at the commencement of the contest the equity of redemption was vested in a Colonel Stevenson, who acquired the property from a Mrs. Treacy; she conveyed it to him in consideration of the sum of £8,000, which was secured on the property by a legal mortgage of even date with the conveyance. The charge of the appellants (who are the trustees of Colonel Stevenson's marriage settlement) was created by a deed of mortgage dated the 29th, and duly registered on the 31st of July, 1896. There is no question as to the validity or the regularity of this mortgage. The charge in favour of the respondents was created or completed by the deposit, on the 15th of July, 1895, of the conveyance to Colonel Stevenson of the Portlemon estate. The charge in favour of the respondents is therefore prior in date to that in favour of the appellants. The respondents' case is that they have not and never had any charge upon the property in question, except the charge created by the mere deposit of Colonel Stevenson's conveyance; that they had therefore nothing to register; that the statute of Anne has no application to their security, and that according to the law laid down in *In re Burke*, 9 L. R. Ir. 24, they are entitled to the priority which properly belongs to priority of date. The case of the appellants is that the deposit on which the respondents rely was accompanied or preceded by certain letters leading up to the actual deposit, which were sufficient to create and did in fact create a valid equitable charge on Colonel Stevenson's interest in the Portlemon estate; that these letters therefore, or some or one of them, ought to have been registered, and that for want of such registration the claim put forward on behalf of the respondents fails, and their alleged security must be held to be fraudulent and void against holders of a subsequent registered mortgage. The whole question therefore depends on the meaning and effect of these letters. They were written by Colonel Stevenson to the local manager of the Provincial Bank of Londonderry, where Colonel Stevenson's account was kept. The earliest in date is one of the 26th of March, 1895. The others are dated the 18th of May, 1895, the 24th of May, and the 7th of June. When those letters were written the conveyance of the Portlemon estate to Colonel Stevenson was not in existence—the arrangement for the sale of the property to him was in progress. The conveyance was not executed until the 11th of July, 1895. It was registered two days afterwards. I need not trouble your lordships by reading these letters. They were discussed very fully in the judgments of the court below. Throughout these letters, and more particularly in the letter of the 18th of May, Colonel Stevenson is making out a case for indulgence and pleading for forbearance. Apparently the local manager had given him to understand that he himself was likely to get into trouble with the head office over the account, and on the 18th of May Colonel Stevenson writes: "All you require is a little patience and my account will be put upon a satisfactory basis." That was the tone of the letters throughout. In addition it is enough for me to remind your lordships that at the outset of the correspondence, on the 26th of March, 1895, Colonel Stevenson writes: "When I receive the title deeds of the Portlemon property from my solicitors I will have same at once lodged with you." That was a clear and definite statement on which the manager of the bank was apparently intended to rely. From that statement Colonel Stevenson never receded. He never qualified it. On the contrary, he repeated it more than once, and in one letter he refers to it as a thing which he had

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

"undertaken." If these letters were serious letters meant to be taken seriously, I cannot doubt that they created a valid charge in equity attaching to Colonel Stevenson's interest in the Portlemon estate the very moment the property was conveyed to him, and carrying over his interest by way of security to the bank. That proposition as a proposition of law was not disputed by the Solicitor-General. But he rested his case on two grounds. In the first place he adopted the view taken by FitzGibbon and Holmes, L.JJ., that these letters had no contractual force, that they were merely friendly letters temporising and intended to put the manager off, that they were of no real importance, and that the transaction which resulted in the deposit must be taken to have commenced on the occasion of the visit of Colonel Stevenson's solicitor to the solicitor of the bank in Dublin on the 11th of July, 1895. I cannot take that view, and I would point out to your lordships that the first three letters are formal business letters beginning "Dear Sir," and addressed to "The Manager, Provincial Bank, Londonderry." The last letter no doubt begins "My dear Mr. Stewart," and contains allusions to private matters. But I am unable to understand how such allusions can detract from the force of a definite assurance on a matter of business, though it be contained in the same letter. The other point on which the Solicitor-General relied was that there was no proof of consideration. The promise, he said, if it was a definite promise, was a *nudum pactum*. No doubt, he said, Colonel Stevenson had overdrawn his account, but there was no stipulation for forbearance for any definite time. The point does not seem to have been argued in the courts below, though it was suggested and touched upon by FitzGibbon, L.J. This point seems to me to be covered by authority. In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was, in fact, extended to the person who expressly or impliedly asked for it. That proposition seems to me to be established by the case of the *Alliance Bank* v. *Broom*, 2 Dr. & S. 289, and other cases, among which I may mention *Oldershaw* v. *King*, 2 H. & N. 517, with the observations on that case and the case of the *Alliance Bank* v. *Broom* by Bowen, L.J., in *Miles* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 266, and I may add that the proposition seems to be good sense. On the whole, therefore, though I am impressed by the weight which must attach to the deliberate opinion of such eminent judges as FitzGibbon and Holmes, L.JJ., I ask your lordships to adopt the view of Walker, L.J. I therefore move your lordships that the appeal be allowed, and the judgment of Meredith, J., be restored, with costs both here and below.

Lord SHAND.—I am entirely of the same opinion. The question is one to be determined entirely on the law of equity as settled by the authorities in England and in Ireland, and as bearing on the provisions of the old statute of Queen Anne. It seems to be settled by the authorities that an undertaking in writing to give the title deeds does certainly create a charge in respect of money advanced on the faith of such an undertaking. In this case I think that there is no doubt that by the letters which have been referred to by Lord Macnaghten there was such an undertaking. That being so, the only question which remains is whether in this particular transaction that rule must apply. I am clearly of opinion that it must do so; for I think the effect of the correspondence is to show that there was a large debt due to the bank on the account of Colonel Stevenson which had been overdrawn, and as I gather from the letters there was pressure for the repayment of that debt. In answer to that pressure, those letters were written which led to the forbearance of the bank, and I am of opinion that that is sufficient to meet the argument on the second point.

Lord DAVEY.—It might appear to some people that the policy of the Irish Registration Act was to postpone an unregistered transfer of property to a registered one, whether the non-registration arose from negligence or inadvertence or from the fact of the transfer having been effected without any document being executed which was capable of being registered. I must express my personal regret that it was not so held, but it is too late now for your lordships to interfere with what has become the settled law, and is expressed in *In re Burke*. I do not think that the learned judges who formed the majority of the Court of Appeal differed from Meredith, J., and Walker, L.J., in the law which they thought applicable to the case; their difference was as to the construction of the letters which passed between Colonel Stevenson and Mr. Stewart, the manager of the bank at Londonderry, in the latter parts of the months of March and May and the beginning of June, 1895. The majority of the court below thought that those letters were only expressed in the language of expectation and hope, and that they did not express any promise or undertaking which might form a contract between Colonel Stevenson and the bank. It appears to me to be important to consider what was the situation at that time. It was this: Mr. Stewart, the manager of the bank at Londonderry, had allowed Colonel Stevenson to overdraw his account to an extent which the directors disapproved, and apparently Mr. Stewart had been instructed by the board at Dublin to press Colonel Stevenson to reduce his overdraft. On the other hand, Colonel Stevenson had at that time contracted to purchase an estate called the Portlemon estate, but it was not conveyed to him. I think Colonel Stevenson clearly undertook by his first letter to lodge the deed of conveyance of the Portlemon estate, when executed, with the bank, for the purpose of securing his overdrawn account, and I think as a matter of law that that was a promise to create an equitable mortgage of the property in favour of the bank. There can be no possible doubt that this promise was accepted by Mr. Stewart on the part of the bank, but it is said that there was no consideration for it. Now, in the letter of the 18th of May (that is, the second letter), Colonel Stevenson writes to this effect, addressing Mr. Stewart: "All you require is a little patience and my account will be put on a satisfactory basis." I think this means: "Exercise patience and some forbearance, and I will give you the required security, and put my account in order." The bank did exercise patience and gave some forbearance by not demanding, as they might have done, immediate payment of the debt, and by giving Colonel Stevenson the required time to effect the security. I think that such forbearance in fact, although there was no agreement by the bank to forbear suing Colonel Stevenson for any definite period, was sufficient consideration to support his promise to give the security, on the principle stated by Kindersley, V.C., in *The Alliance Bank* v. *Broom*. The Vice-Chancellor's judgment in that case was quoted with approval by Bowen, L.J., in *Miles* v. *The New Zealand Alford Estate Co.*, as laying down a sound principle. In the case before Bowen, L.J., the question was whether a guarantee which had been given by the promoter of a company at a general meeting of the shareholders to guarantee

a dividend of a certain amount for a certain time on the shares, was given with or without consideration, and in referring to the case before him, Bowen, L.J., said, after quoting the Vice-Chancellor's judgment: "So it will be sufficient here that the directors did forbear, if their forbearance was at the request, expressed or implied, of the guarantor, and in consequence of his guarantee being given, and it seems to me there is no sort of necessity to discover language of any particular form, or writing of any particular character, embodying the resolution of the directors. We must treat the thing in a business way, and draw an inference of fact as to what the real nature of the transaction was as between business men." That seems to me to be directly applicable to the present question. There can be no doubt that the forbearance was given in this case, and I think it is a just inference of fact that it was given at the request of Colonel Stevenson in consequence of his undertaking to secure the account, and place it on what he describes as a satisfactory basis. However, on this question of consideration I should like to add one word of my own. In the course of the argument I threw out the suggestion that an antecedent debt might be sufficient consideration to support a promise to give security. On reflection I think this was wrong, and the Solicitor-General gave the right answer—viz., that the promise implied by law from the debt was to pay it on request, and a new consideration is required in order to support a different contract, as was stated by Parke, P., in the case of *Hopkins* v. *Logan*, 5 M. & W. 241. I am therefore of opinion that the letters, reading them together, constituted a contract to create an equitable mortgage on the Portlemon estate as soon as the conveyance to Colonel Stevenson was completed. On that event taking place the contract became absolute and bound the property in his hands. The letters therefore constituted a transfer to the bank of the equitable interest in the property and constituted a conveyance within the meaning of the Registration Act. It ought therefore to have been registered in order to secure the priority of the bank, and not having been registered, I think that the appellants who claim under a subsequent instrument which was registered are entitled to priority over the bank in respect of their advance.

Lord ROBERTSON.—This case has been decided by the Court of Appeal on the construction of the four letters of Colonel Stevenson which have been referred to. Now, I find it impossible to read the letter of the 26th of March, 1895, otherwise than as a distinct undertaking to lodge the title deeds as soon as they should be completed. The subsequent letters, so far from detracting from or throwing doubt on the intention and effect of this first letter, are addressed mainly to explaining the delay which had occurred in the execution, and therefore in the deposit, of the promised title deeds; they all recognized what one of them in terms described as an undertaking; but the importance of those subsequent letters seems to me to lie in the corroboration which they afford of what *primâ facie* is the natural construction of the letter of the 26th of March, 1895. Accordingly, I do not encounter the difficulty which FitzGibbon, L.J., very justly observes may arise where you have to spell out a contract from several documents. The only remaining question is, Was it in fulfilment of this undertaking that the title deeds were in the end delivered? I at first thought from the account given of the circumstances of the deposit by one of the learned Lords Justices that the respondents had some case to the negative of this question, but the evidence as to delay in lodging the deeds clearly points to an antecedent undertaking in fulfilment of which the title deeds were ultimately delivered and received.

Lord LINDLEY.—I am of the same opinion. First of all comes the legal question whether an equitable charge is within the Irish statute of Anne. English lawyers are quite familiar with the fact that under the English statutes the context of various sections of those Acts show, I think conclusively, that an equitable charge does come within the word "conveyance." I was not myself familiar with the authorities in Ireland, but there is no dispute on the point, and Holmes, L.J., says, I believe perfectly accurately: "It has been long since well settled that the statute of Queen Anne extends to any instrument in writing creating a charge on land." That was more or less doubtful in this country until it was settled by the case of *Credland* v. *Potter*, 23 W. R. 36 L. R. 10 Ch. 8; and, looking into the authorities which preceded that, cases may be found both ways. It was settled in that case by a judgment delivered by Lord Cairns, L.C., and James and Mellish, L.JJ., three of the most eminent men who ever sat on the bench in this country; and their decision was arrived at, not by a short cut that the word "conveyance" includes equitable charges, but by studying the subsequent sections of the Act of Anne, which show that the word "conveyance" must be used in a much wider sense than what is commonly called conveyance by deed. Having got that legal question clear, the only other question is, what do these letters really mean? Do they constitute an equitable charge? With the greatest deference to FitzGibbon and Holmes, L.JJ., I cannot doubt that they do. We know the position of the parties, we know that Colonel Stevenson's account at the Provincial Bank was largely overdrawn, and that whether there was pressure or not he was obviously very anxious about it, for that is apparent from the letters. I infer that there was some kind of pressure, and then he writes that letter of the 26th of March, by which he undertakes to deposit the deed when he gets it, as a security for his overdraft. What more you want to constitute an equitable charge I cannot conceive. As regards the difficulty suggested by the Solicitor-General, that it was never so understood or so accepted by the bank manager, the inference which I should draw is that it clearly was. It would in my mind never have been open to the slightest doubt if the deed had been given to him, but unfortunately it was given to Mr. Tweedy, who knew nothing at all about these letters, and so some confusion has arisen about the way in which the deed came to be deposited; but when you look at the letters and consider the circumstances under which the deed was deposited, it seems to me certain that Colonel Stevenson's deposit was a deposit in pursuance of his obligation. As to the charge not having been assented to by the bank, in the first place I take it that it is quite plain that when you offer a person something to his advantage, as, for example, security for a debt, it is to be inferred that he accepts it unless he dissents. I come to the conclusion that this deed being offered to the manager for business purposes, he kept it for business purposes, and it is obvious that you must infer assent. The only other difficulty that was suggested is the want of consideration. That is covered entirely by the case of the *Alliance Bank* v. *Broom*. The result is that this appeal must be allowed.

Order of the Court of Appeal reversed; judgment of Meredith, J., restored with costs here and below.

Solicitors for the appellants, *Wansey, Bowen, & Co.*, for *J. Kelso Reid*, Dublin.

Solicitors for the respondents, *Farrer & Co.*, for *John Tweedy*, Dublin.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer, L.J.) Jan. 25.

BEAUMONT *v.* KAYE AND WIFE. (*a.*)

Married woman — Tort committed by wife — Action against husband and wife—Separate and inconsistent defences—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.

Section 1, *sub-section* 2, *of the Married Women's Property Act,* 1882, *has not abolished the common law right to sue both husband and wife for a tort committed by the wife during coverture, and in such an action the husband and wife cannot put in separate and inconsistent defences.*

A husband and wife were sued in the old common law form of action for a libel written and published by the wife during coverture. One statement of defence was delivered. In paragraph 1 *the husband said that so far as he was liable, as the husband of the other defendant, he paid money into court in satisfaction of the claim. In paragraphs* 2 *to* 5 *the wife pleaded a denial of liability.*

Held, that there could be only one defence to the action —namely, the one which the husband put on the record, and that the inconsistent defence of the wife must be struck out.

Appeal from an order of Bucknill, J., at chambers.

The action was brought against husband and wife for libel. The statement of claim alleged that the wife wrote and published of and concerning the plaintiff the alleged libel. There was one statement of defence. In paragraph 1 thereof the husband said that so far as he was liable as the husband of the other defendant he paid into court £5, and said that the same was sufficient to satisfy the plaintiff's claim in the action. In paragraphs 2 to 5 the wife admitted that she wrote the words complained of, but denied that she published them. The plaintiff appealed to the district registrar at Leeds to strike out paragraphs 2 to 5 of the defence on the ground that there could be only one defence to the action, and that by ord. 22, r. 1, a defendant in an action of libel could not, with a defence denying liability, pay money into court.

The district registrar held that there were two defendants having two separate defences, and he dismissed the application.

Bucknill, J., on appeal, struck out paragraphs 2 to 5.

The defendants appealed.

T. P. Perks, for the defendants.—A married woman was always personally liable for her torts committed during marriage: *Capel* v. *Powell*, 13 W. R. 159, 17 C. B. N. S. 743. The judgment would have gone against her and her husband, and she would have been liable to have been taken under a *ca. sa.*: *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120, at pp. 124, 127. If she had been sued alone, unless she pleaded coverture, judgment might have gone against her: *Weldon* v. *Winslow*, 33 W. R. 219, 13 Q. B. D. 784. There were therefore two liabilities, one in the husband and the other in the wife, and the husband and wife were separate defendants. Section 1, sub-section 2, of the Married Women's Property Act, 1882, allows the wife to sue and be sued alone, and any damages recovered against her are made payable out of her separate property. That left the liability of the husband separate from that of the wife. The wife is entitled to put in a separate defence to protect her separate property. By ord. 9, r. 3, the husband and wife must be served with the writ; and by ord. 12, r. 8, they must both enter an appearance. The rules thus treat them as separate defendants in the action. *Seroka* v. *Kattenburg*, 34 W. R. 542, 17 Q. B. D. 177, only decided that the Married Women's Property Act, 1882, has not abolished the husband's liability to be sued with his wife for her torts committed after marriage. It does not touch the question raised here. The paragraphs ought therefore to remain in.

He also referred to *Earle* v. *Kingscote*, 49 W. R. 3, [1900] 2 Ch. 585.

J. A. Compston, for the plaintiff, was not called upon.

COLLINS, M.R.—I see no ground for interfering with the order made by the learned judge. It seems to me that the case becomes perfectly clear when once we come to the conclusion that the old common law action against husband and wife for the tort of the wife committed during coverture still subsists, and if this action is the old common law action everything else follows. It is suggested in a well-known text-book* on the subject that the effect of section 1, sub-section 2, of the Married Women's Property Act, 1882, is to do away with the old common law liability of the husband to be sued with his wife for her torts, and that now the action lies only against the wife in respect of her separate property. That very question was raised in *Seroka* v. *Kattenburg*, and the Divisional Court decided that the old common law action against husband and wife for the wife's tort still subsists. That case was discussed by this court in *Earle* v. *Kingscote*, and it was held that the case was rightly decided. Therefore the old common law action against both husband and wife for the wife's torts committed after marriage has not been abolished. That being so, this statement of claim is carefully framed upon the lines of the old common law action. A tort by the wife is alleged, and the husband is joined simply as a defendant. There is no claim against the wife under the Married Women's Property Act, 1882, in respect of her separate property. There is only one tort alleged—namely, a tort by the wife, and there can be only one defence pleaded to that claim. There has been pleaded in defence, a payment into court by the husband in satisfaction of the claim, the husband not denying liability. That is an admission by the husband on behalf both of himself and his wife, and it is inconsistent with the other defence which the wife sets up denying publication of the libel. The learned judge was therefore right in striking out those paragraphs of the defence which were inconsistent with the husband's plea of payment into court.

ROMER, L.J.—I am of the same opinion. This being a common law action against husband and wife for a tort of the wife committed during coverture, there cannot be separate judgments against the husband and wife. There can be only one judgment against the two. So far as the husband is concerned, he can claim that there shall be no judgment against him and his wife except upon the plea which he puts on the record. If the present statement of defence stands as it was originally delivered, the plaintiff will recover judgment against the husband and wife upon the husband's plea, and there may be an inconsistent judgment upon the wife's separate plea. There can in truth be only one defence, and only one judgment.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

*See Lush on Husband and Wife (2nd ed.), pp. 290, 291.

Appeal dismissed.

Solicitors for the plaintiff, *Hamlins, Grammer, & Hamlin*, for *H. R. Cousins*, Leeds.

Solicitors for the defendants. *Chester, Broome, & Griffithes*, for *Craven & Clegg*, Leeds.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Nov. 14 16; Dec. 21.

CORNBROOK BREWERY CO. (LIMITED) *v.* LAW DEBENTURE CORPORATION (LIMITED). (*a.*)

Company—Brewery business—Debentures—Covering deed before 1900—*Specifically mortgaged property—Leasehold acquired after* 1900 *upon trusts of covering deed —Assignment to company—Sub-demise to trustees of covering deed—Registration of sub-demise—"Charge" —Companies Act*, 1900 (63 & 64 *Vict. c.* 68), *s.* 14.

Trustees for the debenture-holders of a limited company were empowered by their trust deed, which was executed in 1897, *to sell certain property thereby specifically mortgaged and to hold the proceeds upon trust (amongst other things) at the request of the company to purchase or acquire leasehold hereditaments, which were to be held upon the trusts of the specifically mortgaged property. In* 1902 *a portion of the proceeds of sale of the specifically mortgaged property was, at the request of the company, employed in the purchase of a leasehold public-house. The company took an assignment of the house and then sub-demised the property to the trustees for the whole term except the last day.*

Held, that the sub-demise was a specific mortgage or charge upon the property within section 14 *of the Companies Act*, 1900, *and must be registered under its provisions.*

Decision of Byrne, J. (51 *W. R.* 508, [1903] 2 *Ch.* 527), *affirmed.*

This was an appeal from a decision of Byrne, J. (reported 51 W. R. 508, [1903] 2 Ch. 527).

The question was whether or not the plaintiff company had, after the commencement of the Companies Act, 1900, created a mortgage or charge for the purpose of securing an issue of debentures within the meaning of section 14 (1) of that Act.

The plaintiff company had issued £140,000 debenture stock, secured by a covering deed in the usual way.

The deed was dated the 17th of February. 1897, and therefore did not require registration under the Companies Act, 1900. It was made between the plaintiff company of the one part and the defendant corporation, as trustees of the debenture stockholders, of the other part.

In the interpretation clause it was provided that "'the specifically mortgaged premises' means the hereditaments and premises specified or referred to in the second schedule hereto, and which are to be assured to or vested in the trustees in accordance with clause 8 hereof, and any other hereditaments, assets, or premises which may become vested in the trustees in pursuance of the provisions hereinafter contained, or which ought to be so vested"; and that "'the mortgaged premises' means and includes the specifically mortgaged premises and the general assets collectively."

Clause 8 provided that "the company shall forthwith assure to and vest in, or cause or procure the freehold and leasehold hereditaments and premises specified or referred to in the said second schedule hereto to be assured to and vested in the trustees upon the trusts hereof free from incumbrances in the manner" therein provided. By sub-section 2 of the same clause leaseholds were "(unless the trustees require the same to be assigned) to be demised to the trustees for the residue of the term for which the same are respectively held except the last three days of each of the same terms."

Clause 9 was: "The company, as beneficial owner, hereby charges in favour of the trustees the specifically mortgaged premises with the payment of the stock and the interest thereon, and all other moneys intended to be hereby secured, to the intent that such charge may be a specific charge, and not a floating charge, for the payment of such moneys."

Clause 10 brought in a certain sum of £30,000 to be invested in the purchase of further properties to be held by the trustees as part of the specifically mortgaged premises.

Clause 11 gave a charge upon all the assets and undertaking of the company for the time being other than the specifically mortgaged premises, but as a floating charge only.

Clause 22 gave powers as regarded the specifically mortgaged premises, and provided that the trustees were to have "full power, at the request of the company, to do or concur in doing all or any of the things following." Then followed a series of powers given to the trustees to deal with the specifically mortgaged premises, including a power of sale and a power of letting on lease, and various other powers.

Clause 23 provided that "the trustees shall hold the proceeds to arise from any sale, letting, exchange, or other dealing with the specifically mortgaged premises under the last preceding clause, which proceeds shall become and be part of the specifically mortgaged premises, upon trust at the request of the company to apply the same if they shall think fit . . . (2) In the purchase or acquiring of any freehold, leasehold, or copyhold hereditaments, or any rights of way, or any easements or rights which may seem suitable for any of the purposes of the company, and which shall be assured to and vested in the trustees."

Clause 26 provided that "all property assured to or vested in the trustees in pursuance of the provisions herein contained shall be held by the trustees upon and subject to the trusts, powers, and provisions hereinbefore declared and contained, and relating to the specifically mortgaged premises, and shall for all purposes be deemed to form part of the specifically mortgaged premises."

The second schedule contained a list of numerous freehold and leasehold public-houses. Part of the specifically mortgaged property was afterwards sold for £2,700, and the company requested the corporation to invest this sum in the purchase from one Margaret Carroll of a leasehold public-house called "The Exile of Erin."

To prevent the corporation from becoming liable to the onerous covenants of the lease the transaction was carried out by an assignment of the term to the company, who granted to the corporation a sub-demise of the remainder of the term less one day.

The assignment was dated the 14th of March, 1902, and was made between Margaret Carroll of the one part and the company of the other part, and by it, in consideration of £2,700 Margaret Carroll assigned "The Exile of Erin" with certain special rights to the company, their successors and assigns, for the term of 1,001½ years, at the rent of £30, and subject to the covenants and conditions therein contained, and on the part of the company to be observed and performed.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The sub-demise was dated the 18th of August, 1902, and was made between the company of the one part and the corporation of the other part, and was declared to be supplemental to the trust deed of February, 1897. It recited the indenture of the 14th of March, 1902, and that "The corporation now holds under the trust deed certain moneys, forming part of the specifically mortgaged premises hereunder, upon trust among other things to apply the same, if the corporation should think fit, in the purchase or acquiring of any freehold, leasehold, or copyhold hereditaments which may seem suitable for any of the purposes of the company, and which shall be assured to and vested in the corporation, to be held by the corporation upon and subject to the trusts, powers, and provisions by the trust deed declared and contained relating to the specifically mortgaged premises thereunder." It further recited that this particular public-house was suitable for the purposes of the company and did not form part of the specifically mortgaged premises, and that the corporation had agreed to pay the £2,700 out of the trust funds to the company upon having the premises sub-demised to them in manner hereinafter appearing: And it was witnessed that in consideration of the £2,700 the company, as beneficial owners, demised to the corporation "The Exile of Erin" to be held for the residue of the term of 1,001½ years, except the last day, upon the trusts of the trust deeds as if it had been originally comprised in the trust deed.

The corporation proposed to register the sub-demise as a mortgage or charge under the Companies Act, 1900, s. 14. The company thereupon brought the present action, claiming a declaration that the sub-demise of August, 1902, did not require registration under the Companies Act, 1900, and an injunction to restrain the corporation from registering the deed.

Byrne, J., held that the sub-demise was a specific mortgage or charge within section 14 (1) of the Companies Act, 1900, and must be registered under its provisions. He accordingly dismissed the action.

The company appealed.

On the hearing of the appeal a further affidavit of facts was made under the direction of the court. The effect of this affidavit sufficiently appears from the judgments.

Danckwerts, K.C., and *Manning*, for the appellants.

Levett, K.C., and *Kenyon Parker*, for the defendant corporation.

The arguments used were similar to those in the court below.

Cur. adv. vult.

Dec. 21.—VAUGHAN WILLIAMS, L.J.—I think that this appeal must be dismissed.

I think that the company has created a mortgage or charge after the commencement of the Act for the purpose of securing an issue of debentures within the meaning of section 14, sub-section 1, of the Companies Act, 1900.

I agree with Byrne, J., that the result of the evidence is that property which, prior to the execution of the deed in question, did not form part of the specifically mortgaged property as contained in the trust deed thenceforward formed part of the specifically mortgaged property.

This conclusion of Byrne, J., is confirmed by the affidavit of facts made in pursuance of the direction of the Court of Appeal.

Paragraph 8 of that affidavit, showing the grant of the lease on the 14th of March, 1902, and the payment by the company of £2,700, and the payment of the duty as mentioned in paragraph 9, and the date of the underlease as mentioned in paragraph 10, all go to confirm this view, which I think is the right view, although I think with Byrne, J., that probably, if there had been a direct purchase from Margaret Carroll the result might have been different.

ROMER, L.J., concurred in the judgment delivered by Stirling, L.J.

STIRLING, L.J.—In this case I am unable to see my way to differ from the judgment of Byrne, J., who has held that the indenture of the 18th of August, 1902, was a mortgage or charge created by the company after the date fixed for the coming into operation of the Companies Act, 1900, and therefore requiring registration in accordance with the provisions of that Act.

It appears from the affidavit which has been filed since the argument on the appeal, that in November, 1901, the company requested the trustees of the covering deed to concur in a purchase at the price of £2,700 of a leasehold public-house for a term of 1,001½ years from the 29th of November, 1901, subject to a ground-rent and onerous covenants, and that the trustees agreed to do so, but about the same time stipulated that the transaction should be so arranged that the property should be sub-demised to them in such a way that they should not be liable under the covenants in the lease. Thereupon the company proceeded to carry out the proposed purchase as between themselves and Margaret Carroll, the lessee; and by an assignment dated the 14th of March, 1902, she, in consideration of £2,700 paid to her by the company, assigned her public-house to the company. This sum of £2,700 was paid by the company out of their own funds. The result of this was that the leasehold became legally vested in the company and constituted part of the assets of the company over which the trustees of the covering deed by virtue of the provisions of that deed (clause 11) acquired a floating, but not a specific, charge. Matters so continued until the 18th of August, 1902, when the company executed and delivered to the trustees of the covering deed, the deed of that date and received in exchange from the trustees the sum of £2,700, part of a sum of money held by them on the terms of the covering deed. In this way the trustees acquired for the first time a specific charge on the property in question—that is to say, a security of a different kind from that which previously existed.

I think with Byrne, J., that the transaction might have been carried out in such a way as to avoid an assurance to the trustees in the nature of a mortgage or charge requiring registration; but that by the events which have actually taken place, the deed of the 18th of August, 1902, does create a mortgage or charge, and ought, therefore, to be registered. Sub-section 4 of section 14 of the Companies Act, 1902, was referred to on behalf of the appellants, but as the requirements of the clause had not been complied with, it does not seem to assist them. The appeal must be dismissed.

Solicitors, *Hays, Schmettau, & Dunn; Birchams.*

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Dec. 19.

BENSON v. LANCASHIRE AND YORKSHIRE RAILWAY CO. (a.)

Master and servant—Employers' liability—Accident—Compensation—Accident arising out of and in the

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

course of employment—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), *s.* 1, *sub-section* 1.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the deceased workman was an engine-driver in the employment of a railway company; that it was his duty to sign on for work at* 7.45 *every morning at an engine-shed near to which he lived and to which he could get, without crossing the line, by a path running by the side of the line from the road in which he lived; that on the day of the accident he left home at* 6 *o'clock and went along the line in the contrary direction to a signal-box, which was in the middle of the permanent way about a quarter of a mile distant from the engine-shed, in order to ask the signalman a question about the time of the passing of a train which he was charged with having run late a few days before; and that while he was making his way back along the line from the signal-box to the engine-shed he was accidentally run over by an engine and killed.*

Held, that the accident did not arise out of and in the course of the deceased's employment.

Appeal from an award of the judge of the Blackpool County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicants for compensation were the dependants of a workman in the employment of the Lancashire and Yorkshire Railway Co., who met with an accident which resulted in his death.

The deceased was an engine-driver, and it was his duty every morning to go at 7.45 to an engine-shed a little more than a quarter of a mile distant from the Central Station at Blackpool for the purpose of reporting himself and signing on for work. His actual work began at 8.5. He lived not far from the engine-shed, and on the same side of the railway. It appeared that the most convenient way for him to proceed to his work was by going along a road called Rigby-road, which led to a gate giving access to the line at a point near the engine-shed, and between it and the Central Station, and then turning to the left and going along a path which ran by the side of the line and led to the engine-shed. It was not necessary for him, if he went to his work by this way, to cross any rails.

On the 29th of December, 1902, the deceased left home at 6 o'clock in the morning. His daughter stated that this was not earlier than his usual time. He had been called to account with regard to the late running of a particular train on the 16th of December, and had been directed to make a report on the matter, and it seemed that he wished to go to a signal-box which was about a quarter of a mile distant from the engine-shed and quite close to the station, for the purpose of getting information from the signalman as to the time when the train in question passed the box. Accordingly, when he reached the gate, he turned to the right instead of to the left, and made his way to the signal-box, which was situated in the middle of the permanent way, having four lines of rails on the Rigby-road side of it and three lines of rails on the other side. He had some conversation with the signalman, and then, between 6.30 and 6.45, he left the signal-box. At 7.45 he was found lying in the four-foot way about 300 yards from the signal-box having been run over by a pilot-engine and having received very serious injuries from which he shortly afterwards died. The spot where he was found was on the route which he would naturally take on making his way from the signal-box to the engine-shed.

The evidence showed that it was part of the duty of all engine-drivers in the employment of the Lancashire and Yorkshire Railway Co. to make a daily return, which included a statement of the times when their trains arrived at and departed from every station; and that engine-drivers occasionally asked and received information from the signalmen as to the times of the passing of their trains; but that signalmen were not under any obligation to give such information.

The answer of the railway company to the claim for compensation was that the accident by which the deceased met his death did not arise out of and in the course of his employment.

The county court judge found that the deceased left home much earlier than was necessary so far as his duties were concerned in order to make inquiries for his own purposes at the signal-box; that he went out of his way, and put himself in jeopardy by crossing the lines for this purpose; and that, if he had not done so, and had gone direct to his work, no accident would have happened. On the other hand, he found that when the accident happened the deceased was on the premises of the railway company, that he had finished his own business, and that he was on his way to the engine-shed to commence his day's work. He came to the conclusion that the deceased's employment began when he left the signal-box to go to the engine-shed, and that therefore the accident was one arising out of and in the course of his employment. He accordingly made an award of compensation in favour of the applicants.

The railway company appealed.

C. A. Russell, K.C., and *Acton*, for the railway company.—At the time of the accident the deceased was not on his way from his home to his work; neither was he on his way to his work by a route licensed by his employers; neither was he passing over any portion of his employers' premises which he had to pass over in order to get to his work.

They cited *Holness* v. *Mackay & Davies*, 47 W. R. 531, [1899] 2 Q. B. 319; *Smith* v. *Lancashire and Yorkshire Railway Co.*, 47 W. R. 146, [1899] 1 Q. B. 141; and *Smith* v. *Normanton Colliery Co. (Limited)*, 51 W. R. 209, [1903] 1 K. B. 204.

S. T. Evans, K.C., and *Adshead Elliott*, for the applicants.—There was ample evidence that the deceased was on the company's business when he went to the signal-box. At any rate the finding of the county court judge is conclusive that he was on the company's business when he left the signal-box to go to the engine-shed.

They cited *Holmes* v. *Great Northern Railway Co.*, 48 W. R. 681, [1900] 2 Q. B. 409; *Goodlet* v. *Caledonian Railway Co.*, 4 Fras. 986; *Tod* v. *Caledonian Railway Co.*, 1 Fras. 1047; and *Pomfret* v. *Lancashire and Yorkshire Railway Co.*, *ante*, p. 66, [1903] 2 K. B. 718.

Cur. adv. vult.

Dec. 19.—COLLINS, M.R.—This is an application for compensation under the Workmen's Compensation Act by the dependants of a man in the service of a railway company who met his death by an accident on the line. The question is whether the railway company are liable.

The deceased man was an engine-driver on the line, and he lived a short distance—as I understand, between a quarter and half a mile—from the engine-shed where it was his duty to report himself and begin his work every morning at 7.45. He had recently been in some trouble with the company by reason of having been late in the running of a train on a particular occasion, and he had been called upon to make a report on the matter. On the morning of the day of the accident he left home earlier than was necessary in order to get to the engine-shed at 7.45. His home was in a road called Rigby-road, and his natural way of approaching the engine-shed in order to commence his daily work was to go along Rigby-

road until he came to a gate which gives access to the line, and then to follow a path to the left which runs along the side of the line and leads to the engine-shed without involving any necessity for crossing any of the rails. When he arrived at the gate, instead of turning to the left to take the path leading to the engine-shed, he turned to the right and went to a signal-box which is at a point along the line in the contrary direction to the engine-shed, and which is in the middle of the line, having rails on each side of it. He went to the signal-box, as it appears, for the purpose of asking the signalman a question as to the precise time of the passing of the train with regard to which he had been called to account. After having some conversation with the signalman, he went along the line straight in the direction towards the engine-shed. An hour or so later he was found lying on the four-foot way very seriously injured, and he died shortly afterwards. When he met with the accident he had gone more than half the distance from the signal-box to the engine-shed.

Under these circumstances an application for compensation was made on behalf of his dependants, and the county court judge decided in favour of the applicants. The conclusion at which he arrived, and his reasons, are stated in a judgment which is now before the court. He begins by stating his conclusion with regard to the facts. This is as follows: That the deceased left home much earlier than was necessary so far as his duties were concerned, in order to make inquiries for his own purposes at the signal-box; that he went out of his way and put himself in jeopardy by crossing the lines for this purpose; and that, if he had not done so, and had gone direct to his work, no accident would have happened. That is his finding of the facts. But he continues that, on the other hand, when the accident happened the deceased was on the premises of the railway company, that he had finished his own business, and that he was on his way to the engine-shed to commence his day's work. And he concludes that on the whole he thinks that the deceased's employment began when he left the signal-box to go to the engine-shed, and that, therefore, the accident was one arising out of and in the course of his employment.

After having carefully considered the matter, and having regard to the facts found by the learned county court judge, I feel that it is impossible to agree with his conclusion as a matter of law that the accident arose out of and in the course of the deceased's employment. The county court judge found that the deceased went to the signal-box for his own purposes, not for any purposes incident to his duty as an engine-driver. He, in fact, went for his own purposes in the opposite direction to that in which he would have gone if he had gone straight to the engine-shed. After leaving the signal-box he had to cross the line, and he thus incurred risk in order to get at the point at which, when he had arrived there, he would enter upon his employment for the day. Until he got to that point he had not entered into his employment. It seems to me that it is true to say of a person who is in an employment to which this Act applies that during the time he is bound to work he carries with him all the privileges conferred by the Act. But when he leaves his work at the end of the time during which he is bound to work, he is in the same position as a person who is not within the Act at all—that is to say, he is not entitled to any protection at the hands of his employers. Whatever he then does he does at his own risk, and he does not carry with him any right to be insured by his employers against accidents. It is on the facts clear that the place where the deceased had to enter on his work was the engine-shed. It was necessary for him to get there every morning in order to resume his ordinary daily occupation. If he chose to go there by a dangerous route, instead of taking the path by the railway, he did so at his own risk. The county court judge has found that that was what he did. The finding in effect is that the deceased went out of his way and put himself in jeopardy for his own purposes by crossing the line instead of going by the safe way. One would have thought that that would have concluded the matter in favour of the employers. But the learned judge goes on to give reasons for coming to a conclusion contrary to what one would have expected from his finding of facts. In my opinion, the fallacy in the learned judge's judgment is where he says that he thinks that the deceased's employment began when he left the signal-box. Clearly this is not a finding of fact. There is no ground for suggesting, and the learned judge negatives the suggestion, that the deceased was under any duty to go to the signal-box at all. It cannot, therefore, be said that his employment began so as to put him at the risk of his employers when he left the signal-box. It cannot be said that he had entered his employment merely because he was on the premises of the company. A workman in the service of a railway company cannot enter into his employment so as to make the time of his employment begin at whatever point he chooses to enter upon the line. It is not necessary to examine precisely the area or limits of the place of the deceased's employment, but it certainly cannot be said to extend so as to include the signal-box or the place where he was found lying injured. On the admitted facts I am of opinion that the conclusion at which the county court judge has arrived is wrong in point of law. His mistake is that he has treated the deceased's employment as beginning at the signal-box, whereas there is nothing to show that it began till he reached the place where he had to report himself—viz., the engine-shed.

MATHEW, L.J.—I am of the same opinion. It is to my mind clear that, in the circumstances of this case, the employment of the deceased man began at or about the engine-shed. The conclusion arrived at by the county court judge would lead to this, that at any point at which the deceased man chose to enter upon the railway line he would have been in the employment of the railway company. It was suggested that he went to the signal-box because he had been called upon to make a report as to the late running of a train, and that, therefore, he was on the line in the course of his employment when he met with the accident. But the finding of the county court judge is conclusive that the deceased man went to the signal-box to get information for himself and not in pursuance of any order from the company. It is therefore, in my opinion, impossible to treat the transit from the signal-box to the engine-shed as any part of the employment.

COZENS-HARDY, L.J., concurred.

Appeal allowed.

Solicitor for the company, *C. Moorhouse*, Manchester.

Solicitors for the applicants, *Indermaur & Brown*, for *C. W. Callis*, Blackpool.

From K. B. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) July 13, 14, 15; Aug. 11, 1903.

KRELL v. HENRY. (a.)

Contract—Impossibility of performance—Implied term—Substance of contract—Surrounding circumstances.

By a contract in writing the defendant agreed to hire from the plaintiff a flat in Pall Mall for the 26th and 27th of June, 1902, on which days it had been announced that the Coronation processions would pass along Pall Mall. The defendant paid a deposit at the time of the contract. The contract contained no reference to the processions or to any particular purpose for which the flat was hired. The processions not having taken place, the defendant declined to pay the balance of the agreed rent.

Held, that the plaintiff could not recover the balance of the rent, inasmuch as the taking place of the processions must in the circumstances be held to have been the foundation of the contract, and the parties had not at all in their contemplation the risk that the processions might not take place on the dates fixed.

This was an appeal from a decision of Darling, J.

The facts, which were not disputed, were as follow: The plaintiff, Paul Krell, on leaving the country in March, 1902, instructed his solicitor to let his suite of chambers at 56A, Pall Mall, on such term and for such period not exceeding six months as he thought proper.

On the 17th of June, 1902, the defendant saw an announcement in the windows of the plaintiff's flat to the effect that windows to view the coronation processions were to be let. The defendant interviewed the housekeeper on the subject. It was represented to him that a good view of the processions could be obtained from the premises, and he eventually agreed with the housekeeper to take the suite for the two days in question for £75.

On the 20th of June the defendant wrote to the plaintiff's solicitor: "I am in receipt of yours of the 18th inst., including form of agreement for the suite of chambers on the third floor at 56A, Pall Mall, which I have agreed to take for the two days, the 26th and 27th inst., for the sum of £75. For reasons given you I cannot enter into the agreement, but as arranged over the telephone I inclose herewith cheque for £25 as deposit, and will thank you to confirm to me that I shall have the entire use of these rooms during the days (not the nights) of the 26th and 27th inst. You may rely that every care will be taken of the premises and their contents. On the 24th inst. I will pay the balance—viz., £50, to complete the £75 agreed upon." On the same day the defendant received the following reply from the plaintiff's solicitor: "I am in receipt of your letter of to-day's date inclosing cheque for £25 deposit on your agreeing to take Mr. Krell's chambers on the third floor at 56A, Pall Mall for the two days, the 26th and 27th of June, and I confirm the agreement that you are to have the entire use of these rooms during the days (but not the nights), the balance £50 to be paid to me on Thursday next, the 24th inst."

The processions not having taken place on the 26th and 27th of June, the defendant declined to pay the balance of £50.

The plaintiff then brought the present action to recover the balance.

The defendant denied liability and counterclaimed for return of the deposit.

Darling, J., gave judgment for the defendant on the claim and counterclaim.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The plaintiff appealed.

On the appeal the defendant abandoned his counterclaim for £25, so that the sole question was as to his liability for the £50.

Spencer Bower, K.C., and *Holman Gregory*, for the plaintiff.—Darling, J., has held that this case was governed by *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826, and that there was an implied term in the contract that the procession should take place. But here there has been no physical extinction of the subject-matter, and the performance of the contract was quite possible. The right possessed by the plaintiff on the 20th of June was the right of looking out of the window of the room. That right he transferred to the defendant, who took the risk of there being no procession.

They also cited *Appleby* v. *Myers*, L. R. 2 C. P. 651, 15 W. R. Common Law Dig. 127; *Boast* v. *Firth*, 17 W. R. 29, L. R. 4 C. P. 1; *Bailey* v. *De Crespigny*, 17 W. R. 494, L. R. 4 Q. B. 180; *Howell* v. *Coupland*, 24 W. R. 470, 1 Q. B. D. 258; *Nickoll* v. *Ashton*, 49 W. R. 513, [1901] 2 K. B. 126; *Paradine* v. *Jane*, Ab. 26; *Barker* v. *Hodgson*, 3 M. & S. 267; *Marquis of Bute* v. *Thompson*, 13 M. & W. 487; *Hills* v. *Sughrue*, 15 M. & W. 253; *Brown* v. *Royal Insurance Co.*, 7 W. R. 479, 1 E. & E. 853; *Kennedy* v. *Panama, &c., Mail Co.*, 15 W. R. 1039, L. R. 2 Q. B. 580; *In re Arthur, Arthur* v. *Wynne*, 28 W. R. 972, 14 Ch. D. 603; *The Moorcock*, 37 W. R. 31, 14 P. D. 64; *London Founders' Association (Limited)* v. *Clarke*, 36 W. R. 489, 20 Q. B. D. 576; *Turner* v. *Goldsmith*, 39 W. R. 547, [1891] 1 Q. B. 544; *Hamlyn* v. *Wood*, 40 W. R. 24, [1891] 2 Q. B. 488; *Ashmore* v. *Cox*, [1899] 1 Q. B. 436, 47 W. R. Dig. 41; *Blakeley* v. *Muller*, [1903] 2 K. B. 760 note, 51 W. R. Dig. 40; and *Kerrison* v. *Smith*, [1897] 2 Q. B. 445, 46 W. R. Dig. 36.

Duke, K.C., and *Ricardo*, for the defendant.—The real question is what was the bargain? We submit that it was a bargain to take rooms to see the procession, and was entered into on the assumption that the procession would pass. *Taylor* v. *Caldwell* governs the present case.

Holman Gregory replied.

Cur. adv. vult.

Aug. 11.—VAUGHAN WILLIAMS, L.J.—The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of *Taylor* v. *Caldwell*. That case at least makes it clear that "where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Thus far it is clear that the principle of the Roman law has been introduced into the English law. The doubt in the present case arises as to how far this principle extends. The Roman law dealt with *obligationes de certo corpore*. Whatever may have been the limits of the Roman law, the case of *Nickoll* v. *Ashton* makes it plain that the English law applies the principle not only to cases where the performance

of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance. It is said, on the one side, that the specified thing, state of things, or condition the continued existence of which is necessary for the fulfilment of the contract, so that the parties entering into the contract must have contemplated the continued existence of that thing, condition, or state of things as the foundation of what was to be done under the contract, is limited to things which are either the subject-matter of the contract or a condition or state of things, present or anticipated, which is expressly mentioned in the contract. But, on the other side, it is said that the condition or state of things need not be expressly specified, but that it is sufficient if that condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract, and the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case the contracting parties will not be held bound by the general words which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible. I do not think that the principle of the civil law as introduced in the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract, or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited.

Now what are the facts of the present case? The contract is contained in two letters of the 20th of June which passed between the defendant and the plaintiff's agent, Mr. Cecil Bisgood. These letters do not mention the coronation, but speak merely of the taking of Mr. Krell's chambers, or, rather, of the use of them, in the daytime of the 26th and 27th of June, for the sum of £75, £25 then paid, balance £50 to be paid on the 24th. But the affidavits, which by agreement between the parties are to be taken as stating the facts of the case, show that the plaintiff exhibited on his premises, third floor, 56A, Pall Mall, an announcement to the effect that windows to view the Royal Coronation procession were to be let, and that the defendant was induced by that announcement to apply to the housekeeper on the premises, who said that the owner was willing to let the suite of rooms for the purpose of seeing the royal procession for both days, but not nights, of the 26th and 27th of June. In my judgment the use of the rooms was let and taken for the purpose of seeing the royal procession. It was not a demise of the rooms, or even an agreement to let and take the rooms. It is a license to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was regarded by both contracting parties as the foundation of the contract; and I think that it cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route; and I think that the words imposing on the defendant the obligation to accept and pay for the use of the rooms for the named days, although general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards occurred. It was suggested in the course of the argument that if the occurrence, on the proclaimed days, of the coronation and the procession in this case were the foundation of the contract, and if the general words are thereby limited or qualified, so that in the event of the non-occurrence of the coronation and procession along the proclaimed route they would discharge both parties from further performance of the contract, it would follow that if a cabman was engaged to take someone to Epsom on Derby Day at a suitable enhanced price for such a journey, say £10, both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible; but I do not think this follows, for I do not think that in the cab case the happening of the race would be the foundation of the contract. No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionally high; but the cab had no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well. Moreover, I think that, under the cab contract, the hirer, even if the race went off, could have said, "Drive me to Epsom; I will pay you the agreed sum; you have nothing to do with purpose for which I hired the cab," and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day. Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer; and I think that if the King, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the days named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the license in this case. Whereas in the present case, where the rooms were offered and taken by reason of their peculiar suitability from the position of the rooms for a view of the coronation possession, surely the view of the coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab—namely, to see the race—being held to be the foundation of the contract. Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the

affirmative (as I think they should be in this case) I think both parties are discharged from further performance of the contract. I think that the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract; and, secondly, I think that the non-happening of the procession, to use the words of Sir James Hannen in *Bailey* v. *De Crespigny*, was an event "of a such character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened." The test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against. It seems difficult to say, in a case where both parties anticipate the happening of an event, which anticipation is the foundation of the contract, that either party must be taken to have anticipated, and ought to have guarded against, the event which prevented the performance of the contract. In both *Jackson* v. *Union Marine Insurance Co.*, 23 W. R. 169, L. R. 10, C. P. 125, and *Nickoll* v. *Ashton*, the parties might have anticipated as a possibility that perils of the sea might delay the ship and frustrate the commercial venture; in the former case the carriage of the goods to effect which the charter-party was entered into; in the latter case the sale of the goods which were to be shipped on the steamship which was delayed. But the court held in the former case that the basis of the contract was that the ship would arrive in time to carry out the contemplated commercial venture, and in the latter that the steamship would arrive in time for the loading of the goods the subject of the sale. I wish to observe that cases of this sort are very different from cases where a contract or warranty or representation is implied, such as was implied in *The Moorcock*, and refused to be implied in *Hamlyn* v. *Wood*. But *The Moorcock* is of importance in the present case as showing that whatever is the suggested implication—be it condition, as in this case, or warranty, or representation—one must, in judging whether the implication ought to be made, look not only at the words of the contract, but also at the surrounding facts and the knowledge of the parties of those facts. There seems to me to be ample authority for this proposition. Thus in *Jackson* v. *Union Marine Insurance Co.*, in the Common Pleas, the question whether the object of the voyage had been frustrated by the delay of the ship was left as a question of fact to the jury, although there was nothing in the charter-party defining the time within which the charterers were to supply the cargo of iron rails for San Francisco, and nothing on the face of the charter-party to indicate the importance of time in the venture; and that was a case in which, as Bramwell, B., points out in his judgment, at p. 148, *Taylor* v. *Caldwell* was a strong authority to support the conclusion arrived at in the judgment—that the ship not arriving in time for the voyage contemplated, but at such time as to frustrate the commercial venture, was not only a breach of contract, but discharged the charterer, though he had such an excuse that no action would lie. And, again, in *Harris* v. *Dreesman* the vessel had to be loaded, as no particular time was mentioned, within a reasonable time; and, in judging of a reasonable time, the court approved of evidence being given that the defendants, the charterers, to the knowledge of the plaintiffs, had no control over the colliery from which both parties knew that the coal was to come; and that, although all that was said in the charter-party was that the vessel should proceed to Spital Tongue's Spout (the spout of the Spital Tongue's Colliery), and there take on board from the freighters a full and complete cargo of coals, and five tons of coke, and although there was no evidence to prove any custom in the port as to loading vessels in turn. Again, it was held in *Mumford* v. *Gething*, 8 W. R. 187, 7 C. B. N. S. 305, that, in construing a written contract of service under which A. was to enter the employ of B., oral evidence is admissible to show in what capacity A. was to serve B.: see also *Price* v. *Mouat*, 11 C. B. N. S. 508. The rule seems to be that which is laid down in Taylor on Evidence, vol. 2, s. 1082: "It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received." And Lord Campbell, in his judgment, says: "I am of opinion that, where there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of showing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract": see per Campbell, C.J., *Macdonald* v. *Longbottom*, 7 W. R. 507, 1 E. & E. 977. It seems to me that the language of Willes, J., in *Lloyd* v. *Guibert*, 35 L. J. Q. B. 74, points in the same direction. I myself am clearly of opinion that in this case, where we have to ask ourselves whether the object of the contract was frustrated by the non-happening of the coronation and its procession on the days proclaimed, oral evidence is admissible to show that the subject of the contract was rooms to view the coronation procession, and was so to the knowledge of both parties. When once this is established, I see no difficulty whatever in the case. It is not essential to the application of the principle of *Taylor* v. *Caldwell* that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time. In the present case the condition which fails and prevents the achievement of that which was, in the contemplation of both parties, the foundation of the contract is not expressly mentioned either as a condition of the contract or the purpose of it; but I think for the reasons which I have given that the principle of *Taylor* v. *Caldwell* ought to be applied. This disposes of the plaintiff's claim for £50, the unpaid balance of the price agreed to be paid for the use of the rooms. The defendant at one time set up a cross-claim for the return of the £25 he paid at the date of the contract. As that claim is now withdrawn it is unnecessary to say anything about it. I have only to add that the facts of this case do not bring it within the principle laid down in *Stubbs* v. *Holywell Railway Co.*, 15 W. R. 869, L. R. 2 Ex. 311, that in the case of contracts falling directly within the rule of *Taylor* v. *Caldwell* the subsequent impossibility does not affect rights already acquired because the defendant had the whole of the 24th of June to pay the balance, and the public announcement that the coronation and procession would not take place on the proclaimed days was made early on the morning of the 24th, and no cause of action could accrue till the end of that date. I think this appeal ought to be dismissed.

ROMER, L.J.—With some doubt I have also come to the conclusion that this case is governed by

the principle on which *Taylor* v. *Caldwell* was decided, and accordingly that the appeal must be dismissed. The doubt I have felt was whether the parties to the contract now before us could be said under the circumstances not to have had at all in their contemplation the risk that for some reason or other the the coronation procession might not take place on the days fixed, or if the procession took place might not pass so as to be capable of being viewed from the rooms mentioned in the contract; and whether under this contract that risk was not undertaken by the defendant. But on the question of fact as to what was in the contemplation of the parties at the time I do not think it right to differ from the conclusion arrived at by Vaughan Williams, L.J., and (as I gather) also arrived at by my brother Stirling. This being so, I concur in the conclusion arrived at by Vaughan Williams, L.J., in his judgment, and I do not desire to add anything to what he has said so fully and completely.

STIRLING, L.J., said he had had an opportunity of reading the judgment delivered by Vaughan Williams, L.J., with which he entirely agreed. Though the case was one of very great difficulty, he thought it came within the principle of *Taylor* v. *Caldwell*.

Appeal dismissed.

Solicitors, *Cecil Bisgood; M. Grunebaum.*

High Court of Justice.

Chan. Div. } Farwell, J. } Nov. 25, 26.

In re THE BODEGA CO. (LIMITED) AND *In re* THE COMPANIES ACTS, 1862 TO 1890. (a.)

Company — Shares — Transfer — Refusal to register transfer—Lien on shares—Director concerned in contract—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *Table A* (57)—*Vacation of office* ipso facto—*Re-election—Director's share of total remuneration—Extra sum voted*—Ultrà vires—*Money had and received—Mistake or failure of consideration—Right to recover.*

A company refused to register a transfer of shares executed by W., late a director, alleging they had a lien on the shares for money owing by him. W., when a director, had become concerned in a contract with the company not disclosed to and authorized by the board, in contravention of an article of association, which was a modified copy of clause 57 in Table A of the Companies Act, 1862. *The fact remained unknown for over two years from the date of contract, during which time, according to the custom of the board, W. had twice retired, being on each occasion re-elected for twelve months. The board's remuneration was fixed at a lump sum, divisible among its members at the will of the majority, and the share received by W. was £39 a month. On discovering the facts the company claimed repayment of the said monthly sums received by W. since the date of the contract, and also a sum of £400 voted to W. by the board "for his special and constant services during the past year."*

Held, (1) (*distinguishing* Turnbull *v.* West Riding Athletic Club, 70 *L. T.* Rep. 92) *that W. vacated his office* ipso facto *on becoming concerned in the contract, and without any act being necessary to remove him;* (2) *that he was not necessarily disqualified from re-election, and that the re-elections were in fact good, since before their date the contract was complete and required no exercise of discretion by W. as director;* (3) *that, consequently, the only fees repayable were those for the period between the date of the contract and the first re-election;* (4) *that either the company or the board could recover those fees as money had and received, and as paid in mistake or for a consideration which had failed;* (5) *following* In re Geo. Newman & Co., 43 *W. R.* 483, [1895] 1 *Ch.* 674, *that the payment of* £400 *to W. was* ultrà vires, *and that sum with interest must be refunded;* (6) *that on repayment of the moneys so found due, and not before, the company must register the transfer.*

This was a motion by a shareholder of the company asking for an order that the register should be rectified by the insertion therein of the name of a person to whom the applicant had transferred his shares. The company had refused to register the transfer, alleging that they had a lien on the shares in respect of £1,380 11s. 4d. said to be owing to them by the applicant.

The motion originally came on for hearing by Farwell, J., who directed that it should be placed in the non-witness list. It was on that occasion agreed between counsel that the judge should have power at the present hearing to decide questions as to the liability of the applicant to pay certain sums of money making up the above total.

Mr. Wolseley, the applicant, had for several years been a director of the company and chairman of the board. The articles provided for the annual retirement of three directors by rotation, and they were eligible for re-election, but it had become the custom for all to retire annually. Mr. Wolseley accordingly retired and was re-elected on the 8th of July, 1901, and again on the 8th of July, 1902.

The remuneration of the board was fixed by article 75 at £1,400 a year, which was divisible among the directors in such manner as the majority of them might direct. Mr. Wolseley's share had been fixed at a board meeting in 1897 at £500 a year, which had ever since been paid, less income tax, by monthly instalments of about £39 each, amounting, for the period between the 30th of January and the 26th of June, 1901, to £236 9s. 1d., and for that between the 31st of July, 1901, and the 1st of February, 1903, to £744 2s. 3d., making in all £980 11s. 4d.

It was further provided by article 74*a* that the directors might employ any member of their body to perform any special services for the company for such period and upon such terms as to remuneration or otherwise as they might think fit. Though not authorized by this article, the board had, on the 17th of July, 1901, voted to Mr. Wolseley, as chairman, a sum of £400 "for his special and constant services during the past year," and that sum was paid to him a fortnight later.

All the above-mentioned sums the company now claimed to have refunded to them as money had and received to their use, alleging that the payments had been made under a mistake of facts or for a consideration which had failed, since, under the circumstances mentioned below, Mr. Wolseley was not at the dates of payment a director of the company, having vacated his office under article 70 of the articles of association, which was as follows: "The office of any director shall be vacated if he be concerned in, or participate in the profits of, any contract with the company, not disclosed to, and authorized by, the board."

In the year 1900, X., a solicitor, was instructed by the directors to treat for the purchase of a freehold public-house at Nottingham called "The Durham Ox," and on the 19th of December, 1900, he attended a board meeting and reported that he had completed

(a.) Reported by R. HILL, Esq., Barrister-at-Law.

the negotiation at the price of £12,000. The board directed him to enter into a formal contract at that price, and he reported on the 27th of December that the property had been secured accordingly. He was afterwards given bills of exchange for £1,200, accepted by the directors on behalf of the company, for the purpose of paying a deposit of 10 per cent.

The only contract, however, which X. signed in the matter was one with E. M. Kidd, who was the vendor, dated the 24th of December, 1900, and in this X. was named as the purchaser for £8,000. X. afterwards prepared a conveyance, dated the 24th of June, 1901, to which Kidd, X., and the company were expressed to be parties, and in which it was recited that Kidd had "lately contracted" with X. for the sale to him of the premises for £8,000, and that X. had agreed with the company to transfer to them the benefit of the contract on the terms that the company should pay him £4,000. This deed was executed by Kidd and X., the former granting and the latter purporting to grant and confirm the premises to the company in consideration of £8,000 paid to Kidd (the receipt of which he acknowledged), and £4,000 paid to X., the receipt of which latter sum X. acknowledged. This deed X. kept from the knowledge of the company, informing them that there had been a conveyance from Kidd for £12,000, and they only learnt the terms of the deed in June, 1902, whereupon inquiry was instituted, resulting in full particulars of X.'s proceedings being discovered on the 15th of July, 1902. In December following X. signed an agreement with the company in which it was recited that £8,000 had been paid to Kidd, but that the £4,000 had not been and was not to be paid to X., and by supplemental agreement he renounced all claim thereto on the 25th of March, 1903.

Meantime—*i e.*, on the 10th of February, 1903 — Mr. Wolseley's co-directors learnt that there had been a secret agreement between him and X., by which the former was to share in the £4,000. This Mr. Wolseley orally admitted was true, and on the 25th of February, 1903, he gave a formal admission in writing that he had "in the circumstances which have occurred and by the operation of article 70" vacated his office as a director.

In order to facilitate their claim in the present and other proceedings, the company obtained from the other directors a renunciation or assignment of any rights they might have in the £980 11s. 4d. as being part of the £1,400 a year paid to the board as a whole.

Upjohn, K.C (*Galbraith* with him) for the applicant, Wolseley.—The first question is as to the construction to be placed on article 70. Does it *ipso facto* vacate the office of a director concerned in a contract undisclosed, or does something remain to be done to remove him? The latter was the view taken in *Turnbull* v. *The West Riding Athletic Club* (70 L. T. 92). The next point is: Can the company recover these sums, as money had and received, on the ground of mistake or failure of consideration? Mr. Wolseley was doing the work all the while, so there was no failure of consideration. Failure means total failure. It has never been held that money can be recovered back where there has been some consideration. The company paid their directors £1,400 a year, which was to be distributed. Mr. Wolseley's co-directors are not entitled to his share, for he relieved them of part of the work. If not entitled to fees, he was entitled on a *quantum meruit;* the company knew he was acting as a director, and that is equivalent to a request; the re-election, too, was a request. Money paid voluntarily cannot be recovered back. This money was handed to the board for distribution, and there was no obligation to pay Mr. Wolseley's share.

He cited *Lamert* v. *Heath*, 15 M. & W. 486; *Aiken* v. *Short*, 4 W. R. 645, 1 H. & N. 210; *Nicholson* v. *Ricketts*, 8 W. R. 211, 29 L. J. Q. B. 55, 65; *Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337; Bullen and Leake's Precedents (5th ed.), pp. 297 *et seq.*; *Ibid.* (3rd ed.), p. 48; Leake on Contracts (4th ed.), p. 62. [FARWELL, J., referred to *Moses* v. *Macferlan*, 2 Burr. 1005.]

Jenkins, K.C. (*Neilson* with him), was here invited to state the case for the company.—We say that Mr. Wolseley vacated his office *ipso facto* on being concerned in the contract. The words of article 70 are express. The decision in *Turnbull's case* was perhaps influenced by the fact that the directors had passed a resolution removing their colleague. [He cited *Hunnings* v. *Williamson*, 32 W. R. 267, 11 Q. B. D. 533, 534, and *British Asbestos Co.* (*Limited*) v. *Boyd*, 51 W. R. 667, [1903] 2 Ch. 439.] As to the period before re-election, it is said the company cannot recover back the fees, because there was no total failure of consideration; but we say there was. A director contracts with his company, not for specific acts, but to give his honest services: *Salomons* v. *Pender*, 13 W. R. 637, 3 H. & C. 639, 641; *Andrew* v. *Ramsay*, 19 T. L. R. 620. That is the contract this company would have had but for the mistake. The services must be taken as a whole; if they could be split up I admit there might not be a total failure of consideration. Wolseley could have sued the company for his share of the directors' fees, for he was an assign of that part of the £1,400. Therefore the company can sue him for repayment. [He cited *Aiken* v. *Short*.] [FARWELL, J., referred to *Caridad Copper Mining Co.* v. *Swallow*, 50 W. R. 565, [1902] 2 K. B. 44, and *Albion Steel and Wire Co.* v. *Martin*, 24 W. R. 134, 1 Ch. D. 580, cited in Palmer's Prec. (8th ed.), pp. 497, 617.] As to *quantum meruit*, the value would have to be assessed by a jury or some such tribunal. The payment of £400 was *ultra vires* and can be recovered back. [FARWELL, J., referred to *In re Geo. Newman & Co.*, 43 W. R. 483, [1895] 1 Ch. 674.] Then as to the period after re-election, Mr. Wolseley's position was even worse than before. The re-election was a new proof of the company's confidence, yet he went on acting as director without disclosing the contract in which he was concerned. The words in article 70 are "be concerned," and not "become concerned," which latter might mean "become concerned for the first time," and would help Mr. Wolseley's case. X.'s contract was a continuing one; the £4,000 was not paid and the company entered into possession and could have been sued for the money at any time before December, 1902, when the contract was definitely avoided. Mr. Wolseley was concerned in it, for he was to share in the £4,000. I do not rely on the contract of the 24th of December, 1900, but on some contract implied by reason of the purchaser being in possession, for the company, if not in physical possession, were owners in equity by virtue of the conveyance, and were bound to pay the full price. It is a case of vendor's lien which arises by implied contract. [FARWELL, J., referred to Robbins on Mortgages, tit. "Liens."] Then X. was estopped, by the recitals in the conveyance, from saying there was no contract, and his partner in the transaction is bound by that estoppel.

Upjohn, K.C.—There was no lien and no contract. The company may rely on the true facts or on assumed facts acting by estoppel, but they cannot rely on both: *Scarf* v. *Jardine*, 30 W. R. 893, 7 App. Cas. 345, 350, per Lord Selborne. If they rely on the

true facts we say there never was a contract between X. and the company. If, on the other hand, they say we are estopped from saying there was no contract, then I say, look at the whole deed. Taking it as it stands, and assuming that Mr. Wolseley was bound by every word of it, if it shows a contract it shows that the contract was executed and done with before the re-election; it cannot therefore affect Mr. Wolseley's position after the 8th of July, 1901. [He cited *Chapman* v. *Tanner*, 1 Vern. 267; *Mackreth* v. *Symmons*, 15 Ves. 328, 336; *Kettlewell* v. *Watson*, 32 W. R. 865, 26 Ch. D. 501, 507; *Nairne* v. *Prowse*, 6 Ves. 751, 759; *Waring* v. *Ward*, 7 Ves. 332; *Dawson* v. *African Land and Trading Co.*, 46 W. R. 132, [1898] 1 Ch. 6; Fry on Specific Performance (4th ed.), pp. 506, *et seq.*; Dart's Vendors and Purchasers (6th ed.), p. 825.] *Hunnings* v. *Williamson* (as to vacation of office) was a case depending on context. [FARWELL, J., referred to *Cowell* v. *Simpson*, 16 Ves. 275.]

Jenkins, K.C., replied.

FARWELL, J.—This case, under the guise of an innocent application to rectify the register, has raised a number of points of very considerable difficulty. The first difficulty I find is in ascertaining the facts, because the parties appear to have come here, with a laudable desire to save expense, without having clearly formulated any agreement of facts on which I can proceed. However, I do not desire to put the parties to further expense if I can help it, and I propose to deal with the case on the facts which I understand to have been the basis of the arrangement, between the parties, on which it is now brought on.

The case is one of considerable demerit on the part of a director. In December, 1900, the applicant, Mr. Wolseley, was chairman of the board of directors, and on the admitted facts, as I understand them, he and the solicitor entered into a conspiracy by which they proposed to defraud the company of a sum of £4,000. The *modus operandi* was this. The company were minded to buy a public-house called "The Durham Ox," and they authorized this solicitor to negotiate for its purchase. The solicitor bought it for himself for £8,000, and reported to the company that he had bought it for £12,000. He was authorized to enter into a contract for £12,000, and was given bills to pay a ten per cent. deposit on that footing. That was on the 24th of December, 1900.

The contract, having been so entered into, was carried out by a conveyance on the 24th of June, 1901. The conveyance recites—and this is certainly the most extraordinary part of the fraud, because I never saw anything more innocent than the mode in which it was carried out—it recites that the vendor Kidd, the owner of the property, had lately contracted with the solicitor for the sale for £8,000, and that the solicitor had agreed with the company to transfer to them the benefit of the contract for £4,000, and then it is a conveyance in consideration of both these sums, which are acknowledged to have been paid by the company to these two people. I should mention that the £4,000 never was paid. The facts were not discovered by the company until July, 1902, and thereupon, I need hardly say, there were angry protests, and finally the solicitor, by a deed dated the 25th of March, 1903, released all claims he might have against the company for that £4,000 which never had been paid; so that fortunately the intended fraud on the company failed to take effect.

The company's articles contain, amongst others, this: "The office of any director shall be vacated if he become bankrupt or insolvent or compound with his creditors; if he be declared lunatic or become of unsound mind; if he be concerned in or participate in the profits of any contract with the company not disclosed to and authorized by the board." It is admitted this contract was not disclosed to or authorized by the board. The contract in question is the contract alleged to have been entered into by the solicitor for the sale to the company at this profit. It is quite clear that the contract, mixed up as it was with the contract by Kidd with the solicitor, which was represented to the company as a contract by Kidd with the company, is one which the company never would have authorized if they had known the circumstances. On the facts, as I understand them, Wolseley and the solicitor were co-conspirators from the beginning, and this was the machinery by which they proceeded to carry out their scheme. Wolseley therefore was concerned in the contract from the beginning. "The office of director is vacated if he be concerned in any contract, . . ." and he was undoubtedly so concerned.

Now, the first point is this: Does the director, who is himself concerned in a contract not disclosed, thereupon (as it is put in the last edition of Mr. Palmer's book) *ipso facto* or "automatically" vacate his office, or does anything further remain to be done? In my opinion it is quite plain on the words of the article that he automatically or *ipso facto* vacates on the act being done. If he becomes bankrupt, on the adjudication nothing more is to be done; if he becomes lunatic, in the same way; nor indeed is there any *locus penitentiæ* for him, or any means by which the directors can condone the offence, if it be an offence, or condone the act which causes the vacation. The office is vacated; he has to be re-elected in the ordinary way, or the casual vacancy has to be filled up under the article to that effect. The directors have nothing whatever to do with the vacation of the office by an event over which they have no control, and with which they have nothing to do, except to satisfy themselves that the fact has happened, if the facts be put in issue. In this case there is no dispute of fact, because there is no dispute that the man was concerned in the contract. The difficulty about this is a decision, to which I have been referred, of Kekewich, J., *Turnbull* v. *The West Riding Athletic Club*, 70 L. T. 92, but, as I read that case, the learned judge there was really addressing his mind to a different state of circumstances. The article was not absolutely identical. It was practically: "If he contract with the company, or be concerned in, or participate in the profits of, any contract with, or work done for, the company, without declaring his interest at the meeting of directors." The directors took on themselves to call a meeting, and to declare his office vacant, and the learned judge said: "As you chose to call that meeting for the purpose of declaring this man no longer a director, you ought in common fairness to have given him notice of it." I do not think anybody would find any fault with this view. If you are proposing to adjudicate on a man's conduct and position, you ought at least to give him notice of it, and give him the opportunity of being heard. But if the learned judge meant to go on and say—as it is possible he might have meant—I am not sure whether it is necessary to his judgment—that something more must be done than the fact, and that the director might possibly have been so plausible that he might have won over the other directors, I respectfully disagree, for I cannot see what useful purpose it would serve if he had won over every director; the fact would have remained, and the fact was absolutely impossible to get over. The result, therefore, is that in my opinion on Wolseley being concerned in the contract he vacated his office.

What further happened was this: the directors were elected each year for a year, and he went out

of office with the other directors in July, 1901, and was re-elected on the 8th of that month. He held office that year, and after this was re-elected on the 8th of July, 1902. Now the vacation of his office by the contract of the 24th of December, 1900, which I will assume for the moment to be the date—I will come back to it in a minute—was a vacation of the then office of director, and did not, in my opinion, disqualify the man who had been a director, and who thereby vacated his office, from thereafter being qualified as a director. I do not understand the article to mean that if a man be concerned in a contract not disclosed, and he thereby vacate his office, that he cannot be elected in a subsequent year, or even (I will not say in the then current year) to fill a casual vacancy, but at any rate in the subsequent year when the next election comes on. To my mind it is not a continuing disqualification, unless the work to be done under the contract—that is, the mischief aimed at by the article—is a continuing work. If the work to be done under the contract is practically to be reviewed by the director under the contract, and the discretion to which the company are entitled from the director is still to be exercised after the next election, then, and then only, the election would be voided by the continuing contract. But when, as here, it is a contract made once for all for a particular purchase, then I think it only applies to the particular holding of the directorship for the current year; so that I am of opinion that he vacated his office on the entering into the contract, and that the vacation lasted until the 8th of July, 1901, when he was re-elected.

Now as to the date of the contract. In my opinion the only date I can take on the evidence I have before me, which is extremely meagre and unsatisfactory, is the 24th of December, 1900. I think the true view is really what I have stated—I do not wish to hold Mr. Upjohn to his opening, but I think he understood it as I now do, and after hearing it fully I think I do really understand it—I think the meaning was, there was this contract of the 24th of December, 1900, entered into by the two conspirators with the company for this purpose; and that being so, from that date, in my opinion, he vacated his directorship.

Then there comes the conveyance of the 24th of June, which recites the contract, and which then proceeds to convey to the company, and thereupon I think the transaction, as affecting the present question, came to an end. Although the money was not paid, there really was no further exercise of any discretion which would render the service of the director necessary. The mischief was then done, and could only be set aside by being discovered by the directors, and not by any exercise of the director's discretion as such, as distinguished from the conspirators or discovery by some outside agency. That being so, it appears to me that the only period to which this claim for the refunding of the fees, to which I am now coming, relates, is from the 24th of December, 1900, to the 8th of July, 1901.

I may mention, to get rid of it, the sum of £400 which was paid to him as an extraordinary allowance, not under article 74*a* and not as part of the £1,400 to which the directors are entitled, to be divided amongst themselves, under article 75, but as an extra sum given by the directors. It is quite clear on the authorities, *In re Newman & Co.*, 43 W. R. 483, [1895] 1 Ch. 674, and other cases, that that was utterly unjustifiable; and that sum of money must be refunded. Therefore, to the extent of £400, I may dismiss that from further consideration by saying that until that is paid there can certainly be no rectification of the company's register.

But the other question, with reference to fees, is a more difficult one. Under article 75 the remuneration of the directors was, as and from the 31st of March, 1887, to be £1,400 a year, to be distributed amongst them in such proportion as the majority might direct. What happened was that in 1897, as I was told, there was a resolution of the directors, which has been in fact acted on ever since, and under which the directors got a certain proportion. The particular director, Mr. Wolseley, got, I think, £40 a month. Now the £40 a month has been paid to Mr. Wolseley in respect of his services as a director, and what the company now claim is to have it refunded either to themselves in their own right as the company, or to themselves as the assigns, as they are, of the other directors—treating it as being paid by the other directors as Mr. Wolseley's share of the £1,400—as money paid either under a mistake of fact, or on a total failure of consideration. This is a point which now has become very small in point of money, but which seems to me to raise questions of some little interest. The action for money had and received has been dealt with by Lord Mansfield in *Moses* v. *Macferlan*, 2 Burr. 1005, 1012, in a passage which has been quoted so often I am almost ashamed to quote it again: "It lies for money paid by mistake; or upon a consideration which happens to fail." The mistake on which you can recover must be a mistake which, as was said by Bramwell, B., in *Aiken* v. *Short*, 4 W. R. 645, 1 H. & N. 210, 215, "must be as to a fact which, if true, would make the person liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money." That I apprehend means this; if you are claiming to have money repaid on the ground of mistake you must show the mistake was one which led you to suppose you were legally liable to pay. Now I am not sure that the same proposition is not involved in the second head—total failure of consideration. I will deal with the company first in its own right. If the company was liable to pay, it was because they had impliedly contracted with the director to pay him for his services, by accepting the benefit of those services although he was not a director. Of course the company's contract with him as director was an express contract, and there is no question the director would not be entitled under express contract, because the contract was to pay to the director, and he was not one. But it is put on the ground of a *quantum meruit*, or—to travesty the language of Bramwell, B.—there was some legal liability, although not to the full extent; it was not a mere sum which it was desirable should have been paid, but a sum which, as to some part of it at any rate, must be paid. That, I think, brings the question down to this: When you speak of total failure of consideration, do you by consideration mean merely something of value, or do you mean such a legal consideration as would support some form of action by the claimant? In my opinion it is the latter. I think, to analyze the position, it is this; money is recoverable by a man for work done when the person on whose property the work has been done has accepted it; the liability arises on the request, which is implied from his acceptance of the work, to the man who has done the work, to do it. That can only operate, I think, when both parties know the true state of circumstances. Now in the present case it is clear that the company never would have requested Wolseley to do the work if they had known the facts, and had known he was not a director. In fact, without putting it on any question of fraud, Wolseley, by his silence and concealment of this particular act of his, misled the company into making a request which they otherwise certainly would not have made. The mere fact that the work has been done without the request is no

consideration at law. The request is only implied from the acceptance of the work, and, in my opinion, only from the acceptance with a knowledge of the circumstances. If there be a circumstance which is so material that the court could not properly imply request which, after all, has to be a matter of implication by the court—if there be the mere fact that the company had taken the benefit of the work, then I think the court cannot imply the request and there is no consideration. From that point of view, whether I apply the test of Bramwell B, or take the total failure of consideration, in my opinion the company can recover back the money paid for the director's fees. Whether it be the company in their own capacity or the other directors, I do not think is very material; but, in my view, the company, apart from a question which might be raised by reason of the fact that the company can only act through its directors, and that all the other gentlemen are its directors, the company would appear to be in this position, that they have paid to the wrong person. They are bound to pay £1,400 to their directors; they have in point of fact paid a proportion of that to someone who was not a director. If it were not that the people who act for the company are themselves these other directors, that would appear to me to be the answer; but that is not very material to consider, because if I do not take the view that the company have suffered by having to pay over again, then the directors have suffered because they have, on the footing that this man was a director, given him a share of the £1,400, which was to be divided amongst the directors, for his services as a director. If I am to apply the same test to them as I do to the company, I certainly could not imply that they, knowing the circumstances, would ever have requested the director to do the work which he did, if they had known that he was not a director; he was to be remunerated as a director, and the other directors never would have requested, either impliedly or expressly, a man who they knew had ceased to be a director by means of such conduct as this to do any act as a director.

The result is that in my opinion the fees paid from the 24th of December, 1900, to the 8th of July, 1901, must be refunded. With regard to the rest, the man has been re-elected, and I am not holding that there has been any vacating of the office because the director had been guilty of conduct which, if known, would have induced the company not to elect him. He was a director and has done the work, and so far as that is concerned I think the claim for refunding fails. Under the circumstances, and having regard to the nature of the case, all that I can do now is to refuse the motion with costs, because it asks to rectify the register on the ground that the company have no claim on the shares. I am asked, however, to settle all matters in dispute between the parties, and therefore the order will provide that on repayment by Wolseley of the £400 with interest at four per cent. per annum from the date of its receipt by him, and of £235 without interest for the fees which I have held to be repayable, the company is to register the transfer; the costs of the motion and the costs of the action in the Scotch court when taxed there to be paid by Wolseley.

Solicitors, *Parker & Richardson; Gadsden & Treherne.*

Chan. Div.
Buckley, J. } Nov. 11.

In re N. DEFRIES & CO. (LIMITED).
BOWEN *v.* N. DEFRIES & CO. (LIMITED). (*a.*)

Company—Debentures—Registration—Prior agreement—Date of creation of security—Limit of time for registration—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

The fact of an agreement having been entered into by a limited company to issue debentures and to give them to one who advances money to the company as security for his advance, does not prevent debentures subsequently issued for the purpose being duly registered under section 14 *of the Companies Act,* 1900, *more than twenty-one days after the date of the agreement, so long as they are registered within twenty-one days after the time of their being sealed and issued.*

A limited company on the 1*st of March,* 1903, *resolved to issue certain debentures, and in order to obtain an advance from the plaintiff, the company at the same time agreed to give him debentures of* £1,000 *as a security for the advance. These debentures were sealed but not registered, and were, on the* 6*th of April, cancelled and fresh ones were, on the* 7*th of April, sealed, and to the amount of* £1,000 *issued to the plaintiff. These latter debentures were registered on the* 11*th of April.*

Held, that these debentures were duly registered within the twenty-one days limited by section 14 *of the Companies Act,* 1900.

In this case the plaintiff, F. G. Bowen, a holder of forty £25 debentures of the above company, sued the company on behalf of himself and all other the holders of the first mortgage debentures of the company, claiming a declaration that the mortgage debentures constituted a first charge upon the property, and foreclosure or sale, and other relief.

The facts were as follows:

On the 1st of March, 1903, the company resolved to issue certain debentures for £5,000, and a letter was sent on their behalf to the plaintiff informing him of the fact, and the plaintiff thereupon advanced to the company £499 14s. chiefly in cash paid at the time, but partly in value for services already rendered to the company. Under the above resolution debentures were sealed, some on the 13th of March, some on the 16th of March, but they were not registered.

On the 6th of April, 1903, it having been reported to the directors of the company that debentures, part of a series of £5,000, had been sealed, but had not been issued, it was resolved that these debentures should be cancelled, and that others should be issued, as to part in exchange for debentures constituting the prior issue, and as to the balance, £1,000 part thereof should be issued to the plaintiff. In pursuance of this resolution the above forty debentures were sealed on the 7th of April and issued to the plaintiff. These debentures were registered on the 11th of April, 1903, and endorsed with the certificate of the registrar to that effect. The writ in the action was issued on the 20th of April, 1903.

On the 26th of May, 1903, an order was made for the compulsory winding up of the company, and the action was by leave continued against the liquidator.

The defence set up was that the debentures given to the plaintiff were not filed with the Registrar of Joint Stock Companies within twenty-one days after the mortgage or charge which they purported to secure or confer was created.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Levett, K.C., and *A. H. Jessel*, for the plaintiff.—The security was created at the time of the debentures being issued, not at the date of the resolution of the 1st of March or of the letter of the 2nd of March: *In re S. Abrahams & Sons*, 50 W. R. 284, [1902] 1 Ch. 694, 698.

Eustace Smith, for the defendant company.—The debentures were not duly registered within twenty-one days of the date of the creation of the security as required by section 14 of the Companies Act, 1900. The creation of the mortgage or charge was either the resolution of the company of the 1st of March or the letter sent to the plaintiff at the same time which constituted an agreement between the parties. These debentures were not registered until the 11th of April, and are consequently void. To allow debentures to be sealed and then after the twenty-one days have elapsed to be cancelled and fresh ones to be issued and registered would be to allow the Act of 1900 to be evaded. The elaborate provisions of section 15 for an extension of time for registration are designed to meet a case of this kind.

BUCKLEY, J.—It has been proved that there was an agreement by the company with the plaintiff made by the letter sent to him on the 1st of March, 1903, to give him these debentures as a security for his advance. In a certain sense that agreement created a security. The only point argued before me has been whether the debentures issued to the plaintiff were registered in time. If there was (as I think there was) an agreement on the 1st of March, 1903, to give debentures to the amount of £1,000 to the plaintiff, the question is whether it was sufficient to register on the 11th of April, 1903, debentures which had in fact been issued upon the 7th of April. In my opinion it was sufficient. The debentures sealed in pursuance of the resolution of the 1st of March were not registered; but the plaintiff was not relying upon them. He considered that they were not a valid security; but in satisfaction of his bargain of the 1st of March he got the debentures of the 7th of April. These were the security upon which he relied. The fact that the plaintiff did not get the security on the 1st of March does not show that the agreement of that date was void, although it was not performed until the debentures were perfected by registration. The plaintiff remained in possession of that agreement, and was entitled under it to take the debentures sealed on the 7th of April, and registered on the 11th of April. I think that the debentures given to the plaintiff were duly registered within section 14 of the Companies Act, 1900, and that he is entitled to them as a security for his debt. Judgment for the plaintiff.

Solicitors, *Henry Moore; S. J. Woodham Smith.*

K. B. Div. (Walton, J.) — Dec. 8, 18.

DUNLOP PNEUMATIC TYRE CO. (LIMITED) *v.* MAISON TALBOT, EARL OF SHREWSBURY AND TALBOT, AND D. M. WEIGEL.

CLIPPER PNEUMATIC TYRE CO. *v.* SAME. (*a.*)

Slander of title to goods—Injunction—Damage direct result and imminent—Damage not accrued—Letters patent.

An injunction will lie at the instance of legal or equitable owners of letters patent to restrain the publication of a libel or slander of title, if the defamation is in fact a libel or slander of title, where no damage has actually accrued, provided that damage is imminent and is the natural and direct result likely to follow.

(*a.*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

Action tried in the Commercial Court.

This was an action for an injunction to restrain the defendants from publishing a libel or slander of title of the plaintiffs' property.

The plaintiff company were the owners of certain letters patent granted to W. E. Bartlett for an invention of pneumatic tyres, and could license others to manufacture and deal in such tyres. The letters patent were of great value.

The Michelin tyre was a pneumatic tyre for use on motor-cars. The said tyre was manufactured in France, and had a considerable reputation. The said tyre could be purchased in the open market on the Continent of Europe. The said Michelin tyre was constructed in accordance with the invention of W. E. Bartlett and was an infringement of the said letters patent and could not be imported into this realm without the licence of the plaintiffs.

A licence to import into this realm the said Michelin tyre had been granted by the plaintiffs to the Clipper Pneumatic Tyre Co. (Limited), who were licensees of the plaintiffs under the said letters patent or alternatively the owners in equity of a licence granted by the plaintiffs and others to one T. C. Phelps, under which licence the Clipper Pneumatic Tyre Co. had been authorized by the plaintiffs to import into this realm the said tyres, and under which licence the plaintiffs had received royalties from the said Clipper Pneumatic Tyre Co. (Limited) in respect of the Michelin tyres so imported by them into this realm.

The defendant the Earl of Shrewsbury and Talbot was the proprietor of the business of the defendants, the Maison Talbot. The defendant D. M. Weigel was the manager of the said business.

On the 18th of February, 1903, as the plaintiffs alleged, the defendants, by Weigel, falsely and maliciously wrote and published of the plaintiffs and of them in relation to their said business, and of them as owners of the said letters patent, the words following to one C. C. Selbach, who was a customer of the plaintiffs' licensees:

"Maison Talbot, Feb. 18, 1903.

"C. C. Selbach, Esq., 66, Great Russell-street.

"Dear Sir,—In reply to your esteemed favour of the 17th inst., we beg to inform you that Mr. Carter is the representative of the North British Rubber Co., and is travelling at the present moment on our behalf, who are the London representatives of the North British Rubber Co. for Clincher Michelin tyres.

"As regards the remark in your letters as to being able to obtain Michelin tyres from the Clipper Co., we beg to inform you that under an arrangement now come to this is quite impossible, as they (Michelin) will not supply the Clipper Co., and we ask you to be good enough to accept it from us that there are other legal reasons preventing either the Dunlop, the Clipper, or any other company from importing Michelin tyres into this country, by which they would be infringing certain rights held by the North British Rubber Co."

The plaintiffs alleged that the defendant thereby meant and intended it to be believed, and in fact it was understood to mean, that the plaintiff company were not entitled to import or to license others to import into this realm the said Michelin tyres, and that Michelin tyres could not be purchased in this realm from the plaintiffs or from their said licensees. That the defendants by themselves, their servants, agents, and travellers, falsely and maliciously spoke and published

of the plaintiffs and of them in relation to their said property words similar to those set out in the letter. By reason of the publication aforesaid the plaintiffs' title to the said letters patent and their business aforesaid was injured, and that unless the defendants were restrained from the repetition of such statements, irreparable injury would be caused to the plaintiffs, and they would be deprived of profits to be derived from the sale of the said Michelin tyres in this realm.

The defendants admitted that they wrote the letter, but denied that it was a libel or slander of title. They alleged that the letter was privileged; that the words complained of in the letter were not false and that it was written without malice in the *bonâ fide* assertion of the defendants' rights, which the defendants believed they possessed. The words "Michelin will not supply the Clipper Co." were true in substance and in fact, and that the words "under an arrangement now come to" referred to the arrangement between the North British Rubber Co. and Messrs. Michelin. The defendants had been informed, and honestly believed, that no British company except the North British Rubber Co. could lawfully import Michelin tyres into this country. The defendants contended that there was no evidence of malice, and that there was no damage. The Clipper Co., being merely beneficial owners, and there having been no legal licence to them, they could not sue. Further, privilege was a good answer to a claim for an injunction.

Bray, K.C., *A. J. Walter*, and *G. Hume*, for the plaintiffs.

Blake Odgers, K.C., and *Stephen Lynch*, for the defendants.

WALTON, J.—If the letter of the 18th of February contained statements as to the plaintiffs' rights which were false and were injurious to the plaintiffs in respect of such rights, and were made by the defendants for the purpose of injuring the plaintiffs, and not *bonâ fide* for the purpose of protecting or advancing the interests of the defendants, there is no doubt that an action would lie to recover damages in respect of any loss sustained by the plaintiffs by reason of such statements. The statements were injurious to the plaintiffs in respect of their rights in the Bartlett patent. I am satisfied not only that they were false, but that there was no ground whatever for asserting that the plaintiffs could not import Michelin tyres into this country without infringing the rights of the North British Rubber Co. As between the plaintiffs and that company there was no restraint upon the plaintiffs in respect of the patent except as contained in clause 8 of the licence. The defendant Weigel has had a large experience in dealing with the Bartlett tyres and in litigation with regard to the rights of the plaintiffs in the Bartlett patent. He was quite familiar with the terms of the licence to the Rubber Co. It may be that questions of some difficulty arise upon the construction of the licence with regard to other matters, but I am satisfied that the defendant Weigel must have known that there was nothing in the licence which could prevent the Dunlop Co., the owners of the patent, from importing into this country Bartlett tyres manufactured by Michelin. I think that Mr. Weigel must have known that there was nothing to prevent the Clipper Co., as between the Clipper Co. and the Rubber Co., from importing Bartlett tyres made by Michelin. The Clipper Co. have a licence to manufacture and sell, and if they could not under this licence import and sell, there was nothing to prevent the Dunlop Co., as against the Rubber Co., from giving to the Clipper Co. a licence to import and sell. They were by the terms of the licence to the Rubber Co. restrained only from giving further licences to manufacture and sell. This is so clear that I have no doubt that Mr. Weigel must have known it. He cannot have supposed that the statement made in the latter part of the letter of the 18th of February, 1903, was a fair and correct statement of the facts as between the Dunlop Co. and the Clipper Co. on the one side and the Rubber Co. on the other. If he had said only "We beg . . ." down to "suffered the Clipper Co.," it would have been an exaggerated statement of the monopoly obtained by the Rubber Co. by their agreement with Michelin. It is plain that the Dunlop Co. and the Clipper Co. could obtain Michelin Bartlett tyres, though not direct from Messrs. Michelin. But I do not think that any action would lie for such a statement as that. But Mr. Weigel did not stop at this; he went on to say that there were other reasons which prevented the Dunlop Co. and the Clipper Co. from importing Michelin tyres. In my judgment this was not a *bonâ fide* statement honestly made to protect or advance the interests of the defendants. There is evidence of litigation before the 18th of February, 1903, between the plaintiffs and companies of which Mr. Weigel was manager or in the management of which he took an active part, such litigation relating to the rights of the Dunlop Co. in the Bartlett patent. Without making too much of this evidence, it is at least clear that there was in February, 1903, what I may describe as a state of active hostility existing between Mr. Weigel and the Dunlop Co. I think that Mr. Weigel knew when he wrote the letter that it was not a correct or fair statement of the facts, and that he wrote it in order to injure the Dunlop Co. and the Clipper Co. by preventing them from obtaining orders for Michelin tyres. The defendants were asked to withdraw the letter and to undertake to write no more such letters, but they refused to do so. It seems to me that such a letter was calculated directly and immediately to injure the plaintiffs by depriving them of orders. It was intended to have this effect. If actual damage had been proved, I have no doubt that the defendants might have been made liable for damages in an action at law. It had been contended for the defendants that, as no actual damage had been proved, no injunction could be granted, and *White* v. *Mellin*, 43 W. R., 353, [1895] App. Cas. 154, was relied upon for that proposition. No doubt there were expressions in the judgments in that case which afford some plausible ground for that contention. But the language used by the lords in that case must be considered in connection with the view they took of the facts. I think that they came to the conclusion that there was no evidence that the libel was false, or that it had caused or was calculated to cause damage, or that it was false to the knowledge of the defendant, or that the defendant had been malicious. Further, it was extremely doubtful whether there was any libel at all. It was, therefore, perfectly clear that no action would lie for damages or for an injunction. But I am of opinion that where, as in the present case, damage would be the natural and direct result likely to follow, and so highly probable that it might be properly described as imminent, an injunction will lie. As to the second action, it was said that the Clipper Co. were only the equitable and not the legal owners, and that therefore they could not bring the action. If they could not, no one could. The equitable owners were alone injured. I do not think it matters whether the title is legal or equitable. If the libel was injurious the plaintiffs could bring this action. Therefore I grant an injunction as prayed for. As regards the Earl of Shrewsbury, on whose part no want of good faith appeared, on the further

argument, I am of opinion that the attention of this defendant was called to the letter after it was written, and that he refused to withdraw it. Without deciding whether in fact the Earl of Shrewsbury made himself a party to the malice, and without discussing the cases, I am of opinion that the case of *Barwick* v. *English Joint Stock Bank*, 15 W. R. 877, L. R. 2 Ex. 259, is in point, and therefore there must also be judgment against the earl.

Solicitors for plaintiffs, *J. B. & F. Purchase.*

Solicitors for defendants, *J. Hands.*

IN BANKRUPTCY.

K. B. Div. (Wright, J.) — Nov. 30.

In re PARRY.

Ex parte THE TRUSTEE *v.* WALTERS AND ANOTHER. (*a.*)

Bankruptcy—Settlement—Avoidance of voluntary settlement—Purchase for valuable consideration—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

A bankrupt, within two years of his bankruptcy, in consideration of the trustees of a former settlement consenting to the partial revocation of the same, executed a new settlement with the same trustees, settling further property, and giving the trustees power to pay or withhold the income of the settled funds at their discretion.

Held, that the trustees of the settlement were not purchasers or incumbrancers for valuable consideration, and that the new settlement must be declared void as against the trustee in the bankruptcy.

Motion by the trustee in the bankruptcy to avoid a settlement made by the debtor after marriage, and within two years of the commencement of the bankruptcy to such extent as might be necessary in order to pay the debts and costs of the bankruptcy in full.

The debtor, upon coming into certain property in 1899, made a settlement of such property upon trustees, dated the 4th of October, 1899. Under this settlement, which was not impeached in the present proceedings, the trustees were obliged to pay the settlor the income arising from the settled funds. The trustees further had power to revoke the settlement, either wholly or in part, at the request of the settlor; but it was left entirely in their discretion to grant or withhold their consent to any revocation.

In 1902 the debtor was employed as purser on an Atlantic liner, and got into trouble over his accounts, with the result that in December, 1902, he was arrested in London on a charge of embezzlement from the steamship company and taken to Liverpool, where he was lodged in gaol. He appealed to the trustees of the settlement to find bail for him, but they refused to assist him unless he consented to execute the settlement which the trustee in bankruptcy now sought to set aside. On condition of his executing that settlement they consented to a partial revocation of the former settlement to an extent sufficient to enable them to raise out of the settled funds sufficient money to pay his then existing debts and the money he was alleged to have embezzled. Upon the payment of that money the charge against the debtor was withdrawn.

The new settlement, which was executed on the 29th December, 1902, differed considerably from the earlier one, inasmuch as it left it entirely in the power of the trustees to pay the settlor the income of the funds settled under both settlements, or to withhold such income and accumulate it for the benefit of those entitled in remainder. It also included a valuable reversion to which the debtor had become entitled since the date of the earlier settlement.

A receiving order was made against the debtor in March, 1903; he was adjudged bankrupt and a trustee was appointed, who, after inquiring into the circumstances connected with the execution of the settlement of December, 1902, now moved to set it aside.

Reed, K.C., and *Frank Mellor*, for the trustee.—The second settlement is bad under section 47 of the Bankruptcy Act, 1883. The trustees only paid the debtor out of property of his own of which they were trustees. That is no consideration whatever. They cannot be said to be "purchasers or incumbrancers for valuable consideration," for it has been laid down in the cases of *Ex parte Hillman, In re Pumfrey*, 27 W. R. 567, 10 Ch. D. 622, and *Hance* v. *Harding*, 36 W. R. 629, 20 Q. B. D. 732, that "purchaser" must be construed in a commercial sense.

Buckmaster, K.C., and *Hansell*, for the respondents.—The bankrupt was not the only beneficiary under the first settlement, and it is therefore not correct to say that the trustees paid him out of his own property to execute the second settlement. They, on behalf of those interested in the first settlement, surrendered certain rights in consideration of the new settlement being made, and that was sufficient consideration to uphold the recent settlement: *Ex parte Berry*, 19 Ves. 218.

Reed, K.C., replied.

WRIGHT, J.—The view I take of this case depends entirely upon the fact that the first settlement was revocable. I therefore hold that the settlement now in question is not a settlement in favour of a purchaser for valuable consideration within section 47 of the Bankruptcy Act, 1883, following the definition of a purchaser as laid down in *Ex parte Hillman, In re Pumfrey*, 27 W. R. 567, 10 Ch. D. 622; *Hance* v. *Harding*, 36 W. R. 629, 20 Q. B. D. 732. Here the settlor, being anxious to get the present use of a portion of the assets comprised in the first settlement, was willing to bring other assets into settlement on the terms that the trustees should exercise the discretion given them to consent to the partial revocation of the first settlement. I do not think that was really a transaction of purchase at all; the trustees did not purchase at any price at all; they merely exercised their fiduciary power on terms which satisfied them that the trusts would not suffer. In one sense it may be said that the consideration which was given really came from the bankrupt himself; but the ground for the view which I take is that it was not a bargain of purchase at all, but merely a partial substitution of one trust asset for another, in the discretion of the trustees.

I hold, therefore, that the trustee is entitled to avoid the settlement so far as regards whatever would have been available for creditors under the first settlement, and as regards whatever fresh matter was brought into the later settlement.

Application allowed.

Solicitor for the applicant, *E. M. Lazarus.*

Solicitors for the respondents, *Walters & Co.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Jan. 13.

BARRETT v. KEMP BROTHERS. (a.)

Master and servant—Employers' liability—Accident—Compensation — "Factory" — Wharf — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

Every wharf is a factory within the meaning of section 7 *of the Workmen's Compensation Act*, 1897.

Hall *v.* Snowden, Hubbard, & Co., 47 *W. R.* 486, [1899] 2 *Q. B.* 136, *is overruled by* Raine *v.* Jobson & Co., 49 *W. R.* 705, [1901] *A. C.* 404.

Appeal from an award of the judge of the Sittingbourne County Court under the Workmen's Compensation Act, 1897.

The applicant was a labourer in the employment of Messrs. Kemp Brothers, who were builders and contractors. The employers were the lessees of a wharf on the River Medway, which they used for the purpose of loading and unloading materials used by them in their business. There was no machinery or plant on the wharf. Any one was allowed to use the wharf on payment of wharfage. The employers were also the lessees and occupiers of a private road, 250 yards long and 10ft. to 12ft. wide, which led from the public highway to the wharf, and to no other place. A gate 7ft. high separated this road from the public highway, the gate being kept continuously locked, except when the road was being used by the employers or their servants, and the key being kept by the employers. The employers' name was on the gate, and the road was bounded on both sides by a hedge, and the wharf was similarly bounded, except on the side fronting the river and at the junction where it connected with the road. The applicant was employed on the private road, breaking stones for the purpose of repairing the road, and when at work on the road at a place about 30 or 40 yards from the gate, a piece of stone struck one of his eyes and he lost the sight of it. The applicant had never been employed on the wharf itself. The employers gave notice of the accident to the inspector of factories and entered it in the book kept by them for the purpose.

In proceedings to assess compensation under the Workmen's Compensation Act, 1897, it was admitted that if the wharf was a "factory" the employers were the "undertakers" in respect thereof. The county court judge held that the employment on the road leading to the wharf was employment on or about the wharf, and that the wharf was a "factory" within the meaning of section 7 of the Act. He accordingly made an award of compensation. The employers appealed.

G. A. Scott, for the employers.—This wharf is not a factory within the meaning of section 7 of the Workmen's Compensation Act, 1897. There is no machinery or plant on the wharf. To make the wharf a factory it must be a wharf to which some provision of the Factory and Workshop Act, 1901, is applied: *Hall* v. *Snowden, Hubbard, & Co.*, 47 W. R. 486, [1899] 2 Q. B. 136. Section 104 of that Act applies five sets of provisions, as if every dock, wharf, quay, and warehouse were included in the word "factory." Two of those provisions only were capable of being applied to this wharf. Those two provisions were, however, for the reasons pointed out in *Hall* v. *Snowden, Hubbard, & Co.*, not in fact applicable to this wharf. The wharf was not used in such a way as to constitute it a factory within section 7 of the Act of 1897. That section does not make every dock, wharf, quay, and warehouse a factory, but only those to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, now the Act of 1901. The House of Lords in *Raine* v. *Jobson & Co.*, 49 W. R. 705, [1901] A. C. 404, did not say that every dock or wharf is a factory within the Act. Counsel for the respondents there made an admission that every dock is a factory within the Act of 1897. The law lords did not adopt that admission; they only adopted it as an admission that the particular dock in that case was a factory. The decision in *Hall* v. *Snowden, Hubbard, & Co.* is not affected by the case in the House of Lords. The applicant must give some evidence that some provision of the Factory and Workshop Act, 1901, has become applicable to this wharf. There is no such evidence. Even, however, if it can be said that *Raine* v. *Jobson & Co.* decided that every dock is a factory, it does not follow that every wharf is a factory. Every dock must have machinery or plant used for loading and discharging vessels, and therefore must necessarily be a factory. That is not always the case with a wharf. Therefore, the wharf in the present case was not a factory within the Act of 1897. Secondly, if it is a factory, the accident did not happen "on or about" the factory. It occurred more than 200 yards away from the wharf.

He referred upon this point to *Powell* v. *Brown*, 47 W. R. 145, [1899] 1 Q. B. 157, and *Fenn* v. *Miller*, 48 W. R. 369, [1900] 1 Q. B. 788.

Cecil Walsh, for the applicant, was not called upon.

Cur. adv. vult.

Jan. 13.—COLLINS, M.R.—This is an appeal from the judge of the Sittingbourne County Court, who held that the applicant was entitled to compensation under the Workmen's Compensation Act, 1897. The applicant sustained injury by an accident while employed upon a private road within the curtilage of the wharf in question, and the county court judge held that the employment on the road leading to the wharf was employment on or about the wharf, and that the wharf was a factory. We reserved our decision in the matter in order that we might consider what was the true bearing of the decision of the House of Lords in *Raine* v. *Jobson & Co.*, and what was its effect upon the earlier decision of this court in *Hall* v. *Snowden, Hubbard, & Co.* Having carefully considered those cases, it seems to me to be quite clear that the decision in the House of Lords has overruled the decision in *Hall* v. *Snowden, Hubbard, & Co.* It is true that the case of *Raine* v. *Jobson & Co.* was not argued upon the question which arose for discussion in *Hall* v. *Snowden, Hubbard, & Co.*, and the decision of the House of Lords was based upon an admission by Mr. Ruegg in argument that, by the combined effect of the Compensation Act, 1897, and the Factory Act, 1895, every dock is a factory within the Act of 1897. That was an admission that every dock—and the admission necessarily applies equally to a wharf—is a factory, without any qualification whatever, and entirely without regard to the question whether any provision of the Factory Acts has in fact become applicable thereto. No doubt it is impossible for any admission of counsel to alter the law. The decision is the decision of the court, and the responsibility for the decision must rest with the court. But that admission of counsel was adopted by the House of Lords as the basis of their decision, and they decided the case without any evidence as to whether any provision of the Factory Acts, though capable of being applied to the dock, had in fact been so applied.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

They seem to me to have decided that every dock, quite irrespective of whether any of the provisions of the Factory Acts in fact applied to it, was a factory. That is decisive of the question before us. It would not be paying proper respect to the decision of the House of Lords if we were to hold otherwise, though it is true that the ground of the decision in *Hall* v. *Snowden, Hubbard, & Co.* was not expressly dealt with by the House of Lords in *Raine* v. *Jobson & Co.* I am aware that the decision in *Hall* v. *Snowden, Hubbard, & Co.* was not approved by the Court of Session in Scotland, and that in that country it cannot now be considered as law. Still I have not yet seen an answer to Mr. Bray's argument in that case. That argument comes to this, that the Legislature in defining a factory in section 7 of the Act of 1897 does not say that every dock, wharf, quay, or warehouse is a factory. On the contrary, the Legislature says that only those docks, wharves, quays, and warehouses to which any provision of the Factory Acts is applied are factories, assuming that there are docks, wharves, quays, and warehouses which are not factories. The effect of the decision in Scotland—and the text writers seem to adopt the same view as is taken in that decision—is to ignore and treat as not in the Act the *primâ facie* limitation placed by the Act upon the definition of factory so far as it applies to docks, wharves, quays, and warehouses. It is not necessary to pursue this matter further, because the House of Lords has adopted the view that the Act must be construed as though the limitations placed upon the definition did not exist. The county court judge was therefore right.

There only remains the second question, whether the place where the accident happened was on or about the factory. The place was on a road within the curtilage of the factory. The question is one of fact, and there is abundant evidence upon which the county court judge could find as he has done. The appeal must therefore be dismissed.

MATHEW, L.J.—I am of the same opinion for the same reasons.

COZENS-HARDY, L.J.—I agree.

Appeal dismissed.

Solicitors for the applicant, *F. J. Berryman*, for *W. A. Watson*, Chatham.

Solicitors for the employers, *Smiles & Co.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Dec. 19.

ATTORNEY-GENERAL *v.* MURRAY. (*a.*)

Inland revenue—Estate duty—Property deemed to pass on death—Interest provided by deceased—Policy of life insurance—Marriage settlement—Policy on life of deceased settled by father of deceased—Insurable interest—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (d),

On the marriage of C. P. a settlement was made of his fortune. By the deed of settlement it was witnessed (inter alia) *that the father of C. P., who had some years previously effected a policy of insurance in his own name on the life of C. P., assigned the policy to the trustees of the settlement with the approbation of C. P. On the death of C. P. the insurance company paid the policy-money to the trustees. The Crown claimed estate duty on the policy-money under section* 2, *sub-section* 1 (d), *of the Finance Act,* 1894, *as on an "interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person."*

Held, that estate duty was not payable, for the policy was not provided by the deceased within the meaning of sub-section 1 (d).

Held, also, that the want of insurable interest on the part of the father would not have prevented estate duty being payable.

Policies of insurance are within sub-section 1 (d) *of section* 2 *of the Finance Act,* 1894, *as well as within sub-section* 1 (c).

Judgment of Ridley, J., 51 W. R. 572, [1903] 2 K. B. 64, *reversed.*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal from the judgment of Ridley, J., on an information by the Attorney-General claiming estate duty under the Finance Act, 1894 (reported 51 W. R. 572, [1903] 2 K. B. 64).

On the 25th of July, 1866, Sir Henry William Peek effected a policy for £10,000 in his own name on the life of his son Cuthbert Edgar Peek (who was born in 1855), to commence at the age of twenty-one years, with the Commercial Union Assurance Co. (Limited). Ten premiums only of £357 18s. 4d. each were to be paid, the first on the 25th of July, 1866, and the last on the 25th of July, 1875, all of which Sir Henry Peek duly paid. By the terms of the policy, which was under the company's seal, it was declared that the capital stock and funds of the company were liable to pay to the assured £10,000 on proof of the death of Cuthbert Edgar Peek after attaining the age of twenty-one years, and the policy entitled the holder to participate in profits.

In 1884 Cuthbert Peek was married to Augusta Louisa Brodrick, a daughter of Viscount Middleton, and on the occasion of the marriage he brought into settlement certain property (including the moneys secured by the policy) as his property, and separate settlements of the husband's fortune and the wife's fortune were executed. By the settlement of the husband's fortune it was witnessed (*inter alia*) that Sir Henry Peek as settlor assigned the policy to the trustees "with the approbation of the said Cuthbert Edgar Peek and Augusta Louisa Brodrick." The trustees were the defendants, Alexander Henry Hallam Murray and William St. John Fremantle Brodrick. Cuthbert Peek (who succeeded to his father's title on the 26th of August, 1898) died on the 6th of July, 1901, his widow surviving him. On his death the Commercial Union Assurance Co. paid to the trustees a sum of £14,196 17s. in respect of the policy and the bonuses thereon.

The Crown claimed that estate duty under the provisions of the Finance Act, 1894, ss. 1 and 2 (1) (*d*), both or either of them, became payable by the defendants on the above sum of £14,196 17s. as "property passing or deemed to pass on the death" of Sir Cuthbert Edgar Peek.

Section 1 of the Finance Act is as follows: "In the case of every person dying after the commencement of this part of the Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty called 'estate duty,' at the graduated rates hereinafter mentioned."

Section 2, sub-section 1, provides as follows: "Property passing on the death of the deceased shall be deemed to include the property following—that is to say: (*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accru-

ing or arising by survivorship or otherwise on the death of the deceased."

Ridley, J., gave judgment in favour of the Crown.

The defendants appealed.

Danckwerts, K.C., and *R. J. Parker*, for the defendants.—First, the policy in this case was not an annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person. It was the property of Sir Henry Peek and was provided by him, perhaps in concert with his son. But the sub-section does not include property provided by some other person in concert with the deceased. Secondly, Sir Henry Peek never had any insurable interest in the life of his son, and therefore the purported assurance was at all times null and void to all intents and purposes whatsoever under the Life Assurance Act, 1774 (14 Geo. 3, c. 48). Thirdly, sub-section 1 (*d*) of section 2 of the Finance Act does not apply at all to policies of insurance, which are dealt with by sub-section 1 (*c*).

They referred to *Attorney-General* v. *Dobree*, 48 W. R. 413, [1900] 1 Q. B. 442; *Lord Advocate* v. *Robertson*, 45 W. R. 674, [1897] A. C. 145.

Sir Robert Finlay, A.G., and *Vaughan Hawkins*, for the Crown.—First, as to the defendant's second point, the payment of the money by the insurance company to the defendants was not a gift or a voluntary payment. *Worthington* v. *Curtis*, 24 W. R. 228, 1 Ch. D. 419, is an authority to show that, if it was in fact paid, it must be treated as paid in respect of the policy. Next, as to the defendant's third point, policies of insurance do not fall only within sub-section 1 (*c*), they fall within the general scope of section 2, and the terms of sub-section 1 (*d*) are quite applicable to them: *Attorney-General* v. *Robinson*, Ir. L. R. [1901] 2 K. B. 67. Lastly, as to the defendant's first point, the correspondence shows that the policy was in fact provided by the son in concert with his father.

Cur. adv. vult.

Dec. 19.—COZENS-HARDY, L.J., read the following judgment of the court: This is an appeal from a judgment of Ridley, J., who has held that estate duty is payable under section 2, sub-section 1 (*d*), of the Finance Act, 1894, on the death of Sir Cuthbert Peek in respect of a policy for £10,000 on his life settled by his marriage settlement. The material words of the statute are these: "Property passing on the death of the deceased shall be deemed to include the property following—that is to say: Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Three points were raised in support of the appeal. First, it is contended that no property passed on the death, because the policy was taken out by and in the name of Sir Henry Peek, the father of Sir Cuthbert, who had, as the office was informed at the time, no insurable interest in his son's life. The policy was therefore illegal and void under the statute 14 Geo. 3, c. 48, and any money paid by the office after Sir Cuthbert's death was a mere gratuity. In our opinion, this contention cannot prevail. The statute made the contract of insurance void as between the office and Sir Henry, but no further. If the office, though not bound so to do, in fact paid the money, the payment must be treated as made in respect of the policy, and all the same consequences must follow as if the statute had not been passed. The judgment of the Court of Appeal in *Worthington* v. *Curtis* really concludes this point. The words of Mellish, L.J., are clear and direct: "The statute is a defence for the insurance company only, if they choose to avail themselves of it. If they do not, the question who is entitled to the money must be determined as if the statute did not exist. The contract is only made void as between the company and the insurer." The court could not have arrived at the decision in that case on any other view of the law.

Secondly, it is contended that a policy of insurance is not an interest within sub-section 1 (*d*). We have not been able to appreciate this argument. A policy is plainly property within the scope of section 2, and we can see no ground for excluding it from sub-section 1 (*d*). We are content to adopt the reasoning of Palles, L.C.B., in *Attorney-General* v. *Robinson*, and we do not think any good object would be attained by attempting to further elaborate it.

Thirdly, assuming that this particular policy is capable of being brought within sub-section 1 (*d*), it is contended that it was not "purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person." Now it is clear that, apart from the statute of Geo. 3, the policy was the property of Sir Henry alone, and that Sir Cuthbert had no right to or interest in it. The marriage settlement is framed on this footing. Sir Henry "as settlor" assigns the policy to the trustees upon the usual trusts. He also brings into settlement stocks and securities of large amount as well as real estate. We can draw no distinction between the policy and this other property. Who "provided" this property? The answer must be the father and not the son. The son "provided" some other property of his own, including a policy on his own life in another office, which we only mention to show that it has not been overlooked, but he did not "provide" this property. We are not prepared to hold that on a marriage settlement everything brought into settlement on the husband's side by his father or other relatives can properly be said to be provided by the husband in concert or by arrangement with his father or other relatives. The Finance Act must, of course, be construed fairly, but it is for the Crown to establish that a particular case falls within the language used, and we think the attempt fails in the present case. It is perhaps worth noting that if Sir Henry, instead of being father of Sir Cuthbert, had been his uncle or had stood *in loco parentis*, it is clear that succession duty would be payable under the settlement, as on a succession from him, it being a disposition by him as predecessor. That the policies should be "provided" by the son, so as to be liable to estate duty, and at the same time "disposed of" by the legal owner of the policy, so as to be liable to succession duty at a rate based on the relationship of the predecessor, would be a strange result. In our opinion estate duty is not payable in respect of this policy money, but succession duty at 1 per cent. will be payable on the death of Lady Peek, who is now entitled for life to the income arising from the investment of the policy money. In the view which we take it is not necessary to consider the precise meaning of the words "in concert or by arrangement with any other person." Section 15, sub-section 3, indicates one class of cases to which the words might apply, and we conceive they might apply to a case where a husband settles a policy on his own life, and provision is made in the settlement for paying future premiums by the trustees out of the income of the trust property. This is by no means an unusual provision, and other examples might be given. An attempt was made to bring the case within sub-section 1 (*d*) by referring to a letter written by Sir Henry to the office with the proposal, in which he

said: "I effect the assurance in my own name, but with a view to giving him a paid-up policy for marriage settlement or otherwise if after he shall have attained his majority his conduct is quite satisfactory to me." But this expression of intention was of no moment. The intention was never carried into effect. It gave the son no right or interest in the policy. It cannot alter or enlarge the rights of the Crown, which must depend upon the terms of the marriage settlement alone. The appeal must be allowed.

Appeal allowed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitor for the defendants, *Johnsons, Long, & Co.*

High Court of Justice.

Chan. Div. } Farwell, J. } Nov. 20.

OLDE *v.* OLDE. (*a.*)

Vendor and purchaser—Specific performance—Vendor's motion to rescind contract—Form of order—Costs.

Form of order on motion for rescission of contract with costs of the motion and stay of all further proceedings, except such as might be necessary for recovery of the costs in an action for specific performance.

A vendor had brought an action for specific performance of a contract for the sale of land and obtained judgment for specific performance of the contract, with costs of the action to be taxed, &c. The master had certified that a good title had been made and the amount due to the plaintiff for the balance of the purchase-money.

The defendant had not paid the balance of the purchase-money nor the plaintiff's taxed costs in the action.

The plaintiff now moved for the rescission of the contract with costs of the motion, and that all further proceedings might be stayed except such as might be necessary for the recovery of the costs of the action already ordered to be paid and the costs of the motion.

Welby King, for the motion, contended that if *Jeffery* v. *Stewart*, 80 L. T. 17, decided by North, J., were followed, the plaintiff would lose the costs given when judgment was pronounced, as all proceedings would be stayed.

FARWELL, J., in giving judgment, said: I do not quite follow the decision of North, J., but I think the difference is more a question of words than anything else. I will, however, adopt the form of order made by Byrne, J., in *Westerman* v. *Pantlin*, Seaton on Judgments (6th ed.), vol. 3, p. 2289.

Solicitor for plaintiff, *C. G. Algar.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Chan. Div. } Buckley, J. } Dec. 14, 16.

STAINER *v.* HODGKINSON. (*a.*)

Will—Construction—Tenant for life and remainderman—Specific gift—Property of a wasting nature or involving onerous obligations—Gift of business—Profits arising from business pending sale—Enjoyment in specie.

A specific bequest to a tenant for life of property of a wasting nature or involving onerous obligations entitles the tenant for life to enjoy the property in specie; *it is immaterial whether the bequest be that of a leasehold or of a business. To enable executors in such a case to carry on a business, it is not necessary to find in the will a distinct authority for that purpose; the authority may be inferred from the general terms of the will.*

A testator gave to his wife, during her widowhood, all his real and personal estate, and at her death all to be divided amongst his children, also his shares in certain businesses. There was no express trust for conversion or power to carry on the businesses. The shares were not converted during the tenancy of the widow. The question arising whether the whole of the profits earned during the tenancy belonged to the widow or only such proportion as represented £4 per cent. per annum on the capital value of the shares,

Held, that the gift of the shares to the widow during her tenancy was specific, that she was entitled to enjoy them in specie, *and, consequently, that the whole of the profits belonged to her.*

Kirkman *v.* Booth, 11 *Beav.* 273, *distinguished.*

In re Chancellor, 32 *W. R.* 465, 26 *Ch. D.* 42, *followed.*

This was the hearing of an adjourned summons asking for the determination of questions arising on the construction of the will of John Smith (deceased), the answer to one of which depended on whether or not a tenant for life was entitled to the enjoyment in *specie* of the profits of a share in a business.

The testator, at the time of, and for some time prior to his death, carried on business as a colliery proprietor and brick and tile manufacturer in co-partnership with three other persons under the respective styles or firms of "The New Hem Heath Mining Co." and "The New Rose Vale Brick and Tile Co."

By his will, dated the 17th of March, 1896, the testator, after directing payment of his debts and funeral expenses, continued as follows: "I give and bequeath unto my wife, Mary Jane Smith, all my real and personal estate for her use as long as she remains a widow, and at her death all to be divided amongst my four children [naming them], also my shares and interest in" the above-mentioned businesses.

The testator died on the 30th of March, 1896, leaving him surviving his widow, and four children all of whom are still under the age of twenty-one years.

The executors did not at once convert into money the shares of the testator in the two businesses, which were carried on by the surviving partners, large sums, representing the income arising from these shares, being from time to time paid direct to the widow.

At various dates in 1898 the widow, out of the moneys so paid to her, paid £850 into a deposit account at a bank to the credit of the executors. In 1899 and 1900 they repaid to her out of this account £310. There was thus a balance remaining to their credit of £540.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

The executors sold the shares of the testator in the partnerships on the 26th of March, 1900.

The widow re-married on the 4th of August, 1902.

The question for determination was as to who was entitled to the above-mentioned balance of £540.

Earle, for the executors.

Whinney, for the widow.—The widow is entitled to the whole amount. The rule in *Howe* v. *Lord Dartmouth*, 7 Ves. 137, does not apply to a case like the present, where, on the construction of the will, there is a direction that the tenant for life shall enjoy the property *in specie*. There was, therefore, no obligation imposed on the executors to sell the shares in the businesses, and since they did not do so, the widow is entitled to the whole of the profits attributable to the testator's shares during the period in which they remained unsold. A direction to divide property after the death of a person who is to enjoy it for life is an indication of an intention that the tenant for life shall enjoy it *in specie*. *Collins* v. *Collins*, 2 My. & K. 703; *Pickering* v. *Pickering*, 4 My. & Cr. 289; *Holgate* v. *Jennings*, 24 Beav. 623; and *In re Crowther*, 43 W. R. 571, [1895] 2 Ch. 56, are also in my favour.

Buckmaster, K.C., and *W. E. Hughes*, for the persons entitled in remainder. — There is a distinction between a gift of leaseholds and a gift of a business. In the case of a business, unless there is a strong direction in the will itself to the executors to carry it on, the executors ought to sell it: per Lord Langdale, M.R., in *Kirkman* v. *Booth*, 11 Beav. 273, at p. 280. Since it was the duty of the executors to have sold this admittedly wasting security, the widow is entitled only to £4 per cent. on the capital value of the shares. *In re Chancellor*, 32 W. R. 465, 26 Ch. D. 42, and *In re Crowther*, where a power to carry on the testator's business was implied, are distinguishable, because in both there was a power to postpone conversion, with a direction as to the intermediate income. It is a question, on the construction of this will, whether the direction that the widow was to have the "use" of the property amounted to a specific gift.

Fearns v. *Young*, 9 Ves. 549, was also referred to.

Whinney, in reply.—The principle of *Kirkman* v. *Booth* was overruled in *In re Chancellor*, where it was held that a power to carry on a testator's business can be implied from other provisions in the will.

He also referred to *In re Norrington*, 28 W. R. 711, 13 Ch. D. 654; *In re Cameron*, 32 W. R. 834, 26 Ch. D. 19; and *In re Bland*, [1899] 2 Ch. 336.

BUCKLEY, J., after stating the facts, continued: I will first state some general principles. The first is that the mere fact that there is no direction to convert does not in itself entitle the widow to enjoy the property *in specie*. You have still to see that the dispositions are such that the rule in *Howe* v. *Lord Dartmouth* is excluded. What it is necessary to find in the will in order to exclude the rule is the question to be decided. The second principle is that you must bear in mind that there may be two sorts of property as to which it is relevant to consider whether they are of a wasting nature, or whether they are not only wasting, but are also burdened by onerous obligations. There are many cases in the books concerning leaseholds. Leaseholds fall within both categories; for the rent reserved by and the covenants contained in a lease may be trivial or they may be onerous. In the case of an ordinary lease of a house for twenty-one years the obligations may not be heavy. But there are many leases—for example, those of collieries—where the onus on the estate is very heavy. If the case be not that of a leasehold, but that of a business or the share of a business involving risk in trade, I fail to see that there can be any difference, except in degree; there is no difference in principle. There have been two cases, *Collins* v. *Collins* and *Pickering* v. *Pickering*, in which the question now before me has arisen. In both the property was a leasehold, but, as I said before, there is no difference in principle between a leasehold and a business. In *Collins* v. *Collins* the gift was of all the testator's property to his wife for her life, and at her death "to be divided." The decision was that the tenant for life was specifically entitled during her life. In *Pickering* v. *Pickering*, a case before Lord Cottenham, the decision was that if the will contains indications—I say emphatically indications—of an intention that the tenant for life is to enjoy the property in its existing state, then the tenant for life is to enjoy the property *in specie*. The principle is stated in 4 My. & Cr., at p. 299, where, after referring to the rule in *Howe* v. *Lord Dartmouth*, Lord Cottenham says: "But that is merely an inference from the mode in which the property is to be enjoyed, if no direction is given as to how the property is to be managed. It is equally clear that if a person gives certain property specifically to one person for life, with remainder over afterwards, then, although there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the court cannot overlook." In other words, the point of the decision is that from the fact of property having been given specifically to a tenant for life, you can infer an indication of an intention in the testator that the property is not to be converted, but is to be enjoyed *in specie*.

There are two other authorities later than those I have mentioned, where the point was not quite the same, owing to the existence of a trust for conversion and a power to postpone. It was held that, owing to the power which was given to postpone conversion, you might infer in the subsequent direction to pay income a direction to pay the whole income during such time as the conversion might be postponed. These two cases are *In re Chancellor* and *In re Crowther*. *In re Chancellor* is important first because it is a decision that in order to enable the trustees to carry on the business of a testator, it is not necessary to find in the will an express direction or power for them to do so, but that it is sufficient if it be implied. You have to read the will and see whether the testator has indicated an intention that they should do so. Mr. Buckmaster says that to enable them to carry on the business that intention must be a "necessary" implication from the terms of the will. I do not understand what that expression means. The intention is either implied, or it is not; if it is implied, it is necessary, otherwise it is not necessary. The case of *Kirkman* v. *Booth*, to which I shall refer hereafter, was cited in *In re Chancellor*, where it was said, 26 Ch. D., at p. 46, "Without impugning any of the authorities that have been referred to, there is in this will an implied authority to carry on the business, and the testator has said how the profits of the business pending a sale are to be paid and applied." The general rule is stated by Cotton, L.J., at p. 45, to be "that where property is invested on a security of a wasting character, that must be realized, or if not realized immediately, then the tenant for life is only entitled to interest on the realized value. But a testator can say what he likes, and if he chooses to say that the investment may be continued, or the sale of it may be postponed, and that the profits arising from such security in the meantime shall be paid to

the tenant for life, he can do so." *In re Crowther*, decided by Chitty, J., is to the same effect, and is another decision that authority to trustees to carry on the business of a testator may be implied. *Holgate* v. *Jennings* is another case of this class, and it is not necessary to refer to it in detail.

In all those five cases the tenant for life was successful. I pass to two cases where the decision was not in favour of the tenant for life. The first of those cases is *Fearns* v. *Young*. The point of that case, so far as it is material for the present purpose, is that there was no specific gift of the property in question. The other case is *Kirkman* v. *Booth*, a decision of Lord Langdale. The gift was that of a busines, and therefore the case is important. At p. 280 (11 Beav.) Lord Langdale is reported as saying, "I think it is, and it has been admitted to be, a rule without exception, that, to authorize executors to carry on a trade, or to permit it to be carried on with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the will itself for that purpose." Guiding myself by the subsequent decisions, and particularly by the decision of the Court of Appeal in *In re Chancellor*, I am of opinion that that statement is too wide. In the first place, it requires qualification, because it is clear that the executors, after the death of a testator, may carry on the business for a reasonable time, with a view to its more profitable realization. No authority is wanted for that proposition, and Lord Langdale was not addressing himself to it. In the second place, in the light of the decision in *In re Chancellor*, it is too wide a statement to make, that there must be a distinct and positive direction to enable the excutors to carry on the business; it is sufficient if an implication of an intention that the executors should do so can be gathered from the will. And it must be borne in mind that *Kirkman* v. *Booth* was not a case of rights as between tenant for life and remainderman. It was a case where the trustees had carried on a business for thirteen years without any obligation to do so, and during that period of time had incurred a loss. The question was whether they were liable for that loss. With a view to a decision on that point, the court declared that the property ought to have been converted within one year from the testator's death. It is no authority for the proposition that a distinction exists between a leasehold involving liabilities and a business involving liabilities. As I have said before, I do not see that there is any distinction between them. The only other case bearing on the point is that of *In re Bland*, a decision of Stirling J. There, referring to *Collins* v. *Collins* and *Pickering* v. *Pickering*, the learned judge says ([1899] 2 Ch., at p. 338), "Even in a case where the rule in *Howe* v. *Earl of Dartmouth* is strictly applicable, an inference of an intention to the contrary has been drawn from the terms of the gift over," and then after citing a passage from the judgment of Lord Cottenham, L.C., in *Pickering* v. *Pickering*, he follows these two cases.

So much for the authorities. I now go to the terms of this particular will, which was evidently drawn by the testator himself. [His lordship read the will, and continued:] Reading that will, what ought the court to infer from it as to what he meant. After the gift of all his real and personal estate, he gives something else. Of course that is surplusage. But for the purpose of arriving at his intention it is material. He specifically says, I give her these shares. That was a specific gift to her of his interest in these businesses. There is no trust for conversion or power to carry on the businesses. But the inference I draw is that the testator intended that the widow should enjoy the property *in specie* during such time as the businesses should be carried on. After that he uses the language which was found in *Collins* v. *Collins*, "and at her death all to be divided." Without laying too much stress upon those words, I can infer that he meant that during her life nothing was to be converted, and at her death there was to be a division. From this will, therefore, I infer that there was a specific gift of his interest in these businesses to the widow, and also that it was to be unconverted during her widowhood, because there was to be a division at her death.

I think, therefore, that the profits earned in the businesses down to 1900 belonged to the widow.

Solicitors, *Pitman & Sons*, for *Joseph Griffiths*, Newcastle, Staffordshire; *Doyle, Devonshire, & Woodhouse*.

Chan. Div. }
Joyce, J. } May 19, 20; June 27, 1903.

HARVEY v. TRURO DISTRICT COUNCIL. (*a*.)

Highway—Road of varying width—Roadside strip—Public right—Disuse no deprivation of right.

Although a highway varies in width as measured between the fences, nevertheless the public right of passage or way, primâ facie, *unless there be evidence to the contrary, extends to the whole space between the fences, and is not limited to that portion which may be metalled or kept in order for the more convenient use of carriages and foot passengers.*

Action.

In this action the plaintiff claimed a declaration that no portion of a particular plot of land formed part of the highway, and that the defendants were not entitled to deposit upon this portion of the said land any road material without the permission of the plaintiff, and an injunction restraining the defendants' servants, &c., from trespassing on the said land or from demolishing the buildings thereon.

The facts, as deposed to by witnesses in the action, were as follows:

The highway in question was a main road vested in the County Council of Cornwall, but repairable by the defendant council under section 11, sub-section 4, of the Local Government Act, 1888. It adjoined the plaintiff's estate called Trenowth, in the parish of Probus, in the county of Cornwall, and led from Grampound-road to Probus. There was on the eastern side of the highway, between the metalled road and the plaintiff's fence, a strip of roadside waste to which the plaintiff claimed to be entitled, and a part of which he proposed to inclose.

In 1885 the then owner of Trenowth, Mr. Hendy, had pegged out this strip, which had hitherto been uninclosed and open to the public, but the pegs had been removed by the surveyor to the highway authority.

In 1887 a local policeman inclosed a portion of the strip, and for two years cultivated it as a garden, and later on Mr. Hendy's gamekeeper put wire along the fence, but one McCoskrie, in October, 1889, in assertion of a public right, destroyed the fence, and was summoned by Mr. Hendy, was convicted, and fined.

After 1889 the fence was not maintained or repaired.

For many years the road authority had used a portion of the strip as a place to deposit material for road-mending, and for this the road surveyor without authority had agreed to pay, and had paid, a nominal rent. This payment was disallowed by the road authority.

(*a*.) Reported by ALFRED C. THOMAS, Esq., Barrister-at-Law.

In 1886 a wooden building had been erected partly on this strip and partly on what had been the metalled road. For this the plaintiff had received rent and had recovered rent in the High Court for possession against the occupant.

In September, 1903, the plaintiff built a wall separating this strip from the highway. The defendants, the highway authority, caused a portion of this wall to be thrown down.

The defendants justified their action on the grounds of the duties imposed on them by section 26 of the Local Government Act, 1894, and also as representative of the Cornwall County Council under sub-section 4 of section 11 of the Local Government Act, 1888.

Foote, K.C., Hughes, K.C., R. C. Glen, and *A. Bethune*, for the plaintiff.—There are two kinds of roadside wastes, those parts of highway and those not parts of highway, and which of the two any particular roadside waste is, is always a question of fact. Was the piece dedicated? A distinction between strips that run with the road and strips that lie off the road is not sufficient to show dedication, there must be also acceptation: *Easton* v. *Richmond Highway Board*, 20 W. R. 203, L. R. 7 Q. B. 69. Although there is a presumption that the road between the fences is a highway, yet this presumption may be upset on showing that the sides are unfit for a highway: *Evans* v. *Oakley*, 1 C. & K. 125.

Tindal Atkinson, A. Whitaker, and *Crosfield*, for the defendants.—This piece of land was open to the highway till 1885, and then fenced in. From that time efforts made to inclose it, so that before then it was a part of the highway. Where a highway runs between fences there is a presumption that the public have a right of passage over the space lying between the fences: *Reg.* v. *Electric Telegraph Co.*, 2 B. & S. 647; *Steel* v. *Prickett*, 2 Starkie 463, 469; Glen on Highways, p. 55. Nothing that has occurred since has displaced this presumption. There might be something in the physical state of the piece of waste that would preclude the presumption that the waste was to be used as part of the road: *Neeld* v. *Hendon Urban Council*, 81 L. T. 405, 48 W. R. Dig. 67; *Belmore* v. *Kent Council Council*, 49 W. R. 459, [1901] 1 Ch. 873. In this last case there had been from time immemorial interference by the adjoining landowner in the waste. Two matters are proved beyond all doubt as to dedication: (*a*) Existence of many similar strips, one a stone's throw away; and (*b*) that the stable now stands on what was a metalled portion of the highway.

Foote, K.C., in reply.—Where the hedges are irregular and the distances between them varying, then the tendency is to rebut the presumption that the entire piece between the hedges is a portion of the highway: *Attorney-General* v. *Biphosphated Guano Co.*, 27 W. R. 621, 11 Ch. D. 327. Directly evidence is shown to disturb the presumption, then the defendant must show that the land is used as highway: *Belmont* v. *Kent County Council; Neeld* v. *Hendon Urban District Council*. Acquiescence by the road authority since 1887 throws the onus on the defendants to prove it was part of the highway.

Cur. adv. vult.

June 27, 1903.—JOYCE, J.—I do not consider that the title of the plaintiff to the soil of the strip was by any means proved. Indeed there is a question as to whether his estate of Trenowth, which lies on the east of the road, does, as he contends, or does not, extend beyond his fence so as to comprise the strip; but both parties desire that I should determine the principal question—namely, the right (if any) of the public over the roadside waste.

In the first place, as the admitted plan shows, the old fences on either side of the road are as regular and continuous as one ever sees them, though the distance between them is not perfectly uniform. Indeed, this is seldom, if ever, found to be the case, except where the land has been first inclosed in recent years; or the road has been set out of uniform width by the award of commissioners, or otherwise under some Inclosure Act or other statute. The extreme width between the ancient fences, which include therein both the hard road and the strip, appears to vary from thirty to forty-three feet at the most—by no means an extraordinary width for a public highway. There is evidence to show that the hard road at one time ran much nearer to the fence on the eastern side than it does now. It is also the fact that not long before 1870 the metalled portion of the road was widened at the expense of the strip as then existing without any objection from the then owner of Trenowth.

Prior to the year 1885 no part of the strip was inclosed, nor was the use thereof by the public obstructed in any manner. In my judgment the ancient and present fence bounding the enclosed land on the eastern side of the road was put up or constructed in reference to the highway, and not as a boundary between the inclosed land and any piece of uninclosed waste, and the strip generally appears to have been actually used in the same manner and to as great an extent as roadside wastes belonging to the highway, but not metalled or kept in repair, are commonly used. In the case of an ordinary highway running between fences, although it may be of a varying and unequal width, the right of passage or way *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the whole of it as a highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages or foot passengers. All the ground between the fences is presumably dedicated as highway unless the nature of the ground or other circumstances rebut that presumption: see Leake on Uses and Profits of Land, p. 493. Upon this otherwise settled rule it was suggested that some doubt had been thrown by the recent decision in *Neeld* v. *Hendon Urban Council*, but there it was found as a fact that the ground in question was formerly part of the waste of the manor and had been so dealt with all along until the occurrences which gave rise to the action. That alone, in the opinion of A. L. Smith and Vaughan Williams, L.JJ., rendered the general doctrine of the cases inapplicable, and the latter judge expressly says: "The presumption is that *primâ facie*, if there be nothing to the contrary, the public right of way extends over the whole space of ground between the fences on either side of the road; that is to say, that the fences may *primâ facie* be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated." The case of the *Countess of Belmore* v. *Kent County Council* was a decision on the particular facts.

The supposed explanation of the fact that the land apparently dedicated for a highway is often wider than that now kept in repair is to be found in the judgment of Abbott, C.J., in *Steel* v. *Prickett*. Macadam's system of road-making with broken stone was not introduced at the earliest until just before the end of the eighteenth century, and as observed by Lord Tenterden in *Rex* v. *Wright*, 3 B. & Ald. 681, "The space at the sides," that is, of the hard road, "is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the part actually used as road, it could not be kept sound."

If this dispute had arisen and the action had come on to be tried in 1885, there would not, in my opinion, have been any evidence whatever to rebut the presumption that all the ground between the fences of the road at the place in question had been dedicated as highway. It is an established maxim that once a highway always a highway. The public cannot release their rights. Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not have been used will preclude the public from resuming the exercise of the right to use it if and when they think proper. The authorities for this are to be found in any of the usual text-books on the Law of Highways, and there is a well-known case where some of the encroachments on the roadside waste had existed for more than forty years, but it was held that no period of modern enjoyment was of any avail to deprive the public of the right they had once enjoyed. Suppose, then, that in the year 1885 the plaintiff's predecessor in title, as owner of the Trenowth estate, had succeeded in inclosing the strip of land now in question in the absence of effective opposition from the then highway authority, it appears to me that even uninterrupted possession for the seventeen years before the present dispute began would not and could not have legalized the encroachment. [His lordship then referred to the facts that had taken place subsequent to 1885, and continued:] Even if the highway authority had actually consented to any obstruction or encroachment on the strip as being part of the highway, such consent could not legalize that which was otherwise illegal. The highway authority had consented to the obstruction complained of in the case of *Reg.* v. *United Kingdom Electric Telegraph Co.*, 31 L. J. M. C. 166, as also in the well-known case of *Reg.* v. *Train*, 31 L. J. M. C. 169, but such consent was held to be wholly ineffectual.

As I understand it, all that the defendants have done is to cause to be broken down a portion of the new fence in process of erection by the plaintiff. This, I think, they were entitled to do if such fence was an illegal encroachment, as I hold it to be, there being no sufficient evidence to rebut the presumption that the whole of the land between the fences of the road, where the plaintiff proposed to inclose, formed part of the highway, and there being nothing in the dimensions, shape, or character of the ground to make the presumption inapplicable. If necessary, I hold, as a matter of fact, that the fences of the road were put up for the purposes of separating land dedicated as a highway from land not so dedicated.

The statement of claim also asks for a declaration that no portion of the site of a certain building adjoining the strip formed part of the highway. This building is a small wooden erection with a corrugated iron roof erected in 1886 or 1887. I find as a fact that the western half of this site stands upon ground which formerly was actually part of the metalled road. There is, in my opinion, still less evidence to rebut the legal presumption, which I have mentioned, in reference to this site than in reference to the portion of the strip now proposed to be inclosed. The possession of a squatter on the highway since 1886 cannot bar the public right. The plaintiff's case fails with respect to this as well as with respect to the attempted inclosure, and therefore fails altogether, and the action must be dismissed with costs.

Solicitors for the plaintiff, *Coode, Kingdon, & Cotton*, for *Chilcot & Sons*, Truro.

Solicitors for the defendants, *J. A. Bartrum*, for *R. Dobell*, Truro.

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy, J.) — Nov. 6.

REX v. NEPEAN.
Ex parte JENKINS. (*a.*)

Election law—Registration—Parliament—Lodger claim—Objection as to value of lodgings—Evidence—Disallowance of claim—Refusal to state case—Order nisi *for* mandamus*—Statement of revising barrister in answer to order* nisi*—Statement to be made on affidavit—Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *ss.* 42, 65*—Parliamentary Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 22, 23; *s.* 28, *sub-sections* 10, 11; *ss.* 36, 37.

J. claimed to vote as an old lodger; it appeared in the body of his claim that he occupied as lodgings two unfurnished rooms on the top floor of a house, for which rooms he paid 5s. 6d. weekly, and in the declaration annexed to the claim the claimant declared that his lodgings were of the clear yearly value, if let unfurnished, of £10 or upwards. The claim was duly objected to on the ground that the lodgings were not of sufficient value. It was proved that the whole house was only rated at £14, and there were also other circumstances in evidence before the revising barrister which raised a strong doubt in his mind as to whether the lodgings were of sufficient value. The revising barrister adjourned the hearing to an evening sitting of the court, and meanwhile sent a written notice to the claimant that his claim would, or might be, disallowed unless he produced, or caused to be produced, at the evening sitting his rent-book or other sufficient evidence that his lodgings were of the requisite value. The claimant having altogether ignored this notice, the revising barrister disallowed the claim, on the ground that he was not satisfied that the claimant's lodgings were of the requisite value, and refused to state a case. An order nisi *for a* mandamus *having been obtained* ex parte,

Held, that the case raised a question as to the true construction of section 28, *sub-sections* 10, 11, *of the Parliamentary Registration Act*, 1878, *and that the order* nisi *should be made absolute.*

Held, also, that as a general rule a statement made by a revising barrister in answer to an order nisi *should be on affidavit.*

The observations of the Court on this point in In re Bane, *W. N.*, 1879, *p.* 200, *discussed and distinguished.*

Order *nisi* for a *mandamus* calling upon the revising barrister for the Parliamentary Borough of Hackney, and one H. J. Edis, to show cause why an appeal should not be entertained and a case stated in the matter of the objection taken at the revision court by the said Edis to the name of the applicant William Jenkins being retained on the old lodgers' list of electors for the South Hackney Division of the said Parliamentary Borough.

The revising barrister had allowed the objection, and had expunged Jenkins' name from the old lodgers' list.

The order *nisi* was obtained on the *ex parte* application of Jenkins and the registration agent who had appeared on his behalf, who made affidavits in which they stated that Jenkins did in fact pay 5s. 6d. a week for his lodgings, and had duly claimed as an old lodger; that his claim had been objected to by the said Edis on the ground that the lodgings occupied by Jenkins were not of the clear yearly value, if let unfurnished, of £10 or upwards; that no evidence was adduced in support of the objection other than the fact (which was admitted) that the

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

whole house, in which Jenkins occupied two rooms as his lodgings, was only rated at £14 per annum; and that the revising barrister had thereupon allowed the objection, and refused to state a case.

Upon being served with the order *nisi*, the revising barrister, in answer thereto, submitted to the court a written report (not on affidavit), of which the following is a summary, and from which it appeared that the material facts of the case were really as follows:

(1) Previously to the year 1903 the party registration agents in South Hackney, under an agreement between themselves, had refrained from taking any objection on the ground of value to any lodger claims; this had been brought to the revising barrister's attention in 1902, and he had then expressed his disapproval of such practice and intimated that it ought not be continued:

(2) In 1903 the town clerk, at the request of the revising barrister, prepared a statement in regard to the lodger claims made in 1903, showing the rateable value of the houses in which the lodger claimants lodged, from which it appeared that 317 lodger claims were made in respect of houses of a rateable value of £14 and under, and that in the case of 53 houses whose rateable value ranged from £9 to £20, claims for two lodgers in each house had been made:

(3) On the 14th of September, 1903, the revising barrister made a personal inspection of the larger part of South Hackney, accompanied by the borough registration officer, who had known the constituency for twenty years, and the barrister then satisfied himself that the character of the constituency was very poor and the houses very small, many streets consisting entirely of houses which were little better than hovels, and that consequently the question whether or not any particular lodgings were worth £10 a year unfurnished was extremely doubtful:

(4) Ada-street, in which the claimant Jenkins' lodgings were situate, was not one of the streets visited by the barrister, but on hearing of Jenkins' claim the borough registration officer, in answer to a question of the revising barrister, stated that Ada-street was as poor a street as any which the revising barrister had inspected:

(5) It was proved to the satisfaction of the revising barrister that the rateable value of the whole house 8, Ada-street, in which the claimant Jenkins occupied two rooms as his lodgings, was only £14 per annum, which was 6s. less than the amount of the annual rent which Jenkins in his claim stated he paid for his lodgings:

(6) Jenkins' claim, together with numerous other lodger claims to which objections on the ground of insufficient value had been taken, were adjourned by the revising barrister from the 15th of September to an evening sitting to be held on the 18th of September, the revising barrister then stating in court that if the claimants respectively satisfied him that they paid rent amounting to £10 per annum, or that their respective lodgings were of the prescribed value, he would allow the claims, but that otherwise he would not allow them:

(7) On the 15th of September the revising barrister also sent to each claimant, including Jenkins, the following written notice: "Take notice that your claim to vote as a lodger has been objected to on the ground that your lodgings are not of the clear yearly value of £10 if let unfurnished; your claim will or may be disallowed unless you produce, or cause to be produced, to me at the evening sitting at my court commencing at 6.30 p.m. on Friday, the 18th of September, 1903, your rent-book or other sufficient evidence that your said lodgings are of the clear yearly value of £10 or upwards if let unfurnished":

(8) At the evening sitting of the court on the 18th of September some sixty lodger claimants attended, and, by production of their rent-books or other evidence, satisfied the barrister that they actually paid the rent stated in their claims amounting to £10 per annum or upwards; a few other claimants who were unable to attend wrote letters to the same effect, which the barrister accepted as evidence, and allowed the claims in all such cases. Jenkins, however, and some hundreds of other lodger claimants neither attended nor wrote, nor was any explanation given of their absence. The revising barrister thereupon disallowed the claim of Jenkins and the claims of these others on the ground that they had respectively failed to satisfy him that they occupied lodgings of the necessary value:

(9) The registration agent who appeared on Jenkins' behalf thereupon gave the revising barrister notice in writing requesting him to state a case by way of appeal in Jenkins' case:

(10) The revising barrister, however, considered that, having regard to the provisions of section 42 and 65 of the Parliamentary Registration Act, 1843, and to the remarks of the Court of Appeal in Ireland in the case of *Hambridge* v. *Campbell*, Lawson's Registration Cases, 1893, at p. 348, he ought not to state a case.

In paragraph 14 of his report to the court, the revising barrister stated what his course of practice was in the case of disputed lodger claims; this paragraph was as follows:

"14. I treat the declaration annexed to the claim (but not the claim itself) as *primâ facie* evidence, and unless there is evidence in support of the objection, I allow the claim. If, however, the objector is able to raise a reasonable doubt, I hold that the *primâ facie* evidence in favour of the qualification is displaced, and that the claimant must attend and prove his claim. I have the less difficulty in treating the *primâ facie* evidence as rebutted in South Hackney than elsewhere, because it is apparent on the face of the claims, and was expressly admitted by both political agents during the revision, that in the case of old and new lodgers alike the agents fill in all particulars, including the amount of rent, in the form of claim and declaration before it is sent to the claimant for signature. The result is, that the evidence afforded by the declaration is, in my opinion, highly unsatisfactory in the majority of cases."

In paragraph 21 of his report the revising barrister stated a further reason (in addition to those stated above) why he refused to state a case. The paragraph is as follows:

"21. Moreover I was of opinion that by stating a case I should be throwing doubt upon the existence of the power of the revising barrister to require the personal attendance of the claimant in a case where the *primâ facie* evidence of the claim is displaced, and where there is in addition reason to suspect, as I suspected, the prevalence of a wholesale manufacture of unqualified votes. The overseers do not exercise the same supervision in the case of lodger claimants as they exercise in the case of other claimants, and indeed have been advised by counsel that they have no power to incur any expenses in investigating lodger claims. Practically the only check upon such a manufacture as I have indicated, is the power already referred to of the revising barrister, and I was unwilling to disparage it. I therefore declined to state a case unless directed to do so by the court."

The following was the form of Jenkins' claim; it was in accordance with statutory form prescribed by the Registration Order, 1895, "Form No. 2."

"To the Town Clerk of the Metropolitan Borough of Hackney.

"I claim to have my name inserted as a lodger

among the Parliamentary electors for the South Division of the Parliamentary Borough of Hackney in respect of the qualification named below:

Name of claimant in full, surname being first.	Description of rooms occupied and whether furnished or not.	Street and No. (if any) of house in which lodgings situate.	Amount of rent paid.	Name and address of landlord to whom rent is paid.
Jenkins, William	Two rooms top floor unfurnished.	8, Adastreet	5s. 6d. per week	James John Fergusson (same address)

"I hereby declare that I have, during the twelve calendar months immediately preceding the 15th day of July in this year, occupied as sole tenant and resided in the above-mentioned lodgings, and that those lodgings are of a clear yearly value, if let unfurnished, of £10 or upwards, and I hereby declare that I am on the register of Parliamentary electors for the said Parliamentary borough in respect of the same lodgings as above mentioned, and I desire to have my name inserted in the old lodgers' list.

"Dated the 20th day of July, 1903.

"(Signed) WILLIAM JENKINS."

"I, the undersigned, hereby declare that I have witnessed the above signature of the above-named William Jenkins, at the date stated above, and that I believe the above claim to be correct.

"Dated the 20th day of July, 1903."

The name, residence, and calling of the person who witnessed the claimant's signature was then set out.

Jenkins' claim had been duly objected to on the ground that his lodgings were not of the clear yearly value, if let unfurnished, of £10 or upwards; and the notice of objection had been duly served on the 20th of August upon Jenkins. The other material facts are sufficiently stated in the above-mentioned written report submitted by the revising barrister to the court.

The procedure as to an appeal from a revising barrister is governed by sections 42 and 65 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18). Section 42 enacts that "It shall be lawful for any person who shall have made any claim to have his name inserted in any list . . . or whose name shall have been expunged from any list, and who in any such case shall be aggrieved by or dissatisfied with any decision of any revising barrister on any point of law material to the result of such case, either by himself or by some person on his behalf to give to the revising barrister in court before the rising of the said court on the same day on which such decisions shall have been pronounced, a notice in writing that he is desirous to appeal . . . and the said barrister, thereupon, if he thinks it reasonable and proper that such appeal should be entertained, shall state in writing the facts which according to his judgment shall have been established by the evidence in the case, and which shall be material to the matter in question . . . and his decision upon the point of law in question appealed against, and such statement shall be made as nearly as conveniently may be in like manner as is now usual in stating any special case for the opinion of the court upon any decision of any court of quarter sessions. . . . "

Section 65 enacts as follows: "No appeal or notice of appeal . . . shall be received or allowed against any decision of any revising barrister upon any question of fact only, or upon the admissibility or effect of any evidence or admission adduced or made in any case to establish any matter of fact only. . . . "

Section 37 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), provides that "If any person feels aggrieved by a revising barrister neglecting or refusing to state any case, he may within one month after such neglect or refusal apply to the High Court of Justice upon affidavit of the facts, for a rule calling on the revising barrister . . . to show cause why a rule should not be made directing the appeal to be entertained and the case to be stated, and thereupon the High Court or any judge thereof . . . may make such rule to show cause and make the same absolute, or discharge it . . . as seems just; and the revising barrister on being served with any such rule absolute shall state the case accordingly. . . . "

The following are the other material Acts and sections bearing on the present case:

As to the lodger franchise, section 4 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102) provides: "Every man shall be entitled to be registered as a voter who is qualified as follows (that is to say), (2) As a lodger has occupied in the same borough separately and as sole tenant for the twelve months preceding the 15th day of July in any year the same lodgings, such lodgings being . . . of a clear yearly value, if let unfurnished, of £10 or upwards."

Section 22 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), provides that "where a person is entered in respect of lodgings on the register of voters for the time being in force, and desires to be entered in the next register in respect of the same lodgings, he may claim to be so registered by sending notice of his claim to the overseers on or before the 25th of July"; and the overseers are by that section directed to publish lists of all persons so claiming; and such lists "shall for the purposes of the Registration Acts be deemed to be lists of voters, and the provisions of the Registration Acts as to objections shall apply to such lists."

Section 23 of the same Act enacts as follows: "In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be *primâ facie* evidence of his qualification."

Section 28 of the same Act enacts as follows: "A revising barrister shall with respect to the lists of voters perform the duties and have the powers following: . . . (9) Subject as herein and otherwise by law provided, the revising barrister shall retain the name of every person not objected to, and also of every person objected to, unless the objector appears by himself, or by some person on his behalf, in support of his objection. (10) If the objector so appears, the revising barrister shall require him . . . to prove that he gave the notice of objection required by law to be given by him, and to give *primâ facie* proof of the ground of objection, and for that purpose may himself examine, and allow the objector to examine, the overseers or any other person on oath touching the alleged ground of objection, and unless such proof is given to his satisfaction shall, subject as herein and otherwise by law provided, retain the name of the person objected to. The *primâ facie* proof shall be deemed to be given by the objector if it is shown to the satisfaction of the revising barrister by evidence, repute, or otherwise that there is reasonable ground for believing that the objection is well founded, and that, by reason of the person

objected to not being present for examination, or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to. (11) If such proof is given by the objector as herein prescribed, or if the objection is by overseers, then unless the person objected to appears by himself or by some person on his behalf, and proves that he was entitled on the 15th day of July then next preceding to have his name inserted in the list in respect of the qualification described in such list, the revising barrister shall expunge the name of the person objected to."

Nov. 6.—*Sutton*, for the revising barrister, showed cause against the order *nisi*.—The affidavits on which the order *nisi*, was obtained do not state the facts fully or accurately. The true facts are stated in the written report which the revising barrister has submitted to the court. [Lord ALVERSTONE, L.C.J.—Why is the report not made in the form of an affidavit?] The revising barrister considered that, having regard to the observations of the court in *In re Bane*, Weekly Notes (1879), p. 200, he ought to make his report in the form of a written statement not verified on oath. [KENNEDY, J.—In Rogers on Registration (16th ed.), at p. 340, it is stated that Grove, J., in *In re Sale*, Saint's Registration Cases (2nd ed.), p. 443, is reported to have said that the observations in *In re Bane* were not to be understood as applying to all cases, but had reference only to the particular circumstances of that case; and in the subsequent case of *Reg.* v. *Soden* (*Syke's case*), 45 W. R. 234, Smith's Registration Cases (1896), p. 115, there was an affidavit made by the revising barrister.] The revising barrister is quite prepared to make his statement in the form of an affidavit if the court thinks it proper to do so. [*Lewis Thomas.*—I take no objection to the barrister's report not being in the form of an affidavit.] [Lord ALVERSTONE, L.C.J.—I think it better that in future the barrister's statement should be made by affidavit, though, of course, there may be cases in which the matter cannot be put on affidavit.] The question of yearly value is a question of fact. The barrister had before him, on the one side, the statement in the declaration annexed to the lodger claim that the lodgings were of the clear yearly value, if let unfurnished, of £10 or upwards, and that statement was, no doubt, by virtue of section 23 of the Act of 1878, *primâ facie* evidence of value; on the other hand, he had before him the following facts—namely, that the rateable value of the whole house was only £14, that the class of houses in this street was as poor as any he had inspected personally, that in former years no objection had been taken to lodger claims on the ground of value, and that the claimant had ignored the written notice which the barrister sent him on the 15th of September. It was therefore a question of the balance of evidence as to a matter of fact—viz., the value of the lodgings—and consequently, having regard to section 65 of the Act of 1843, the barrister's decision was not a matter of appeal. The evidence as to the rateable value of the whole house was an important, although not a conclusive, element, and the fact of the claimant's ignoring the notice was also material. The Scotch cases of *Andrews* v. *Armstrong*, (1897) 25 Rettie 95; *Stirling* v. *Fletcher*, (1895) 23 Rettie 120; and *Hamilton* v. *Ferguson*, (1897) 25 Rettie 94, cover the present case, and also show that no appeal lies in such a case. *Kellie* v. *Little*, (1897) 24 Rettie 379, is also an authority showing that the rateable value of the house is an element—though not a conclusive one—on the question of value, and that case was followed in *Flynn's case*, (1899) Lawson's Registration Cases 1894-1900, at p. 287. [*Lewis Thomas.*—I shall rely on *Flynn's case* as a strong authority in my favour.] The case of *Nuth* v. *Tamplin*, 8 Q. B. D. 255, which has been relied by the claimant, has no application here; it only decided that section 23 of the Act of 1878 applied to new lodger as well as to old lodger claims. I rely on the concluding portion of sub-section 10 of section 28 of the Act of 1878.

Lewis Thomas, for Jenkins, in support of the order *nisi*.—The report of the revising barrister discloses no single fact which is evidence, apart from the statutory declaration which the claimant had made as to the value of his lodgings. The claimant was entitled to ignore the written notice sent by the revising barrister on the 15th of September, which was sent out in fact before he held any court at all, and before the case had been gone into at all. The revising barrister had no right or authority to send any such notice to the claimant saying "your name will or may be struck off unless you come here with some specified form of evidence, such as your rent-book." [Lord ALVERSTONE, L.C.J.—Are you satisfied, Mr. Thomas, to take this report of the barrister as the statement of a special case?] I must take what the revising barrister says are the facts. [He was stopped.]

Lord ALVERSTONE, L.C.J.—I am not quite clear whether there is not a point of law involved here with regard to the nature of the evidence, which, as it appears from his report, the barrister was acting upon. My brother Kennedy and I both think that there is quite sufficient evidence to have the case raised. We will treat the report of the revising barrister as the statement of a special case, and we make the rule *nisi* absolute. The revising barrister, however, can add anything further to the report if he wishes to do so; and the report so altered will be treated as a special case.

Order nisi made absolute.

Solicitors for the applicant, *Russell, Cooke, & Co.*

Solicitors for the respondent, *The Solicitor to the Treasury.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Darling, JJ.) } Nov. 16; Dec. 21.

JENKINS *v.* GROCOTT. (*a.*)

Election law—Registration—Parliamentary franchise—Lodger claim—Objection as to value—Evidence pro *and* con*—Revising barrister—Jurisdiction—Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *ss.* 42, 65*—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 4, *sub-section* 2*—Parliamentary Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 22, 23; *s.* 28, *sub sections* 10, 11; *s.* 36.

A revising barrister has no jurisdiction to make the allowance of a lodger claimant's vote dependent upon the claimant's compliance with a requirement that he shall attend personally; the only way in which a lodger claimant's personal attendance can be required is by means of a summons under section 36 *of the Registration Act*, 1878.

Section 28 *of the Registration Act*, 1878, *does not absolutely confine the right of a revising barrister to disallow a lodger claim to the case of such* primâ facie *proof of the ground of objection being given as is described in sub-section* 10 *of that section; that sub-section deals*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

only with one special method of establishing a primâ facie *case against the claim; and, therefore, even although the objector's case does not satisfy sub-section* 10, *it may still consist of evidence against the lodger's claim, which the revising barrister is entitled to weigh and ought to give effect to by allowing the objection, if he thinks that the weight of such evidence is sufficient to outweigh the evidence of the lodger's declaration (which by section* 23 *of the Act of* 1878 *is constituted* primâ facie *evidence of the qualification) and any other evidence confirmatory of the declaration which the claimant may think proper to adduce. As to the weight and effect of such evidence* pro *and* con, *the revising barrister is the constituted judge, and no appeal lies from his decision.*

This was an appeal from the decision of the revising barrister for the Parliamentary Borough of Hackney, whereby he disallowed the claim of the appellant William Jenkins to be registered as an old lodger for the South Hackney Division of the Parliamentary Borough of Hackney.

The facts of the case are fully stated in *Rex* v. *Nepean*, *ante*, p. 264, and the written report submitted to the court by the revising barrister in that case was, by the direction of the court, taken to be the case stated, together with anything further the revising barrister might add to the report. The revising barrister added a further paragraph by way of amplification to paragraph 14 of his report, set out in *Rex* v. *Nepean*.

"14A. The question" (as to the course of practice adopted by the barrister in the case of disputed lodger claims) "is generally raised by the objector tendering hearsay evidence in support of his objection. For example, the objector says: 'The claimant does not occupy solely, but jointly with his brother; I have seen his brother, who says so'; or again, 'He does not pay four shillings a week, but only three shillings; his landlord told me so.' In all such cases I hold that the case of *Dalgleish* v. *Dodds*, (1894) 22 Rettie 198, precludes me from disallowing the claim on hearsay evidence; but I think I am justified in saying that the claimant must attend and prove his claim. I therefore adjourn the matter to the evening sitting, giving the claimant notice, as in the case under appeal, or summoning him to attend, pursuant to section 36 of the Registration Act, 1878, in most cases issuing a notice rather than a summons, as being less oppressive. Sub-sections 10 and 11 of section 28 of the same Act seem to render the giving of notice unnecessary, but I consider it fairer to give it."

Nov. 16.—The appeal came on for hearing on this date before a Divisional Court (Lord ALVERSTONE, L.C.J., and KENNEDY and DARLING, JJ.).

Robson, K.C., and *Lewis Thomas*, for the appellant Jenkins.—The point of law arising in this case is, what is the true construction and effect of that part of sub-section 10 of section 28 of the Registration Act, 1878, which enacts that "the *primâ facie* proof shall be deemed to be given by the objector if it is shown to the satisfaction of the revising barrister by evidence, repute, or otherwise that there is reasonable ground for believing that the objection is well founded, and"—(I emphasize the conjunction "and")—"that by reason of the person objected to not being present for examination, or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to." The revising barrister has given too wide a construction to that paragraph; he seems to think it is applicable to all cases. But it only applies where two facts are found to co-exist—namely, first, where the objector is prevented by reason of the absence of the claimant from discovering or proving the truth of his objection; and, secondly, in addition to that, that the revising barrister is satisfied by evidence, repute, or otherwise that the objection is well founded. The revising barrister has not found as a fact—and could not so find—that the objector in this case was prevented, by reason of the absence of the claimant, from proving the truth of his objection in the ordinary form; he has found that he was satisfied "by evidence, repute, or otherwise" that the objection was well founded; but we submit that those words in the sub-section only apply to a case where the objector is prevented, by the claimant's non-attendance, from being able to discover or prove the ground of his objection. The objector could have asked the claimant's landlord (whose name and address appears, as it was bound to appear, on the claim) as to whether the claimant did in fact pay 5s. 6d. a week rent; or he could have applied to the barrister to issue a summons either to the claimant or his landlord to attend, but he took no steps whatever to try and prove his objection. Under section 36 of the Registration Act, 1878, the barrister has power to issue a summons to any person to attend, under pain of a fine. Section 23 of the Act of 1878 enacts that the declaration annexed to the lodgers' claim shall be *primâ facie* evidence of his qualification. The barrister states in paragraph 14 of his report that if the objector was able to raise a reasonable doubt, he (the barrister) would hold that the *primâ facie* evidence in favour of the qualification was displaced, and that the claimant should attend and prove his claim; and in paragraph 21 the revising barrister states that one of the reasons why he refused to state a case was, lest he should be throwing doubt upon the existence of the power of the revising barrister to require the personal attendance of the claimant in a case where the *primâ facie* evidence of the claim was displaced. That, we submit, was a wholly wrong procedure; the barrister had no right to make the personal attendance of a lodger claimant a condition precedent to the allowance of the claim simply because the barrister had a reasonable doubt in his mind as to the validity of the claim; he should also be satisfied and find as a fact that by reason of the non-attendance of the claimant the objector was prevented from discovering or proving the truth of the objection. Though the claimant Jenkins did not attend personally to prove his claim, yet he was represented by the registration agent, who was present for that purpose. There was no evidence at all that the objector was prevented from proving the truth of his objection by reason of the non-attendance of Jenkins. The statutory provision making the declaration *primâ facie* evidence would be absolutely worthless if it can be displaced—not by rebutting evidence in the legal sense of evidence—but by repute or otherwise. [KENNEDY, J.—As I read the clause in sub-section 10, the words "if the barrister is satisfied by evidence, repute, or otherwise" apply to both branches of the clause—namely, to there being reasonable ground for believing that the objection is well founded, and also to the barrister being satisfied that by reason of the non-attendance of the person objected to or for some other reason, the objector is prevented from discovering the truth.] *Flynn's case*, Weekly Notes, 1900, at p. 230, is a distinct authority, that although the rateable value of the house is of some importance when the general question is being considered, yet standing alone and unrebutted, it is not *primâ facie* proof of an objection as to value. The evidence on which the revising barrister acted here was not evidence constituting *primâ facie* proof of the ground of the objection; it was merely a relevant circumstance, but was not sufficient to displace the statutory

primâ facie evidence supplied by the claimant's declaration.

Sutton, for the respondent.—The statutory form of declaration of a lodger claimant only declares that his lodgings are of the yearly value, if let unfurnished, of £10 or upwards; the declaration does not purport to declare that all the particulars in the form of the claim—such as the rent paid for the lodgings—are correct. Those particulars are often filled in by the registration agents before the claim is signed by the claimant. The revising barrister has found that the claimant Jenkins failed to satisfy him that Jenkins' lodgings were of the prescribed value; and the only question for this court is whether the barrister had any evidence before him to justify that finding. The evidence which the barrister had before him is fully stated in his report. [Lord ALVERSTONE, L.C.J.—The revising barrister has not expressly found that he was satisfied by evidence, repute, or otherwise that the objector was prevented from discovering or proving the truth respecting the entry by the non-attendance of the claimant.] He has not expressly so found, but inferentially he has. As to the cases, the Scotch cases—*Andrews* v. *Armstrong*, (1897) 25 Rettie 95; *Hamilton* v. *Ferguson*, 25 Rettie 94; and *Stirling* v. *Fletcher*. (1895) 32 Rettie 120—are important as to the effect of a claimant ignoring altogether a notice to attend, or giving no explanation on the question of value; the effect being that such conduct on the part of the claimant is an admission of the want of value. If the claimant Jenkins was himself unable to attend the evening sitting of the court on the 18th of September, he could at least have got his landlord to write to confirm the statement as to the rent paid, or have given his rent-book to the registration agent to produce to the court. The barrister was entitled to take these circumstances into consideration in arriving at his decision. If there was (as I submit there was in this case) any evidence before the barrister which would entitle him to say as a question of fact: "I am not satisfied that the claimant's lodgings are of the clearly yearly value of £10 unfurnished," then, having regard to section 65 of the Registration Act, 1843, there can be no appeal from his decision.

Robson, *K.C.*, in reply.—The lodger's declaration is intended to be the substitute for attendance, and the claim has to be in a statutory form setting out full particulars as to the lodgings, the amount of rent paid, and the name and address of the landlord: full means of information are therefore given by the claim to the objector. The only condition under which a lodger claimant can be called on to attend is where the objector has given *primâ facie* proof of the objection and is prevented from discovering the truth by the absence of the claimant, or otherwise.

Sutton further cited *Neilson* v. *Bryan*, Lawson Registration Cases 1901, p. 10, an Irish case, in which Fitzgibbon, L.J., said, "If the objector was able to raise a reasonable doubt on the subject" (*i.e.*, the value of the lodgings) "the *primâ facie* case in favour of the qualification would have been displaced, and the claimant would have to come up and show that he gave good consideration."

Cur. adv. vult.

Dec. 21.—The judgment of the court was delivered by

KENNEDY, J.—The material facts appearing in the special case are these: The claimant duly sent in his declaration annexed to his statement of claim. This was, under the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 23, *primâ facie* evidence of his qualification. The claimant was objected to on the ground that the lodgings were of insufficient value. The South Hackney list came on for revision in the Registration Court on the 15th of September. Before that date the revising barrister had made a personal inspection of the larger part of South Hackney with the borough registration officer, who had known the constituency for twenty years. He satisfied himself, he states, that the character of the constituency was very poor and the houses very small, many streets consisting entirely of houses which were little better than hovels, and that consequently the question whether or not any particular lodgings were worth £10 a year unfurnished was an extremely doubtful one. Upon the claim of Jenkins being opposed by the Conservative agent, the registration officer, in answer to a question of the revising barrister, stated that Ada-street (the street in which Jenkins' lodgings was situate) was as poor a street as any which the revising barrister had inspected; and it was proved to the satisfaction of the revising barrister that the rateable value of the whole house in which Jenkins lodged was only £14 per annum, that is, 6s. less than the amount of the rent which Jenkins in his claim stated to have been paid by him for the lodgings on which his title to be a voter depended. The town clerk, at the request of the revising barrister, had prepared a statement in regard to lodger claimants considered in relation to the rateable value of the houses in which they lodged, and this was also put in evidence. The statement appears in the schedule to the case. The relevant point in it appears to be that no less than 317 lodger claims were like that of Jenkins in respect of lodgings in houses of a rateable value of, or less than £14 per annum, and that in the case of fifty-three claims there were instances of two lodgers claiming in respect of houses whose rateable value ranged from £9 to £20. The revising barrister knew from the statement of the party agents in the previous year that they had by agreement then abstained from opposition on the ground of value to lodger claims. In the present year objection was made by the Conservative agent in numerous cases on the ground of insufficiency of value and to the claim of Jenkins amongst others. The revising barrister ordered all these cases of objection to stand over until the evening sitting of the 18th of September, stating in court that if the claimants respectively satisfied him that they paid rent amounting to £10 per annum, or that their respective lodgings were of the prescribed value, he would allow the claims, but that otherwise he would not allow them. He also gave to each claimant a notice in writing, which, in the case of Jenkins, ran thus: "To Mr. William Jenkins, of 8, Ada-street, N.E. Take notice that your claim to vote as a lodger has been objected to on the ground that your lodgings are not of the clear yearly value of £10, if let unfurnished. Your claim will, or may, be disallowed unless you produce, or cause to be produced, to me, at the evening sitting of my court, commencing at 6.30 p.m., on Friday, the 18th of September, 1903, your rent-book, or other sufficient evidence that your said lodgings are of the clear yearly value of £10 or upwards, if let unfurnished." On the 18th of September, according to the case, Jenkins did not attend. He sent no letter or other communication. No explanation of this absence was given. The revising barrister disallowed the claim.

These being the facts, the appellant contends that the decision was wrong in a point of law necessary to the decision of the case, according to the Registration Act of 1843, s. 42. The same statute provides (section 65) that there could be be no appeal on a question of fact only, or upon the admissibility or effect of any evidence or admission adduced or made

in any case to establish any matter of fact only. The points of law put forward by the appellant are two. He says, first that the revising barrister improperly made the personal appearance of the claimant a condition of his allowance of the claim; secondly, that the claimant having by his declaration given that which by the express terms of the Parliamentary and Municipal Registration Act, 1878, s. 23, was *primâ facie* evidence of his qualification, and the objector not having given, it is contended, that which is to be deemed to be *primâ facie* proof of objection under section 28, sub-section 10, of the same statute, the revising barrister was not in point of law entitled to require of the claimant what he did require by his oral notice given in court on the 15th of September, and by the notice of the same date sent the claimant in writing; and upon the claimant's failure to comply with these requirements to disallow the claim.

As to the first point, we are clearly of opinion that if a revising barrister in such a case as the present made the personal attendance of a claimant a condition of the allowance of his vote, he would be doing that which the law does not authorize. No statutory sanction for such a requirement was cited to us, and we are aware of none. The only way in which the claimant's personal attendance can be compelled is under the provisions of section 36 of the Registration Act, 1878, which empowers the revising barrister by summons under his hand to require any person to attend and give evidence or produce documents. Section 28, sub-section 11, of the same Act, to which we shall refer presently, makes sufficient the appearance of the claimant "by himself or by some person on his behalf." In commenting upon this enactment Mr. Rogers, in the 16th edition of his work (Rogers on Elections: Registration Appeals), at p. 322, speaks of these words as dispensing with the necessity of personal attendance of the person objected to, if he is represented by some one in court. "But, of course," he adds, "the absence of a person objected to will in some cases weigh with the revising barrister in deciding as to the facts of the case." If in this case the revising barrister could be shown to have made the allowance of the claimant's vote dependent upon his compliance with a requirement of personal attendance and had disallowed his claim because the claimant did not personally appear, we should be of opinion that his decision could not be supported. But, as we understand the facts, although the revising barrister seems by the statements in paragraphs 14 and 21 of the special case to have entertained a mistaken opinion on this point of the personal appearance in court, it appears to us to be the fair interpretation of the special case and of the written notice sent to Jenkins, which we have already cited, that he did not disallow this vote or intimate, either by his statement in court or by the written notice, that he would disallow it on the ground of the failure of the claimant to appear personally on the 18th of September. He gave notice that he should require certain evidence to support the claim; but neither orally nor by notice did he insist upon the personal attendance of the claimant; in fact, as the case tells us, in some cases where claimants were unable to attend he accepted as sufficient evidence letters written by them to him stating that they had paid rent sufficient to satisfy the statutory standard of qualification. We desire to express our view that the statute does not make personal attendance absolutely necessary; such a requirement might entail serious hardship in the case of these lodger claimants who, to a very large extent, form part of a very poor class which could ill afford to bear the loss of time involved in personal attendance at the proceedings of the revising barrister's court.

We now pass to the second point made by the appellant, that the provisions of section 28, sub-section 10, have not been complied with. In our view this contention rests upon an erroneous conception of the meaning and intent of this enactment. It is not intended by the Legislature, in our view, absolutely to confine the right of the revising barrister to disallow a claim when the claimant has by his declaration given *primâ facie* evidence of his declaration, to the case of such *primâ facie* proof of the ground of objection as is therein described. Section 28, sub-section 10, deals only with one special method of establishing a *primâ facie* case against the claim, and then in sub-section 11 goes on to say that in case of such *primâ facie* proof of objection being given the revising barrister shall (not may) expunge the name of the person objected to unless the person objected to appears by himself or by some person on his behalf and proves his title to inclusion in the list of voters. The section does not prevent the revising barrister from considering and, if he thinks it just, giving effect to, by a decision adverse to the claim, any proper evidence against the claim. If, to take a single example, the objector, in order to meet the *primâ facie* evidence afforded by the claimant's declaration, at once called the landlord or produced the lodger's rent-book, and by this evidence proved that the rent paid was much below the statutory standard, the revising barrister would, in our view, clearly be entitled in point of law to say that if the matter stood there he had evidence which entitled him to reject the claim. As to the weight of such evidence and the proper effect to be given to it, he is the constituted judge, and no appeal lies from his decision. Section 28, sub-section 10, and sub-section 11, merely enacts in substance that if the objector's *primâ facie* proof of the ground of objection is made out in a particular way, then, unless it is rebutted in a particular way, the revising barrister *must* disallow the claim. If the objector's case does not satisfy section 28, sub-section 10, it still may consist of evidence against the claim which the revising barrister is entitled to weigh, and may give (and ought to give) effect to, if he thinks its weight is sufficient to outweigh the *primâ facie* evidence of the claimant's delaration, and any other evidence confirmatory of the declaration which the claimant may think proper to adduce.

In this case the revising barrister had on one side the declaration, and on the other side the rating of the house within formation as to the character of the street in which it was situated. The rating was not necessarily conclusive evidence against the claim; it was some evidence only, as the court pointed out in regard to the valuation roll in *Kellie* v. *Little;* and the revising barrister decided to give the claimant the chance, if he wished to take it, of "producing or causing to be produced" at a later sitting of the court evidence, either by his rent-book or otherwise, in support of the declaration. Many other claimants in the like position availed themselves of the chance, and succeeded; this claimant did not do so; and the revising barrister, in this state of things, held adversely to the claim. He had to decide what effect he ought to give to the evidence *pro* and *con;* and even if this court could upon the same evidence have decided otherwise it has no power to overrule his decision.

Appeal dismissed, without costs.

Solicitors for the appellant, *Russell, Cooke & Co.*

Solicitor for the respondent, *The Solicitor to the Treasury.*

Prob. Div. & Adm. Div. Probate. } July 29, 30, 1903.

WILSON v. BASSET. (a.)

Probate—Undue influence—Fraud—Costs.

The Court held that, inasmuch as there did not appear to be anything unreasonable in the charge of undue influence and fraud being made, it was justified in allowing the plaintiff's costs as between solicitor and client to come out of the estate, and subject thereto the costs of the defendant as between party and party to be paid out of the estate also.

Action.

The plaintiff in the action, Frances Mary Wilson, claimed revocation of probate of a will dated the 2nd of December, 1892, the probate having been granted on the 22nd of June, 1902, and she propounded a will dated the 28th of May, 1900.

The testatrix, Eliza Sarah Bird, died on the 2nd of April, 1902, and the plaintiff was her niece.

The defendant, who was a nephew of the deceased, pleaded, *inter alia*, that the execution of the will was obtained by the undue influence of the plaintiff, and stated that the substance of his case was that the plaintiff and her mother had threatened to send the testatrix, who was a woman of 82 years of age, to the workhouse unless she made a will in favour of the plaintiff.

With respect to the allegation of fraud the defendant alleged that the plaintiff and her husband had led the deceased to believe that the defendant was a bankrupt and was unable to assist her financially.

The facts were shortly as follows: In May, 1900, the plaintiff's husband called on a gentleman named Wright, who was not a solicitor, and asked him to take instructions from the testatrix for her will. This he did, and the testatrix in the presence of the plaintiff stated that she wished to leave all her property to the plaintiff. A solicitor, on the suggestion of Mr. Wright was subsequently sent for, who drew a will, and this was the one dated the 28th of May, 1900. The doctor and the clergyman deposed to the fact that the deceased appeared to be perfectly rational and to have understood what she was doing.

The court found for the will, and negatived the charge of fraud and undue influence.

W. O. Willis, for the plaintiff, asked that the defendant should be condemned in costs in accordance with the usual practice where a charge of undue influence and fraud was put upon the record and failed.

Slade Butler, for the defendant, contended that there was no hard and fast rule.

He cited *Orton* v. *Smith*, 3 P. & D. 23; *Fulton* v. *Andrew*, 7 H. L. 448; *Tyrrell* v. *Painton*, [1894] P. 151.

WALTON, J., in delivering judgment, said the present case being within *Brown* v. *Fisher*, 63 L. T. 465, and *Fulton* v. *Andrew*, 7 H. L. 448, there was a presumption against the will of May, 1900, which presumption the person propounding the will was bound to rebut, as Lord Hatherley said in *Fulton* v. *Andrew*, "by showing the righteousness of the transaction." The defendant was, at all events *primâ facie*, entitled to presume what the law presumes, and to call upon the plaintiff to prove not merely the valid execution of the will, but also that it was not obtained by fraud or undue influence, and that it does really express the true will of the deceased. The defendant did this by pleading undue influence and fraud. There may be cases which fall within the rule laid down in *Brown* v. *Fisher*, 63 L. T. 465, and in which, nevertheless, the circumstances may be such as make it unreasonable for the person disputing the will to plead undue influence and fraud. But there is nothing in the circumstances of the present case which made it unreasonable for the defendant by his pleading to raise those issues. I think that the circumstances of the case and the conduct of the plaintiff reasonably excited suspicion and justified those pleas.

The fact that the plaintiff has now, by the evidence adduced on her behalf, succeeded in discharging the additional burden of proof, does not affect the right which the defendant had to call upon her to do it. I shall follow the case of *Orton* v. *Smith*, 3 P. & D. 23, and, in doing so, I do not think that I am departing from the established practice. The order I make is that the plaintiff's costs, as between solicitor and client, be taken by her out of the estate, and, subject thereto, that the costs of the defendant as between party and party be paid out of the estate.

Solicitors for the plaintiff, *Welman & Sons*, for *Last & Goodford*, Windsor.

Solicitor for defendant, *R. L. Butler*.

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Divorce. } Oct. 30.

PAIN v. PAIN. (a.)

Divorce—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 5—*Desertion—Condonation—Revival.*

The Court held that the statutory offence of desertion created by the Matrimonial Causes Act, 1884, *may be revived by subsequent adultery.*

This was a petition for dissolution of marriage on the ground of adultery and desertion. The desertion had been condoned and the question for the consideration of the court was whether that offence, which was the statutory offence created by the Matrimonial Causes Act, 1884, could be revived by subsequent adultery.

The facts were shortly as follows:

In September, 1901, the husband left the wife, telling her that he intended to go away with a woman and that nothing would alter his determination. The wife then filed a petition for restitution of conjugal rights and obtained a decree which the husband did not comply with. She then filed a petition for dissolution of marriage, but during the pendency of that suit she resumed cohabitation on an assurance that her husband had given up the woman. The petition was then dismissed by consent. She subsequently discovered that her husband was still intriguing with the woman in question, and she thereupon declined to live any longer with her husband, who accordingly left her on the 10th of February, 1903, and in the following month this petition for dissolution was filed.

Priestley, K.C., and *Barnard*, for the petitioner, cited *Blandford* v. *Blandford*, 8 P. D. 19, and *Bigwood* v. *Bigwood*, 13 P. D. 89.

Le Bas, for the respondent, did not oppose the suit.

BARNES, J., held that the statutory offence of desertion had been revived by the subsequent adultery, and pronounced a decree *nisi*.

Solicitors for the petitioner, *Norris & Norris*.

Solicitors for the respondent, *Keen, Rogers, & Co.*

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law

Prob. Div. & Adm. Div. Divorce. } May 4, 18, 1903.

HOUGHTON v. HOUGHTON. (a.)

Divorce—Incest—Condonation—Revival—Desertion.

The husband committed incestuous adultery, which the wife condoned, but he afterwards deserted her.

The Court held that such desertion revived the condoned incestuous adultery, and granted a decree nisi.

This was an undefended suit. The facts were briefly as follows:

Mary Jane Houghton was married to David John Houghton in 1887, and there had been one child of the marriage.

In the year following the husband committed adultery with the wife's sister, but in order to avoid scandal the wife forgave her husband and lived with him, at least to the extent that marital intercourse was renewed between them, although for some months the incestuous adultery continued. About five years after the last act of incest the husband went to Canada, stating that he was going for eighteen months for his health, and for a time he corresponded with his wife.

In 1901 the husband obtained a decree at Detroit, U.S.A., dissolving his marriage on the ground of desertion, but the wife was not served with the documents in that suit.

In 1902 the husband returned to this country for a short time, but did not go back to the wife.

Since the husband's first leaving for Canada, the wife had maintained herself by keeping a tobacconist's shop, and afterwards by taking a situation as a housekeeper, and the reason, as she alleged, for not taking proceedings when the offence of desertion was complete was her want of means.

Newson, for the petitioner, contended that the wife was entitled to a decree of this court dissolving her marriage on the ground of incest; for, although it had been condoned by subsequent cohabitation and intercourse, the incest had been revived by the desertion. Although desertion was not an offence known to the ecclesiastical courts it would, since its creation by statute, have the same power to revive a matrimonial offence as the older offences had. There was no case which decided that it would have that power; but the words in *Dent* v. *Dent*, 4 Sw. & Tr. 105, and *Cooke* v. *Cooke*, 3 Sw. & Tr. 126, on the doctrine of the revival of a condoned offence were very wide and might by implication fairly include the offence of desertion.

He cited also *Palmer* v. *Palmer*, 29 L. J. P. M. & A. 124; *Cargill* v. *Cargill*, 1 Sw. & Tr. 235; and *Binney* v. *Binney*, 69 L. T. 491.

Cur. adv. vult.

JEUNE, P., in giving judgment, said: I think I can yield to the arguments addressed to me, and I am anxious to do so if I can. The principle is as clear as possible. When the law speaks of condonation and revival, it means that the offence is condoned on the condition that there shall be in the future a proper compliance with the matrimonial decencies and duties, and a person who goes back to live with his or her guilty spouse goes back on that implied condition alone. Desertion is as serious a matrimonial offence as can be imagined, because it probably results in breaking up the matrimonial home. My doubt when this case first came before me, and I do not say that it has even now been altogether dispelled, arose upon the terms of the Act of 1857 (20 & 21 Vict. c. 85), which made desertion for the first time a matrimonial offence. The Act made desertion a matrimonial offence for certain specified purposes, and amongst these is not the revival of previous misconduct. In holding, as I am about to hold, I feel that I am doing something which is not mentioned in the Act itself. But condonation, not only in previous cases under the old ecclesiastical law, which, of course, would apply in suits for judicial separation, but not in suits for dissolution of marriage, is to be, in the terms of the Act, an answer to the suit; and in the old sense of the term—namely, conditional on future good conduct. So far, then, the Act of 1857 proceeded by bringing in the old technical meaning of the law with the condition attached to it that there should be future good conduct. Under these circumstances one is entitled to look, not only at such acts of matrimonial misconduct as were recognized before the Act, but to look also at the law as it stands. As it stands desertion is a matrimonial offence of a serious kind, and one would be ignoring the effect of condonation—namely, its conditional forgiveness, by holding that cruelty and adultery would revive a former matrimonial offence, but that desertion would not. There is no distinct decision on the point, but the language used by the judge ordinary in *Dent* v. *Dent*, 4 Sw. & Tr. 105, appears to me to be wide enough to carry one to that conclusion. He said this: "Now the rule of law is that all condonation is conditional, and the condition is that you shall treat her as a husband ought to treat his wife, and if you hereafter break your matrimonial obligation and are guilty of adultery or of cruelty the condoned offence is revived." That would seem to bring in the case of desertion equally with cruelty and adultery. *Dent* v. *Dent* was decided in 1865; that is, some years after the passing of the Matrimonial Causes Act, 1857. The decision in *Cooke* v. *Cooke*, 3 Sw. & Tr. 246, I look upon very much in the same way. It was decided in 1863, and the judgment of the full court contains this passage: "The wife appears to have been willing to condone provided she was treated by her husband in the manner she had the right to expect if she returned to live and cohabit with him. She was on her return to him not treated by him in the manner she ought to have been, and on non-compliance with that which was a condition of condonation the offences said to have been condoned were revived." I do not see why that also should not apply to a case of desertion equally with adultery and cruelty. It rests on the meaning to be attached to condonation; and taking it to mean that it is a conditional forgiveness, I think I am justified in holding that the Act of 1857 is as efficacious to revive by subsequent desertion as it is to revive by subsequent cruelty or adultery. I am prepared to take this step on principle—a principle which may be said to be to some extent supported by judicial authority, or, at any rate, not to be contradicted by it. I therefore pronounce a decree *nisi* with costs, and I order that the petitioner may have the custody of the children of the marriage. I do not like to date back the decree to the day on which the case was first before the court, as I am now asked to do, but I will say that the petitioner may apply to have the decree made absolute from six months from to-day.

Solicitors, *Spencer, Chapman, & Co.*

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Nov. 5, 6; Dec. 21.

In re RAYNER.
RAYNER *v.* RAYNER. (*a.*)

Will—Construction—Investment—"Securities"—Evidence.

A testator gave all his property, real and personal, to trustees upon trust for conversion, and continued: "I declare that all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit. And I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities."

Held, that the testator had not used the word "securities" in its strict and primary sense of "money secured on property," but in its popular sense, so as to include railway stocks and shares.

Per Vaughan Williams, L.J.—*The meaning of a word is relative to the circumstances and occasion and date on which the word is used, and it is the duty of a judge to inform his mind, not only by reference to dictionaries, but also by evidence, of the meaning ordinarily given to such a word.*

This was an appeal from a decision of Farwell, J.

By his will, dated the 11th of December, 1895, Edward William Rayner, after giving his property to his trustees upon trust for conversion, continued: "And I declare that my trustees may in their absolute discretion postpone the sale and conversion of my real and personal estate or any part thereof so long as they shall think fit. And that the rents, profits, and income to accrue from and after my decease of and from such part of my said estates as shall for the time remain unsold and unconverted shall after payment thereout of all incidental expenses and outgoings be paid and applied to the person or persons and in the manner to whom and in which the income of the proceeds of such sale and conversion would for the time being be payable or applicable under this my will if such sale and conversion had been actually made. And I declare that all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit. And I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities."

At the time of his death the testator had a large part of his property invested in stocks and shares which would not come within the strict meaning of the word "securities."

A summons was taken out by the trustees of the will asking (*inter alia*) upon the construction of the will (1) whether the trustees were authorized to appropriate out of investments belonging to the testator at his death in part satisfaction of the trust legacy, ordinary stock of the Midland Railway Co.; (2) whether the trustees were authorized to purchase with moneys belonging to the trust legacy ordinary shares of the London and North-Western Railway Co.

Farwell, J., held that the word "securities" must be interpreted in its strict and primary sense of "money secured upon property," and he answered both questions in the negative.

The persons beneficially interested in the property appealed.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Upjohn, K.C., and *MacConkey*, for the appellants.—The strict legal meaning of "securities" rests upon the authority of *Huddleston* v. *Gouldsberg*, 10 Beav. 547. *Harris* v. *Harris*, 9 W. R. 444, 29 Beav. 107, and also *Ogle* v. *Knipe*, 17 W. R. 1090, 8 Eq. 434, are to the same effect. But these cases all really applied to a different state of things, and to a period when the modern facilities for dealing with stocks and shares did not exist. In modern times the word "securities" invariably includes stocks and shares. It is used in this sense in the Conveyancing Act, 1881, the Settled Land Act, 1882, and the Trustee Act, 1893, and also in the Rules of the Supreme Court, see ord. 22, r. 17. In Cavanagh's Law of Securities for Money, the Encyclopædia Britannica, vol. 32, p. 864, Chambers' Encyclopædia (1895 ed.), and Murray's Oxford Dictionary, sub. tit. Investments, the word "securities" is used to include stocks and shares, and it is used in this sense daily in the money article in the *Times*.

They also cited *Cocks* v. *Chapman*, 45 W. R. 67, [1896] 2 Ch. 763; *Little* v. *London Joint Stock Bank*, 39 W. R. 449, [1891] 2 Ch. 270; *Tucker* v. *Wilson*, 1 Peere Williams 260; *Murphy* v. *Doyle*, 27 L. R. Ir. 495, 29 L. R. Ir. 333; *Dicks* v. *Lambert*, 4 Ves. 725.

Bramwell Davis, K.C., and *Rotch*, for the trustees.

Butcher, K.C., and *E. Ford, contra.*—"Securities" has been used in its strict sense of money secured on property in a long succession of cases, some of which are more recent than *Ogle* v. *Knipe*: see *Trafford* v. *Boehm*, 3 Atk. 440; *Turner* v. *Turner*, 21. L. J. Ch. 843; *M'Donell* v. *Morrow*, 23 L. R. Ir. 591; *Murphy* v. *Doyle*. The whole current of the authorities show that "security" has a definite legal meaning attached to it; and the courts will give it this primary legal meaning in the absence of context: see Wigram on Wills (3rd ed.), proposition 2, p. 17. The argument drawn from the Acts of Parliament is really in our favour, as the Acts always contain a definition clause to show that "securities" does include stocks and shares.

They also cited *Dawson* v. *Higgins*, 48 W. R. 673, [1900] 2 Ch. 756; *Higgins* v. *Dawson*, 50 W. R. 337, [1902] A. C. 1.

Upjohn, K.C., in reply, cited Wigram on Wills, proposition 5, p. 51.

Cur. adv. vult.

VAUGHAN WILLIAMS, L.J.—The question the court has to decide in this case is, what is the meaning of the word "security" in this will?

In my judgment, in this will the meaning of that word, or rather the word "securities," is determined, for reasons which I will presently discuss, by the context of the will, and it is unnecessary, therefore, to discuss generally what is the meaning of the word "security," either its common and ordinary meaning at the date of the will or what is the meaning of the words "strict and primary sense" in proposition 2, in the treatise of Wigram, V.C., on Extrinsic Evidence, for in my judgment it is apparent from the context of this will that the testator has not used the word "securities" in what Farwell, J., holds to be the strict and primary sense, but in what may be called its popular sense; which I may observe is a sense in which I am of opinion, without the assistance of either dictionary or the evidence of the commercial or other witnesses, it is applied habitually by those who have to deal with property transferable by the assignment of indicia of property, be they commercial men or non-commercial men, lawyers or laymen, and a sense in which it has been used daily in the *Times* since the year 1886, and in divers Acts of Parliament.

Now, the reasons why I have formed this conclusion as to the meaning of the word "securities" in this will are these.

Take the passage in the will "and I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities." This obviously means "the same investments," and I think that the effect of using the words "moneys invested" and the word "securities" to cover the same subject-matter is not to narrow down or limit the natural sense of the words "moneys invested," but to extend what Farwell, J., considers to be the strict and primary meaning of the word "securities," so as to cover anything which, according to the strict and primary meaning of the words "moneys invested," would be covered or connoted by those words, and in my judgment property in the shape of railway shares falls within the meaning both of the words "moneys invested" and of the word "securities."

The moneys invested are authorized to be left and continued *quâ* investment *in statu quo*.

I wish to add, although it is not necessary to do so for the decision of this case, having regard to the ground upon which the court has decided it, that in my judgment the meaning of a word is relative to the circumstances and occasion and date on which the word is used, and that if a judge is entitled to take into consideration at all the fact that at the date of the will "securities" is largely used in a sense other than a pledge for an advance of money, or in the particular sense of investments in property transferable by the assignment of indicia, such as certificates, it is the duty of the judge to inform his mind not only by reference to the dictionaries of good reputation, but also to inform himself by evidence of the meaning ordinarily given to such a word amongst those who deal in such property. A rule prohibiting a judge from so doing would be, in my judgment, a most serious limitation of the rule that evidence is admissible for the purpose of explaining the meaning of the words used by the testator, as distinguished from evidence of the testator's intention; and would be also a serious limitation of the rule that for the purpose of explaining the meaning of the words used by the testator, evidence is admissible of the circumstances surrounding the testator at the time of making his will. I think that evidence is admissible to show that expressions used in the will had acquired an appropriate meaning either generally or by local usage or amongst particular classes, and that "where any doubt arises upon the true sense and meaning of the words themselves or any difficulty as to their application under the surrounding circumstances the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party." See the opinions of Parke, B., and Tindal, C.J., in *Shore* v. *Wilson*, 9 Cl. & Fin. 355, 566, and the judgment of Parke, B., in *Richardson* v. *Watson*, 4 B. & Ad. 787, 799. I quite recognize that a word used in a technical sense in a legal instrument must be construed in its strict legal sense, which in relation to such a document is its primary sense, although not necessarily its archaic sense, or its popular sense at the date of the instrument; but I do not think that a decision like that in *Ogle* v. *Knipe* controls the meaning of the word securities in a description of property disposed of by the testator.

That case merely decides that in that will, at that date, the words "money and securities for money of every description" (very different words from the present) did not carry Bank of England stock and canal shares. The decision certainly did not impress a "technical meaning" on the word "securities" or limit for ever the meaning of the word "securities" to its narrow archaic meaning.

ROMER, L.J.—In the absence of any context or admissible evidence from which it can be gathered that the word "securities" has another meaning, I agree with Farwell, J., that it must be taken in a will to have the meaning stated by him. And that the expressions "securities for money" and "investment of money in securities" would accordingly in the absence of anything sufficient to negative that view, be held to apply only to securities in the sense above stated. But the meaning of the word is a flexible one, and I recognize that it is largely used in a wider or different sense, and in particular is widely used as a synonym for "investments." Now, in the present case, after much hesitation and with the doubt I generally feel on the rare occasions when I come to a different conclusion from that arrived at by Farwell, J., I think there is sufficient in the will in question to show that the testator has used the word "securities" in the sense of "investments." I arrive at this conclusion chiefly from the clause in the will "and I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities." On the whole I think that the testator in the first part of this clause intended by the words "any moneys invested at my death" to refer to all investments of his moneys existing at the date of his death, and that by the words "the same securities" he meant "the same investments." This being so, I agree in thinking that the appeal should be allowed, for the word "investment" would cover investments by the testator in shares.

STIRLING, L.J.—The question on this appeal is whether the word "securities" as used in the will dated the 11th of December, 1895, of Edward William Rayner (who describes himself as of the City of Liverpool, in the county of Lancaster, general broker) includes stocks and shares of railway and other companies.

Farwell, J., has held that it does not, and his decision is in accordance with that of James, V.C., in 1869 in *Ogle* v. *Knipe*, on a will dated the 16th of March, 1841. Although there is not to be found in the English reports any subsequent decision on the point, I believe that this case has been repeatedly followed by judges of the Chancery Division. It is said, however, that the meaning of the word has changed since 1869, and that as ordinarily understood by mercantile men both in 1895 and at the present time it includes stocks and shares as well as mortgages on land and other property. As at present advised I am not prepared to say that this contention is well founded, but I think it is unnecessary to decide the question, which is one of importance, on this occasion. Even assuming that in the primary meaning of the word it is limited to "money secured on property," still, as is laid down by Lord Cranworth in *Hicks* v. *Sallitt*, 2 W. R. 173, 3 D. M. & G. 782, 794, another meaning may be given to it if there be pointed out "either some inconsistency in different parts of the will or a positive statement of such being the sense intended, or a *reductio ad absurdum* by not taking the word in a qualified sense." In *Abbott* v. *Middleton*, 7 H. L. C. 68, 89, the same learned judge says: "Where by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then if the language admits of two constructions we may reasonably and properly adopt that which avoids these anomalies, even though the construction

adopted is not the most obvious or the most grammatically accurate." This passage was quoted with approval by Lord Cairns in *Gordon* v. *Gordon*, L. R. 5 H. L. 254, 284.

Now the passage to be construed is this, "I declare that all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit. And I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities." If in the second of these sentences the word "securities" is limited to money secured on property, the result would be that if the testator at the time of his death had standing in his own name two parcels of shares, one being an investment of his own while the other was only security for an advance of money, the trustees would be at liberty to retain the latter but not the former. I think that such a course would be capricious and without any intelligible motive on the part of the testator, who, it is to be remembered, was a business man. In my opinion, therefore, the word "securities" in both sentences ought to be held to mean "investments."

Appeal allowed.

Solicitors, *W. Wynne & Sons*, for *Evans, Lockett, & Co.*, Liverpool; *Van Sandau & Co.*, for *Wright, Beckett, & Co.*, Liverpool; *H. Forshaw & Hawkins*, Liverpool.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Dec. 16.

WEBSTER v. SHARP & CO. (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Partial incapacity—Weekly payment—Earnings before accident—Earnings after accident—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clause* 2.

Where a workman claiming compensation under the Workmen's Compensation Act, 1897, *is at the time of the arbitration only partially incapacitated, and has resumed work and is earning wages, but those wages are less than half the wages he was earning before the accident, there is no general rule by which the arbitrator ought, in assessing compensation, to award the maximum weekly payment allowed by the Act—viz., a payment of half the amount of the average weekly earnings before the accident; but he must exercise his discretion in each particular case.*

Appeal from an award of the judge of the Bradford County Court, in an arbitration under the Workmen's Compensation Act, 1897.

The workman in this case met with an accident in the course of his employment which resulted in his being incapacitated for work. His average weekly earnings before the accident were 24s. 9d. The workman and the employers came to an agreement whereby the employers were to pay him during the incapacity the weekly sum of half the amount of his average weekly earnings before the accident—viz., 12s. 4½d. The employers made this weekly payment for two years, and at the end of that time the workman resumed work under them. His average weekly earnings were then 11s. The employers having discontinued the weekly payment, the workman filed a request for arbitration as to the amount of compensation payable to him under the Act. The county court judge made an award for a weekly payment of 12s. 4½d., and recorded the grounds of his decision in the following note: "In my opinion the meaning of the Act is that the workman is to receive compensation for his loss of wages whether this is total or partial, but that for the protection of the employer there is the proviso that no more than half his wages is to be paid him. In the case of partial disablement I think the court should first ascertain what is the loss of wages the person has sustained—in this case 13s. 9d. I think that, if this is less than the maximum allowed—viz., half the original wages, the whole of such amount ought to be awarded, unless there is some reason to the contrary, but the court is not bound to award the whole of that amount, but may award a less amount, say, half the difference, if it sees fit. In this case 13s. 9d. exceeds the half wages, which are agreed at 12s. 4½d.; so I cannot give more than that amount; but I see no reason why I should not give the full amount allowed by the Act and award 12s. 4½d. This is the rule I always follow in these cases unless some grounds are given for varying it."

The employers appealed.

S. T. Evans, K.C., and *Minton-Senhouse*, for the employers.—The learned county court judge has laid down for himself a rule, which he follows in nearly every case, of bringing up the amount of compensation as nearly as possible to the original wages. His practice is to award the injured workman the maximum compensation allowed by the Act—viz., half the amount of his original weekly earnings, unless he is since the accident earning a larger sum a week than half his original weekly earnings. This involves a noncompliance with clause 2 of the first schedule to the Act, which provides that "in fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." The effect of the county court judge's rule of practice is that a man who is partially disabled gets more than a man who is totally disabled, and all inducement is taken away from employers to take on an injured workman at reduced wages.

J. J. Wright, for the applicant.—In *Illingworth* v. *Walmsley*, [1900] 2 Q. B. 142, 48 W. R. Dig. 117, it was held that clause 2 of the first schedule to the Act does not operate so as necessarily to cut down the maximum rate of compensation allowed by clause 1 (*b*) of the schedule. The county court judge in this case did not disregard clause 2. He conformed to the schedule. He did not consider himself bound to award the maximum, but he thought that he had power to do so.

COLLINS, M.R.—I am of opinion that the appeal must be allowed, and that the case must go back to the learned county court judge. He seems to have applied a hard-and-fast rule for determining the amount of the weekly payment where the workman is only partially disabled and is earning wages since the accident, which he thought ought to be followed in all cases. I am of opinion that it is impossible for a county court judge to lay down any hard-and-fast rule, and that it is his duty to exercise his discretion in each particular case. The statute limits the maximum weekly sum which may be awarded—viz., half the wages which the workman was earning at the time of the accident. That is the maximum weekly payment which the county court judge has to deal with, and it is to be noticed that the maximum is the same whether the compensation be for total or for partial disablement. It clearly does not follow that the maximum is to be given in every case. In my

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

opinion it may well be that in some cases the judge would be well-advised not to give the maximum. The statute imposes on the county court judge the duty of exercising his discretion in the matter. Clause 2 of the first schedule says that "in fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." The difference which is here suggested as a topic for consideration seems only to be relevant for the purpose of reducing the payment below the maximum allowed by the Act. Although the county court judge is not bound to reduce the amount, he is contemplated as being in the position of a person who is invited to readjust a weekly payment which is already at the maximum with the view of reducing it. And this is so whether he is, as in this case, hearing an original application by the workman, or whether he is hearing an application under clause 12 of the schedule. I think the county court judge made a mistake in feeling himself bound to follow the rule of practice which he has adopted, and the case must therefore go back in order that he may apply his judicial discretion to the matter.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitor for the applicant, *W. H. Scott*, Bradford.

Solicitors for the employers, *Wynne-Baxter & Keeble.*

From County Palatine of Lancaster. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Dec. 3, 4.

BRIGG *v.* THORNTON AND GRANT. (*a.*)

Landlord and tenant — Lease — Covenant — Restrictive covenant — Trade — Covenant not to let adjoining property for purposes of a particular trade—Meaning of term "artistic and heraldic stationer"—"Picture post-cards."

In 1901 *the defendant T. demised to the plaintiff for twenty-one years premises in an arcade by an agreement containing a stipulation on the part of the plaintiff "not to carry on upon the premises any other trade or business than that of a dealer in pictures, prints, engravings, photographs, and articles of vertu, artistic and heraldic stationer, frame maker and dealer in photographic frames, artists' colours, and the accessories to said trade or business," and a stipulation on the part of the lessor (the defendant T.) "not to let any other portion of the said arcade for the trade or business hereinbefore mentioned to be carried on by" the plaintiff. In* 1902 *the defendant T. demised to the defendant G. for one year other premises in the arcade, adjoining the premises demised to the plaintiff, and this agreement contained a stipulation on the part of G. not to carry on, upon the premises demised to him, any other business than that of a "librarian, newsagent, bookseller, or stationer." The defendant G., in the course of the business carried on by him in the arcade, sold and dealt in* (inter alia) *picture post-cards, Christmas and New Year cards.*

The plaintiff claimed an injunction and damages both against T. for letting and permitting the use of, and against G. for using, premises in the arcade for the purpose of carrying on a business similar to that carried on by the plaintiff.

Held, that, having regard to the terms of the plaintiff's agreement, the business contemplated to be carried on by him was of an aggregate description, and included as a substantial portion thereof that of "artistic and heraldic stationer"; that the subsequent letting of other premises in the arcade to the defendant G. for the purpose of carrying on (inter alia) *the business of a "stationer" generally, without any limitation, was a breach on the part of the lessor T. of his stipulation in the agreement with the plaintiff "not to let" any other part of the arcade for the purpose of the trade or business carried on by the plaintiff, and that the defendant T. was liable in damages to the plaintiff in respect of such breach.*

Held, further, that the plaintiff's claim against G. failed altogether, inasmuch as the express terms of the restrictive covenant only extended to "not letting," and did not restrict "the using of" the premises for the purpose above mentioned.

Kemp *v.* Bird, 25 *W. R.* 838, 5 *Ch. D.* 549, *discussed.*

Appeal from the decision of Hall, V.C., in the Palatine Court of Lancaster.

The facts were as follows: The plaintiff C. A. Brigg carried on business at Nos. 6 and 7, The Arcade, Lord-street, Liverpool, as a fine art dealer. The defendants, Robert and James Thornton, builders and contractors, were the landlords of the arcade in which the plaintiff's shop was situate. By the action as originally brought the plaintiff sought for an injunction to restrain Messrs. Thornton as such landlords from letting and allowing to remain let certain other premises, Nos. 8 and 9 in the arcade, immediately opposite those occupied by the plaintiff, or any part thereof, or any other portion of the arcade, for the purpose or any of the purposes of the business carried on by the plaintiff, in alleged violation of a covenant contained in the plaintiff's agreement for lease.

The action first came on for trial on the 25th of February, 1903, but upon being partially opened the Vice-Chancellor intimated that the tenant of the premises Nos. 8 and 9 ought to be joined as a defendant in the action, so as to have the case properly dealt with. Accordingly the defendant C. J. Grant, the tenant of Nos. 8 and 9, was added as a party, and the case came on for trial on the 29th of April.

The agreement for lease between the plaintiff and the Messrs. Thornton was dated the 30th of October, 1901, and contained, on the part of the plaintiff, the lessee, the following clause: "Not to carry on upon the premises any other trade or business than that of a dealer in pictures, oil and water colours, prints, engravings, photographs, etchings, and articles of vertu, artistic and heraldic stationer, frame-maker and dealer in photographic frames, artists' colours, and the accessories to the said trade or business." The agreement contained the following stipulation on the part of the landords: "Not to let any other portion of the said arcade for the trade or business hereinbefore mentioned to be carried on by the tenant" (*i.e.* the plaintiff). The plaintiff's agreement for lease was for twenty-one years at a rent of £150 per annum, and the plaintiff went into possession of the premises, which had only recently been completed, but no lease had as yet actually been granted. After the plaintiff had gone into occupation he found that all the shops in the arcade were not let, as he had been led to understand, and some remained unlet for a considerable time, one of them, the cause of the action, remaining unlet for twelve months after the plaintiff had gone into occupation

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

of his shop. During the temporary absence of the plaintiff, he was told that the premises, Nos. 8 and 9, were let to a Mr. Latarche, and on his return the plaintiff found that it was to be opened as a "Libraire Francaise," and that stationery and picture postcards would be sold there. Directly these were exhibited the plaintiff wrote to the defendants Thornton calling their attention to the fact, and suggesting that they should inform the tenant that he must not sell or advertise these goods in the arcade, as such articles came within those specified in the clause in the plaintiff's agreement. Some correspondence took place, but nothing resulted, and various articles, such as Christmas cards and New Year cards, were from time to time exhibited, also views similar to those the plaintiff sold.

By an agreement dated the 25th of September, 1902, and made between the defendants Thornton and Grant, the Thorntons leased to Grant, for a term of one year, to begin on the 1st of October, 1902, a stall occupying the whole front portion of the shop Nos. 8 and 9 in the arcade. This agreement contained a stipulation that the tenant (Grant) should not carry on any other business than that of "a librarian, newsagent, bookseller, or stationer" without the previous consent in writing of the Thorntons. Grant commenced to carry on therein a business which included, as the plaintiff alleged, that of an artistic and heraldic stationer, and also dealt in pictures, prints, engravings, photographs, &c. (including picture postcards, Christmas and New Year cards). Grant, it appeared, was the manager for Mr. Latarche, who carried on practically the same business in Liverpool as the plaintiff carried on. A great deal of correspondence ensued, and a large number of letters passed between the solicitors of the various parties. Eventually after some delay a meeting took place on the 31st of October, 1902, between the defendants Thornton and Grant, the result of which was that Grant said he would give an undertaking not to sell photographs, but would not agree not to sell picture postcards or Christmas cards. Accordingly the writ in the action was issued on the 10th of November. The plaintiff alleged that by reason of the word "stationer" being included in the business which Grant was authorized to carry on, he was entitled to sell all things which other stationers sold all over the country; and the plaintiff objected to the sale by Grant of picture postcards, which constituted, as he alleged, "artistic stationery," a portion of the business carried on by the plaintiff. The plaintiff accordingly, by his amended claim, claimed an injunction to restrain Grant from selling such articles or carrying on a business which included that of an "artistic and heraldic stationer" and dealer in pictures, prints, engravings, etchings, &c.; he also claimed damages against Grant. The defendant Grant denied that the stall in Nos. 8 and 9 was let to him for the purpose of carrying on a business similar to that of Mr. Latarche or for any other business than that of a librarian, newsagent, bookseller, or stationer, and contended that the sale of picture postcards, Christmas cards, and New Year cards was a part of the business of a librarian, newsagent, bookseller, or stationer.

The Vice-Chancellor granted the injunction against the defendants Thornton during the continuance of the plaintiff's tenancy under the agreement of the 30th of October, 1901, from letting any portion of the arcade for trades or businesses which included those specified in the agreement with the plaintiff, and he also granted a similar injunction against the defendant Grant from taking or continuing to hold a lease or tenancy of, or using, the premises Nos. 8 and 9 in the said arcade for any trades or businesses similar to those specified in the plaintiff's agreement for lease; but the injunction was directed to be suspended for three months, and also in case of appeal.

From this decision the defendants Thornton and Grant appealed.

Neville, K.C., *F. M. Preston*, and *H. Mather*, for the appellants.—They cited the following cases: *Kemp* v. *Bird*, 25 W. R. 838, 5 Ch. D. 549, 974; *Fitz* v. *Iles*, [1893] 1 Ch. 77, 41 W. R. Dig. 208; *De Mattos* v. *Gibson*, 7 W. R. 100, 4 De G. & J. 276, 7 W. R. Ch. Dig. 27.

P. O. Lawrence, K.C., and *R. B. Lawrence*, for the respondent.—If you have the word "stationery" it would include all kinds of stationery, including "artistic and heraldic stationery": *Stuart* v. *Diplock*, 38 W. R. 223, 43 Ch. D. 343, 38 W. R. Dig. 60. In every separate trade it is a question of substance. All the evidence shows that there is no substantial trade distinction between "stationery" and "artistic stationery." "Artistic and heraldic stationery" may well be defined as "high class-stationery." When we prove that our client is a high-class stationer, then it is clearly proved that there has been a direct interference with his business. The only defence to the action would be that of a purchaser for valuable consideration, having the legal estate, without notice of the restrictive covenant. The defendant Grant has not shown he has the legal estate. [VAUGHAN WILLIAMS, L.J., referred to *Leech* v. *Schweder*, 22 W. R. 292, 633, 9 Ch. App. 463, 22 W. R. Dig. 102.] *Rogers* v. *Hosegood*, 48 W. R. 202, 659, [1900] 2 Ch. 388, 48 W. R. Dig. 197, shows that the only conclusive answer to an action on a covenant such as this, is by the person possessing the legal estate without notice. The defendants had constructive notice of the covenant; they admitted in their defence that they were bound by the covenant.

They referred also to the following cases: *Tulk* v. *Moxhay*, 2 Ph. 774; *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 321, 620, 20 Ch. D. 562, 30 W. R. Dig. 179; *Osborne* v. *Bradley*, [1903] 2 Ch. 446; *The Attorney-General* v. *Biphosphated Guano Co.*, 27 W. R. 621, 11 Ch. D. 327; *Nottingham Patent Brick and Tile Co.* v. *Butler*, 34 W. R. 405, 16 Q. B. D. 778, 34 W. R. Dig. 211; *Mander* v. *Falcke*, [1891] 2 Ch. 554, 39 W. R. Dig. 103, 158; *Holloway Bros.* v. *Hill*, [1902] 2 Ch. 612, 51 W. R. Dig. 81, in which *Bryant* v. *Hancock*, [1898] 1 Q. B. D. 716, 46 W. R. 386, was distinguished.

Neville, K.C., replied.

VAUGHAN WILLIAMS, L.J.—This is an action which in substance is brought for the remedy of an alleged breach of a clause in an agreement for a lease. Now, the clause in the agreement which it is alleged is broken runs thus: "Not to let any other portion of the said arcade for the trade or business hereinbefore mentioned to be carried on by the tenant." It is said that there has been a breach of that clause. That clause, it will be observed, is a clause against letting, it is not a clause against using. Then one has to see whether there has been a breach of it, and in order to do that one must ascertain the meaning of the words "for the trade or business hereinbefore mentioned to be carried on by the tenant." One looks above to see what is the business hereinbefore mentioned and one finds out in an antecedent clause which runs thus: "Not to carry on upon the premises any other trade or business than that of a dealer in pictures, oil and water colours, prints, engravings, photographs, etchings, and articles of vertu, artistic and heraldic stationer, frame-maker and dealer in

photographic frames, artists' colours and accessories to the said trade or business." I agree with the learned Vice-Chancellor that if one looks at the evidence and considers substantially what business it is which is mentioned in the earlier clause, the evidence shows that there has been a substantial breach of the covenant not to let any portion of the arcade for the trade or business hereinbefore mentioned. In order, however to arrive at this conclusion one is bound also to look at the letting from year to year to the defendant Grant, but it will be observed that that letting from year to year is a letting which is determinable by the lessor, I think upon a six months' notice. The words of that letting are in the third clause: "The tenant shall keep the said stall in good repair during the tenancy and in such repair shall deliver the same to the landlords on the determination of such term. The tenant shall not make any alteration in or addition to the said stall in order to carry on any business other than that of a librarian, newsagent, bookseller, or stationer, without the previous consent in writing of the landlords."

Now, if you look at the description of the business in the plaintiff Briggs's agreement and ask yourself the question whether the letting of the premises to the defendant Grant for the purpose of carrying on the business of a stationer would be a breach of the agreement not to let the arcade for the purpose of carrying on the business mentioned in Briggs's agreement, it seems to me that if there is no qualification of the word "stationer" or no limitation of what may be done under that business, the letting to Grant would be a substantial breach of the covenant in the agreement with Briggs. When once that conclusion has been arrived at it seems to me that one has got over the principal difficulty which exists in this case. But, assuming that the letting by the lessors to Grant is a breach of the lessors' covenant in the Briggs agreement, it still is necessary to consider what are the remedies of the plaintiff, and moreover against whom has he got those remedies? Now I think that if information had come to the plaintiff while this letting to Grant was threatened or in negotiation, the plaintiff could then probably have applied to the court for an injunction, not only to restrain the lessors from letting to Grant, but also to restrain Grant from taking these premises in breach of the covenant of the lessors with the plaintiff. And after the letting to Grant by the lessors had become an accomplished fact, in my judgment the plaintiff could have applied to the court for a declaration that that letting was a bad letting, and that declaration would have bound both lessors and Grant. But that is not what happened in this case. The plaintiff has not got any such declaration, nor has he got any such injunction as I have suggested. The truth of the matter is, that in this case the plaintiff has been content to allow the letting to Grant to stand as an existing fact, and not to impeach it. Such an injunction as he has obtained in the court below applies merely to future dealings with this property, and not to that dealing with the property which consisted in the letting of it to Grant. It seems to me that under those circumstances the remedy of the plaintiff against Grant (the tenant) is gone altogether and does not any longer exist. In my judgment the plaintiff cannot get either damages or an injunction against Grant in respect merely of the user by Grant of these premises. The plaintiff's right of action against Grant is for the breach of a covenant, not as to user, but the breach of a covenant as to letting; and inasmuch as he does not now impeach the letting, it seems to me that his remedy is merely a remedy against the lessors; and the remedy against the lessors, so far as letting to Grant is concerned, is merely a remedy in damages. No doubt if there was a reason to suppose that there was likely to be a further dealing with this property in the same way in which the lessors dealt with the premises when they let to Grant, there might then be a remedy by way of an injunction with regard to such future dealing with the property, and indeed the Vice-Chancellor has granted such an injunction; but I shall have to say a word in a moment about the necessity for that.

But the primary remedy in respect of this particular transaction is, in my judgment, that the plaintiff should have damages against the lessors for the breach of the covenant not to let; and it seems to me, the letting standing, that no damages in respect of that can be recovered by the plaintiff as against Grant.

So much for the damages. With a slight modification of wording, the direction of the Vice-Chancellor as to damages can stand. It cannot quite stand, because it will be seen that there is a reference in that direction to a common law injunction or something of the sort, and in my judgment there is no need of an injunction here at all. There is nothing in the facts of this case to lead one to suppose that there will be a repetition of a letting of this sort. In all probability the form which the letting took was a mere slip, and if the parties had been well advised in the transaction the letting might very well have been made in such words as would have limited the stationer's business to be carried on by Grant in such a way that it would not—even if there had been an express letting—have amounted to a breach of the covenant not to let any part of the arcade for the business mentioned in the agreement with the plaintiff.

In these circumstances no injunction will be necessary. There need only be liberty to apply, in the event—which is very improbable—of any attempt being made by and by to grant further lettings. There will be a declaration simply that the letting to Grant was a breach of the clause in the agreement with the plaintiff by the lessors not to let for the business before mentioned in that agreement; and an inquiry as to what damages have been sustained by such breach.

ROMER, L.J.—The parties here certainly raise, to my mind, a very puzzling question, but the conclusion I have come to is that, at any rate, the defendants Thornton must be held to have committed a breach of their agreement with the plaintiff. The trade or business referred to in the agreement with the plaintiff appears, as I gather from the document itself and the evidence, to be one of what I may call an aggregate kind; that is to say, it consists of several heads, and those heads appear to be detailed in the agreement itself, and amongst those heads I find "artistic and heraldic stationer," and also "dealer in photographs." Now, the conclusion I come to from the document and the evidence is, that those references to the heads of the trade or business are all references to substantial portions of the trade or business regarded as a whole, and that a substantial part of the business was that which is referred to in the words "artistic and heraldic stationer," and also by the part which refers to the photographs. I am here confining myself to the artistic and heraldic stationer. I cannot come to the conclusion that that was simply a mere accessory to another business—the business of a dealer in pictures, or pictures and water-colours. To my mind it was an essential part, or at any rate a substantial portion of the business regarded as a whole. That being so, when the defendants Thornton entered into their agreement with Grant they expressly authorized him by the terms of their

letting to him to carry on the business of a stationer generally. Now, on the evidence it is reasonably clear that a stationer's business comprises more than the business which may be described under the head of "artistic and heraldic stationer." From the evidence I gather that stationers would carry on a business which would include, to a practical extent, the business (if regarded as a separate business) of artistic and heraldic stationers; and I come to the conclusion on the whole, therefore, that the letting by Thorntons to Grant was a letting to enable Grant to carry on a substantial portion of the trade or business referred to in the agreement with the plaintiff. Now that being so, it of necessity follows that there was a breach by the landlord of his covenant with the plaintiff, and there is no doubt that some damage at any rate has followed from that letting to Grant. That being so, the plaintiff is entitled, I think, to a declaration that the letting to Grant was a breach of the covenant with the plaintiff, and to an inquiry as to damages. For the reason given by Vaughan Williams, L.J., it is clearly not a case in which there was any necessity for an injunction with regard to future letting. But that I think shows the extent of the plaintiff's right. I cannot see that the plaintiff has established any right to hold the defendant Grant liable in this action. The covenant by Messrs. Thornton in their agreement with the plaintiff was only "not to let any of the other portions of the arcade for any trade or business referred to in that agreement." Nothing is said purporting to bind the lessors' property in the arcade generally in respect of user. Nothing is said as to prohibiting Messrs. Thornton from permitting a new tenant to use the property in any particular way, or purporting to bind the property. On the face of it the covenant is restricted in its form to "not to let." I suppose, having regard to the somewhat similar case of *Kemp* v. *Bird*, that such a covenant would not prevent the landlords themselves carrying on in the arcade any kind of business they chose; and it would not prevent them selling the arcade, or prevent the purchaser carrying on a similar business to that of the plaintiff. It is clear from the case of *Kemp* v. *Bird* that in cases like this the court ought not to presume any intention to extend a covenant such as this beyond what, on the face of it, it purports to be. As was said by James, L.J., in *Kemp* v. *Bird*, "Persons who are men of business, as they were here, are able to get protection and advice, and they must make their covenants express, so as to state what they really mean, and they cannot get a court of law or equity to supply something which they have not stipulated for in order to get a benefit which is supposed to have been intended." That being so, finding here simply a covenant to restrain letting, what are the plaintiff's remedies if a letting is about to be made, or has been made? If it is threatened, and if it is an improper letting, he can apply for an injunction. It is possible, though we need not go into detail in considering it, that even after a letting has been effected, if the tenant has notice express or implied (though probably he always would have implied notice), it may be that the plaintiff would be entitled to have the letting declared invalid possibly as against him. That may be. I need not consider it; but beyond that his rights do not extend. I find nothing which enables him to say "There is a letting; I do not apply to set aside that letting, I do not apply to prevent it; it is effective and it is there; but assuming the letting is a good letting and stands, I now ask the court to hold that the tenant cannot use the property under his tenancy except subject to a particular construction." I can find nothing in the covenant contained in the agreement with the plaintiff which enables the court to hold that; and in that respect I think we are bound by the principle of the decision in *Kemp* v. *Bird*.

The plaintiff does not seek any relief in the way of preventing the letting or the repetition of the letting as against him. On the contrary, he comes here and he asks for damages against Thorntons on the footing that there has been a letting, and no doubt he will seek to establish substantial damages possibly as against Thorntons on the very ground that that letting has allowed the tenant Grant to carry on the business he is carrying on, and which he cannot be stopped carrying on. That being so, it appears to me that the plaintiff here has no remedy against Grant. He cannot attack Grant, as being bound by any restrictive covenant affecting the user of the property during his tenancy; and Grant, not being a person, who has contracted with the plaintiff, cannot, of course, be sued for a breach of covenant. Under those circumstances there can be no damages, it appears to me, as against Grant, and the action against him ought to have been dismissed with costs.

STIRLING, L.J.—I am of the same opinion. I agree with the Vice-Chancellor as to the construction which he has put upon the covenant in the agreement entered into between Messrs. Thorntons and the plaintiff, and for the reasons which he has given and which my brothers have given; to these I cannot usefully add anything. But I should like to say one word upon the case as regards the defendant Grant, who has taken the subsequent lease. As regards him the case is based upon the stipulation in the agreement with the plaintiff, that the lessors would not let any other portion of the arcade for the trade or business mentioned to be carried on by the tenant, that is, the plaintiff. We are really asked to read that as if it mere a stipulation that the lessor would not let *or use* any other portion of the arcade for the trade or business mentioned to be carried on by the plaintiff. In my opinion that is not the fair construction of the covenant. I say so for the same reasons as were given by Fry, J., in the case of *Kemp* v. *Bird*—namely, that the covenant as it stands is perfectly intelligible and reasonable. In the second place, the construction contended for by the plaintiff creates a much wider obligation than is imported by the strict words of the covenant. The lessors, Messrs. Thornton, might, upon my reading of the covenant, either themselves carry on the same business as the plaintiff upon another part of the arcade, or they might have sold part of the arcade for that purpose. The covenant being as it stands intelligible and rational, it does not appear to me that there is any reason for reading it as extending to include not merely the letting, but the user, of the other portions of the arcade. I may point out that if as I think is the true construction of the agreement in this case, the assigns of Messrs. Thornton are bound (and those include lessees), still the same objection arises, because the only obligation upon such an assign is not to let a portion of the premises, and he is not prohibited from using them. It seems to me, therefore, that the relief which the Vice-Chancellor has granted as against Messrs. Thornton, is not that to which the plaintiff is entitled. It may be that the plaintiff in this case has failed to protect himself to the extent which he desired, but that does not appear to be sufficient reason for altering what is, in my judgment, the plain construction of the covenant.

Solicitors for the appellants, *Rowcliffes, Rawle, & Co.*, for *Bremner, Sons, & Corlett*, Liverpool.

Solicitors for the respondent, *Sharpe, Parker, & Co.*, for *Charles Garnett*, Liverpool.

High Court of Justice.

Chan. Div. Kekewich, J. } July 1, 2, 1903.

WHITE v. METCALF. (a.)

Mortgage—Foreclosure—Account—Receiver—Repairs—Mortgagee not in possession—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 24, *sub-section* 8 (*i.*) (*ii.*) (*iii.*).

A receiver, not in possession of mortgaged premises, has no power to make repairs without the written authority of the mortgagee, and then only to the extent of the rents and profits. In taking an account, therefore, in foreclosure proceedings, the mortgagee is not entitled to the cost of such repairs made without such written authority.

Summons by the plaintiffs, who were the first mortgagees of certain leasehold premises, to determine whether they were entitled to be allowed the cost of repairs done to the mortgaged premises.

The defendants, Metcalf and Greig, were the lessees of a block of flats for a term of years under a lease wherein they covenanted, among other things, to repair and keep the premises in repair.

On the 14th of November, 1892, they mortgaged this property to one Godfree, to secure £2,500.

On the 24th of March, 1893, they mortgaged their equity of redemption to the defendant Rawlinson to secure £1,000. On the 30th of June, 1893, Godfree transferred his security to Rawlinson. On the 5th of September, 1894, Rawlinson made a further advance of £500, making the total sum advanced £4,000.

On the 22nd of September, 1899, this mortgage was absolutely assigned to the plaintiffs, the defendant Rawlinson joining in the transfer as mortgagee, and at the request of the mortgagors, but subject to the mortgagors' equity of redemption under the indenture of the 30th of June, 1893, and their interest under another indenture which comprised other property.

By the mortgage deed under which the plaintiffs were entitled, the defendants Metcalf and Greig covenanted to observe and perform the covenants of the lease during the continuance of the mortgage. On the 22nd of September, 1899, the plaintiffs effected a policy of assurance with the Law Guarantee and Trust Society, guaranteeing the plaintiffs against loss in respect of this mortgage.

On the 5th of March, 1902, the plaintiffs under the powers conferred on them by the Conveyancing and Law of Property Act, 1881, appointed Mr. T. R. Ronald, the general manager of the Law Guarantee and Trust Society receiver of the rents and profits of the mortgaged premises, who entered into the receipts of the rents and profits accordingly.

The plaintiffs alleged that the covenants in the lease as to repairs were not fulfilled by the mortgagors, and the rents and profits not being sufficient for the purpose, the receiver expended a sum of £217 7s. 6d. in repairs, the money being supplied by the Law Guarantee and Trust Society.

On the 18th of July, 1902, the plaintiffs commenced an action by originating summons for foreclosure against the mortgagors and Rawlinson, the second mortgagee.

On the 10th of August they obtained an order *nisi* for foreclosure on the footing that they were not in possession of the mortgaged premises, and an account was directed to ascertain what was due to the plaintiffs under their security.

The plaintiffs claimed to be allowed the cost of the repairs, and took out this summons to have this question determined.

E. Beaumont, for the plaintiffs.—The mortgagee, who has expended money in necessary repairs, is entitled to be allowed that expenditure in taking an account.

Warrington, K.C., and *E. P. Hewitt*, for the second mortgagee.—The cost of repairs cannot be allowed. Under section 23 of the Conveyancing and Law of Property Act, 1881, the receiver is only agent for the mortgagor for the purpose of receiving rents. He cannot expend money unless expressly authorized to do so by the mortgagee. The first mortgagees are not in possession and cannot themselves repair, and the receiver can only do so on their written direction out of the rents. If the repairs are urgent the mortgagee must go into possession to do them.

They cited *In re Leslie, Leslie* v. *French*, 31 W. R. 561, 23 Ch. D. 552; and *Falcke* v. *Scottish Imperial Insurance Co.*, 35 W. R. 143, 34 Ch. D. 234.

Beaumont, in reply.—The claim for this money is on behalf of the first mortgagees, not of the receiver, and has been expended on necessary repairs, and they are entitled to be allowed the costs of these repairs in taking the account. It is immaterial who found the money. In *In re Leslie* Fry, J., mentions four cases in which a lien might be created on money secured by a policy by payment of premiums—the fourth one being "by reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property." That applies not only to the case of policies, but is of general application, as here, to expenses incurred in making the property more valuable. For this purpose it makes no difference whether the mortgagee is in or out of possession.

KEKEWICH, J.—This summons really covers a point of considerable difficulty, which appears to be one of entire novelty. It is a summons issued in a foreclosure action, the plaintiffs being the first mortgagees, and the defendant a second mortgagee and the mortgagors. It seems that some questions of account as to the sum of interest and the date when it was payable have arisen in chambers, and it is desired to have these questions settled by the court before the certificate goes. But in truth the only question which has been argued is not at all what one would have expected, but is the question whether in taking the account to ascertain the sum due to the plaintiffs the cost of certain repairs is to be allowed. What has happened is that there is a receiver who is not in possession, but is in receipt of the rents and profits of the mortgaged property, which, although the same thing for many purposes, is, of course, really entirely different. It is necessary to consider who that receiver is, and what is his office and character. Long before the Legislature intervened to simplify the rights and remedies of a mortgagee, it was very common to provide in a mortgage deed that the mortgagee might appoint a receiver, and he often appointed at once. But it was always provided that the receiver was to be the agent of the mortgagor. He was, of course, appointed to protect the mortgagee, but as a third person, in whose hands the money was stopped; he was to pay rates and taxes and other outgoings, and then was directed to pay the net balance of the moneys he received to the mortgagor, after paying what was due for interest to the mortgagee. Now there can be no question that a

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

receiver appointed in that way could not possibly execute repairs and charge them against the mortgagee. The mortgagee would be entitled to say, on taking the receiver's account, "You have received so much for rent, and out of that you must pay outgoings, but beyond that you can pay nothing without my direction. Subject to the payment of outgoings, the rent and profits form a net sum applicable in the first instance to keeping down the interest, and the balance will then go to the mortgagor. But not a single penny can be spent otherwise before my interest is discharged unless it was so expressly provided in the terms of the deed, or you have my express authority." That was the object and the result of the appointment of a receiver before 1881. Now, the Conveyancing and Law of Property Act, 1881, in this particular, as in many others, merely adopted the practice of conveyancers, and section 24 only sets out in a concise form what has been embodied before in mortgage after mortgage. By sub-section 1 it empowers a mortgagee, who has become entitled to exercise the power of sale conferred by the Act to "appoint such person as he thinks fit to be receiver." Sub-section 2 says that such a receiver "shall be deemed to be the agent of the mortgagor," in other words, if the receiver takes the rents and profits, leaving the mortgagee in the lurch, the mortgagor still remains liable on his covenant. There follow certain directions as to what the receiver may receive, his remuneration, and his duty to insure if so directed in writing by the mortgagee. Then sub-section 8 provides for the application of all money received by him (1) "in discharge of all rents, taxes, rates, and outgoings"; (2) "in keeping down all annual sums or other payments and the interest" on prior charges; then by sub-clause (3) "in payment of . . . the cost of executing necessary or proper repairs directed in writing by the mortgagee." So that as regards repairs, the receiver's only authority is that of the mortgagee. The mortgagor cannot give him that authority. It would be a monstrous thing if he could, and entirely contrary to practice and the law attaching to that practice. What he has in his hands is applicable to keeping down the mortgage interest, and the balance then belongs to the mortgagor; but until the interest is kept down that balance belongs to the mortgagee. In fact, the only discharge the receiver can get is from the mortgagee. It is from the mortgagee that he gets his authority, and it is to him that he is accountable, and the mortgagor is responsible for him. In the present case the receiver has thought fit, without any direction from the mortgagee, to execute certain repairs. Let us assume, then, they were highly desirable, that the premises would not let otherwise, and that the money was well spent with judgment and good faith in order to secure a good tenant. That may have been a very wise thing for a landowner to do, but the landowner is not the mortgagor for this purpose, but the mortgagee, who is entitled to say that he will have his interest paid, and that the repairs shall not be done until that is paid. Then it is said that because the receiver in this case is the manager of a society which has guaranteed the mortgagee against loss, that therefore he is entitled to do something which any other receiver could not do. I see nothing in the old practice, or in the Act itself, to bear out that suggestion. The society which has guaranteed this mortgage is in the position of any other guarantors, and is no doubt entitled to enforce its rights by being subrogated to the rights of the principal whom it protects, but for the moment it is a mere stranger. It is not a party to this action at all, and in no way bound by the account. I am asked to regard this receiver in two capacities—as a receiver appointed by the plaintiffs', the agent of the mortgagor, with the limited powers which the Act points out, and also as agent of this society. But the only person I can regard is Mr. Ronald, the agent of the mortgagor appointed receiver under this Act. In that character it seems to me that he cannot justify any expenditure on repairs unless authorized in writing by the mortgagee, and then only to the extent of the rents and profits.

I therefore hold that the first mortgagees having expended money on repairs, have no right to charge it against the second mortgagee. There will be a direction to the master that in taking the account, he is not to allow to the first mortgagees any moneys expended on repairs or otherwise, except necessary or proper repairs within section 24 of the Act, and paid for out of rents and profits on the direction in writing of the mortgagees.

Solicitors, *Merriman, White, & Thompson*; *Needham, Tyer, & Barrow.*

Chan. Div. } Feb. 10-13, 15, 17.
Farwell, J. }

ATTORNEY-GENERAL *v.* MAYOR, &c., OF NOTTINGHAM. (*a.*)

Nuisance—Smallpox hospital—Action quia timet—*Weight and sufficiency of evidence.*

Where the site of a smallpox hospital is carefully chosen, is in a proper situation, and constitutes no appreciable danger to the public health and no nuisance to private property, and the hospital itself is properly managed and all precautions taken to prevent infection that scientific skill and knowledge require, the facts, that the hospital is within fifty-one feet of a high road and that there is some risk of infection even when the utmost care is taken, do not outweigh the benefits accruing to the public in general from the maintenance of a smallpox hospital that reduces the risk for every inhabitant of the district wherein it is situate. To warrant an injunction restraining the use of such a hospital there must be a strong probability, almost amounting to moral certainty, that the hospital will be an actionable nuisance.

Action *quia timet.*

The plaintiffs were the Attorney-General *ex relatione* and the owners and occupiers of premises in the parish of Bestwood, Nottinghamshire, and the defendants were the mayor and corporation of Nottingham. The plaintiffs sought to restrain the defendants from maintaining a smallpox hospital that had been erected by them within fifty-one feet of a high road, and within half a mile of the residence of one of the plaintiffs, within 200 yards of the premises occupied by another plaintiff, and within various distances, not exceeding half a mile in any case, from the residence of others; and it was alleged that the use of the hospital caused great danger of the spread of infection among the inhabitants of the neighbourhood and people using the highway. Other material facts are stated in the judgment.

Upjohn, K.C., and *Llewellyn Davies.*—Plaintiffs must establish a strong probability of apprehended mischief.

(*a.*) Reported by H. STEPHEN, Esq., Barrister-at-Law.

They called a number of expert witnesses to prove the danger to be apprehended by reason of the hospital's proximity to a high road and to dwellings, and they cited *Hill* v. *Metropolitan Asylums Board*, 6 App. Cas. 193, 207, 42 L. T. N. S. 212, 47 L. T. N. S. 29; *R.* v. *Vantandello*, 4 M. & S. 73; *R.* v. *Burnett*, 4 M. & S 272; *R.* v. *Lister*, 3 Jur. N. S. 570; *Attorney-General* v. *Shrewsbury Bridge Co.*, 21 Ch. D. 752.

Asquith, K.C., Macmorran, K.C., and *R. J. Parker.*—If the views expressed by the plaintiff's expert witnesses are acted on, the provision of smallpox hospitals will become impossible in many parts of the country, and the only alternative will be treatment at the patients' homes. Although not bound by the rules of the Local Government Board, since no loan was required, the hospital had been erected in a place reasonably near the neighbourhood to be served by it, and as isolated as possible; the hospital had not within a quarter of a mile radius a population of 200, although within a half mile radius there was an employed population of 600.

They differentiated *Hill* v. *Metropolitan Asylums Board*, which was not an action *quia timet*, and cited *Fleet* v. *Metropolitan Asylums Board*, 2 T. L. R. 361; *Attorney-General* v. *Guildford Corporation*, 12 T. L. R. 54; *Attorney-General* v. *Manchester Corporation*, 41 W. R. 459, [1893] 2 Ch. 87; *Harrop* v. *Ossett Corporation*, 14 T. L. R. 308; *Benbelow* v. *Wortley*, 57 L. J. Ch. 762; *Attorney-General* v. *Rathmines* (*Ireland*), 1st of February, 1904, not yet reported.

Cur. adv. vult.

Feb. 17.—FARWELL, J.—This is an action to restrain the defendants from using a building lately erected and used as a smallpox hospital from so using it, on the ground that it is a nuisance, necessarily causing serious danger to the public health and causing special damage to the relator plaintiffs. No actual case of injury has arisen; and the action is *quia timet*. In order to succeed in such an action the plaintiffs must show a strong case of probability that the apprehended mischief will in fact arise—[His lordship here cited *Attorney-General* v. *Manchester Corporation*, [1893] 2 Ch. 87]—or in other words the law requires proof by the plaintiffs of a well-founded apprehension of injury—proof of actual and real danger—a strong probability almost amounting to moral certainty that if the hospital be established it will be an actionable nuisance. A sentiment of danger and dislike, however natural and justified, certainty that the hospital will be disagreeable or inconvenient, proof that it will abridge a man's pleasure or make him anxious, the inability of the court to say that no danger will arise, and none of these accompanied by depreciation of property, are not sufficient to remove the burden of proof resting on the plaintiffs or to justify a merely precautionary injunction restraining an owner's use of his own land upon the ground of apprehended nuisance to his neighbours—[citing the language of Fitzgibbon, L.J., in *Attorney-General* v. *Rathmines* (unreported)]. Further, the defendants are entitled to ask the court to assume that the hospital will be properly managed and that all the precautions that scientific skill and knowledge usually require will be taken, and they are entitled in the present case to the benefit of the observation that the hospital has been open and has received patients for the last six months, during the last half of which it has been full, and that no mischief has at present arisen therefrom. The hospital stands on a piece of ground 4½ acres in extent, roughly triangular in shape, the base of the triangle being about 350 yards long and abutting on the high road. It is enclosed on all sides except one with a close wooden fence 6ft. 6in. high, with barbed wire on the top, and there is an inside fence of barbed wire 20ft. distant. The hospital building is 51ft. from the high road. On the side where there is no fence there is a stream nearly 20ft. wide with a steep bank 15ft. or 20ft. high sloping abruptly from the hospital grounds down to the river. There are 204 residents within a quarter-mile radius from the building and 510 within the half-mile radius. There are 230 men employed on the Bestwood ironworks, part of which is within the quarter-mile radius, and 1,280 on the colliery, which is without the quarter-mile radius but within the half-mile radius; but the majority of the latter work underground, and some 45 men work at the bleach works outside the quarter-mile radius and within the half-mile radius. The hospital is some miles from the populous parts of Nottingham, and has access to the city by means of a road which has few houses on either side and is not much used for general traffic. The nearest private residence is a cottage, with five inmates, 48 yards distant, and the next nearest are six cottages, with 23 inmates, 157 yards distant.

The plaintiffs' allegation that the hospital is a nuisance rests on the establishment as a general affirmation of the proposition that all smallpox hospitals necessarily constitute a serious danger to the health of persons resident, working, or passing by within a radius of at any rate 51ft. This is obviously a very serious question. Having regard to the impossibility of stamping out smallpox under the existing laws and to the practical impossibility of isolating an outbreak in crowded areas, the court ought not to come to any conclusion that would result in closing the majority of the smallpox hospitals in the kingdom unless the expert testimony is really conclusive. Now it is clear from the evidence that I have heard in this case that the medical profession are divided into two camps on this question, each containing persons of eminence and experience. The first point of difference is on the theory of aerial convection for any considerable distance—say, for more than 50ft. This is a purely scientific question, and I gratefully adopt Lord Bowen's statement in *Fleet* v. *Metropolitan Asylums Board*, that "it would be most dangerous to form an independent opinion on a scientific question from the smatterings of science that might be picked up during the hearing of a case." The plaintiffs do not contend that there is a consensus of expert opinion on the point, and therefore it is enough for me to say that it is not proven, and that I am not competent to form an opinion of my own on the question. If the plaintiffs could have established aerial convection for the requisite distance they would have had a strong case in that they would have shown the reason why danger should exist; but, failing this, they are driven to the empirical opinions of experts. This is, of course, a legitimate and usual mode of proof; and the court in the case of a conflict of experts, may either say that the onus is on the plaintiff and has not been discharged, or it may examine the facts and the reasoning given by the experts as the ground of their opinion; and, so far as that reasoning can be tested by ordinary rules independent of special scientific knowledge, I feel bound to test it and not to state simply that the plaintiffs have not discharged the burden cast on them. I will take an example of the reasoning of the plaintiff's witnesses. The opinion of this witness is a conclusion of logic, not of medical science, and he seeks to extend an induction founded on cases observed by or known to him to all other cases; but the induction

fails; for the conclusion that all hospitals are sources of danger does not necessarily follow from the premise that some hospitals are such; or, in other words, his cases are not sufficiently exhaustive, and his reasoning is a mere instance of the method of the ancients described by Bacon as *inductio per enumerationem simplicem, ubi non reperitur instantia contradictoria.* There is the further difficulty that the cases are complicated by so many varying circumstances that the application of the methods of agreement and difference is impracticable. If the case had rested on the plaintiffs' evidence alone, I should have had great difficulty in adopting the conclusions as sufficiently proved; but the court is in possession of a number of other cases in which smallpox hospitals have been full during outbreaks of the disease, and in which no case has occurred within the quarter-mile radius that could not be accounted for by some means other than the hospitals. The plaintiffs' case depends on the inference to be drawn from an unbroken series of facts. In all cases where A has occurred, B has followed, therefore A causes B. But the conclusion depends on the universality of the premise, and a negative instance unexplained spoils the chain. It would serve no useful purpose for me to go through the evidence in detail, but with regard to the plaintiffs' historical instances, if I may so call them, they have already figured in former actions, and very recently in the Irish Court of Appeal in the *Rathmines case*, and have never been accepted as sufficient. It is important to remember that the Compulsory Notification of Diseases Act came into force only in 1899, and that before that it must obviously have been far more difficult, if not impracticable, to obtain trustworthy and sufficient *data* from which to generalize; and, indeed, I may well adopt FitzGibbon, L.J.'s, comment in the *Rathmines case* on them: "Cases such as Fulham, Sheffield, Bradford, and Nottingham may be explained by reason of the character of a neighbourhood and their other circumstances." The defendants' evidence is very strong. It is not for them to prove the negative, but their instances are amply sufficient to break the chain of the plaintiffs' affirmative cases, even if I were satisfied that they had proved them. There is, of course, some risk of infection wherever there is smallpox owing partly to the folly of bystanders and of friends and relations of the patients and partly to the human fallibility of doctors and attendants, however careful. But, in considering the question from the point of view of a public nuisance, one must bear in mind that it is necessary for the public safety that some provision should be made for isolation, that the difficulties in the way of isolating in the case of the poor living in one or two rooms or crowded together in a single cottage are very great, and that it is a choice of evils. This consideration is mentioned by Chitty, J., in *Attorney-General* v. *Manchester Corporation*. And the same consideration applies, though perhaps not to the same extent, to the private nuisance alleged by the plaintiffs. If the fact of a public nuisance were established, it would of course be no answer to the private owners to say that the hospital must be placed somewhere—[His lordship cited Lord Blackburn in *Hill* v. *Metropolitan Asylums Board*, 6 App. Cas. 207]—but where the question is whether the nuisance in fact exists or not, all the circumstances must be taken into consideration; and, after all, the owners and occupiers of the adjacent lands have a far more effective prophylactic provided for them by medical science than by any injunction of any court. I respectfully agree with the following passage in FitzGibbon, L.J.'s, judgment in the *Rathmines case*: "It seems probable that the dread of smallpox is to a great extent the result of tradition. That scourge of the eighteenth century retains its terrors for those who do not realize that it has been deprived of most of its dangers. Vaccination is not only a preventive, but it also modifies the disease. . . . In applying the maxim *sic utere tuo ut alienum non laedas*, the duty of reasonable precaution for one's own protection is not to be ignored. An isolation hospital reduces the risk for every inhabitant of the district. It is, in fact, a necessity, and though the individual must be protected, the public advantage should not be forbidden unless the danger and injury to the individual are clearly proved." In the present case I find as the result of the evidence that the site of the defendants' hospital was carefully chosen, is in a proper situation, and constitutes no appreciable danger to the public health and no nuisance to the relator plaintiff's property. As I understand that this case is likely to go to the House of Lords, I desire to add an observation as to the evidence in the hope of obtaining some direction from a superior tribunal. Both parties concurred in asking me to accept evidence in chief of what had happened with other hospitals, and I acceded to the request in deference to the opinion expressed in *Hill* v. *Metropolitan, &c.*, and also because the same evidence of the same cases (with the same result) appears to have been admitted in the other reported cases relating to smallpox hospitals. I suggest that the admission of such evidence in chief is wrong in principle, as raising a number of side issues on which it is impossible for the court to adjudicate without injury to absent parties—*e.g.*, how can I rely on the case of the hospital ships (*Fleet* v. *Metropolitan Asylums Board*) as a proved fact in the present case without injustice to them? If the assumption in the judgment of Cotton, L.J., in *Hill* v. *Metropolitan Asylums Board*, 42 L.T. 212, were correct in fact, the evidence would be valuable, but there are numbers of such hospitals and their conditions are infinitely various and the extent and value of such differences are exceedingly difficult to estimate. As Lord Bowen pointed out in the *Fleet case*, it is no part of the functions of the court to qualify itself as an expert in science. The court acts on the opinion of experts whose qualifications can be tested by cross-examination, and weighs the evidence so given and tested. The result is that the action fails and is dismissed with costs.

Solicitors, *Hind & Robinson*, for *Wells & Hind*, Nottingham; *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *Sir Samuel G. Johnson*, Town Clerk, Nottingham.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Channell, JJ.) July 8, 1903.

MILES v. HUTCHINGS. (a.)

Criminal law—Shooting at dog—Malicious intention— Bonâ fide *belief that act was necessary—Malicious Damage Act,* 1861 (24 & 25 *Vict. c.* 97), *s.* 41.

The test of whether a person is liable to conviction, against whom an information under 24 & 25 *Vict. c.* 97, *s.* 41, *has been laid, is whether he acted under a* bonâ fide *belief, right or wrong, that it was necessary for him to do the act complained of in order to protect his own or his master's property.*

Daniel *v.* Janes, (1877) *L. R.* 2 *C. P.* 351, 25 *W. R. Dig.* 91, *considered.*

Case stated by justices for the county of Southampton.

At the petty sessions held at the Castle of Winchester on the 25th of April, 1903, an information was preferred by Frederick Hutchings, the respondent, against John Miles, the appellant, under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 41, charging that the appellant did unlawfully and maliciously kill a dog, the property of one Sheldon.

At the hearing it was proved, and the justices found as facts, that the appellant was a gamekeeper; that on the day in question he saw a fox terrier dog near an aviary in which pheasants, the property of his master, were confined for breeding purposes; that he fired two shots at the dog; that the dog died from the effects of the shots, and that the dog was then wearing a collar bearing the name and address of the owner engraved on it.

It was stated on behalf of the appellant that the pheasants had been very much troubled and injured by stray dogs; that notice boards had been put up against people letting their dogs stray near the aviary; that various people owning dogs near the aviary had been personally asked to keep their dogs away; that Sheldon, the owner of the dog shot, had not been personally warned, as the appellant did not know that he kept a dog; that the appellant shot at the dog with the intention of driving it away and not with the intention of killing it, and that he thought it necessary to shoot at the dog in order to protect his master's property.

It was contended on the part of the appellant that it was lawful to kill any animal so found straying, and that the shooting of the dog was in law neither unlawful nor malicious so as to bring the act complained of within the provisions of the statute.

The justices, however, were of opinion that the evidence given before them brought the case within the operation of the statute; that the appellant had no right to shoot the dog, and that if any damage had been done by the dog there were other ways of proceeding without shooting the dog.

They therefore convicted the appellant of the offence, and ordered him to pay £2 for damages and 9s. costs.

The questions for the opinion of the court were (1) Whether the case came within the provisions of section 41 of the Malicious Damage Act, 1861; (2) whether the appellant was legally convicted of the offence charged against him.

Section 41 of the Malicious Damage Act, 1861, provides that "Whosoever shall unlawfully and maliciously kill, maim, or wound a dog, bird, beast, or other animal not being cattle, but being either the subject of larceny at common law or being ordinarily kept in a state of confinement or for any domestic purpose, shall on conviction thereof before a justice of the peace, at the discretion of the justice, be liable to imprisonment or a fine not exceeding £20."

Cancellor, for the appellant.—The conviction was wrong, as in order to bring an act within section 41 of the Act of 1861 it must be shown that the act was done maliciously, and not an act done under the impression, right or wrong, that the party doing it was justified in doing it to save his premises from trespass: *Daniel* v. *Janes,* L. R. 2 C. P. 351, 25 W. R. Dig. 91; *Smith* v. *Williams,* 9 Times L. R. 9, 56 J. P. 840; *Bryan* v. *Eaton,* 40 J. P. 213. In the recent case of *Armstrong* v. *Michell,* 88 L. T. Rep. 870, 51 W. R. Dig. 6, it was held that shooting at a dog that was trespassing without intending to kill it, but with the intention of injuring it if necessary to frighten it away, was not of necessity cruelly ill-treating it. The court (Lord Alverstone, C.J., and Channell, J.) there expressly said that each case was question of degree, and was for the justices. Here the question is not whether the appellant might have driven the dog away without shooting at him, but whether the shooting was malicious, or prompted by an honest desire and intention of protecting his master's property.

The respondent did not appear.

Lord ALVERSTONE, L.C.J.—The question raised by this case is of considerable importance, and it has been raised on more than one occasion for the consideration of the court. I think, however, that the facts at present stated are insufficient to enable us to deal satisfactorily with the case, and that it must be sent back to the justices for further statement. The justices say that it was stated on behalf of the appellant that he shot at the dog, not with the intention of killing it, but with the intention of driving it away. But when they come to express their opinion on the case, they merely say that the appellant had no right to shoot the dog. They therefore have not dealt with the important question whether the appellant *bonâ fide* believed that the only way of protecting his master's property was to act as he did—a point upon which it is most desirable to have their finding.

In *Daniel* v. *Janes* Lord Coleridge, C.J., said: "The forty-first section of the Act upon which the conviction proceeded points to a crime, the unlawful or malicious killing or maiming the animals referred to, simply for the purpose of indulging a cruel disposition, and not to an act done under an impression, right or wrong, that the party is justified in protecting his premises from a trespass by such means, especially after notice given." Here the act was said to be done by the appellant for the protection of the property of his master; and while feeling all respect for the decision of Lord Coleridge I cannot agree with all that is there said. I cannot help expressing my opinion that the real test is whether the appellant was *bonâ fide* doing an act which he thought was necessary for the protection of his master's property. If he did so believe, the allegation that he was acting unlawfully and with malice would be negatived. If, however, he fired at the dog unneccessarily and without any such *bonâ fide* belief, I think that the offence of unlawfully and maliciously killing the dog would be made out. It is therefore important that the facts should be clearly stated on this point, and for this reason it is necessary

a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

that the case should go back in order to have the fact more clearly ascertained.

WILLS, J.—I agree. I think the case of *Daniel* v. *Janes* was correctly decided upon the facts before the court, but the test laid down by Lord Coleridge, L.C.J., involves a general proposition which, I think, puts somewhat too broadly the right of a person to do an act of the kind in question. It is not enough that he should be under the impression, right or wrong, that he is justified in protecting his premises from trespass or (as in the present case) his master's property from injury; if he knows that much less violent measures would attain his object he is not justified in resorting to such means as killing or wounding the animal. I think that the test laid down by my lord is a more accurate and a safer guide in practice.

CHANNELL, J.—I also agree that the case must be sent back. While the justices have found that the shooting was unnecessary, they have found nothing as to the appellant's *bonâ fide* belief. I think that the malicious intention is negatived if the man wrongly, but honestly, thought it was necessary to shoot the dog in order to drive it away.

Case remitted to justices.

Solicitors for the appellant, *Prior, Church, & Adams*, for *Percy W. Snelling*, Winchester.

C. C. R.
(Lord Alverstone, L.C.J., and Wright, Kennedy, Darling, and Phillimore, JJ.) — Nov. 27.

REX v. WYATT. (*a*.)

Criminal law—Evidence—Obtaining credit by fraud—Evidence of criminal acts other than those charged—Evidence tending to show system—Admissibility.

Upon the trial of a prisoner who was indicted for unlawfully obtaining credit by false pretences and fraud from a person who let apartments, evidence was admitted showing that the prisoner had shortly before obtained apartments at other houses and had left without payment,

Held, that the evidence was relevant and admissible, as tending to show a system of fraud and negativing accident or mistake or any honest motive on the part of the prisoner.

Case stated by J. Willis Bund, Esq., the chairman of Worcestershire Quarter Sessions.

The prisoner was tried on the 19th of October, 1903, on an indictment charging that he, on the 4th of August, 1903, and on other days, unlawfully, in incurring a certain debt to one Rhoda Williams to the amount of fourteen shillings and sixpence, did obtain credit to the amount of the debt from Rhoda Williams under false pretences. There was a second count charging him with obtaining credit for the same amount from the same person by means of fraud other than false pretences. It was proved that the prisoner came to Mrs. Williams' house and asked if she let apartments. She replied that she did, and he asked if she could take him. She asked for how long, and he replied for the night only. She agreed to take him in, and he asked for tea, and had a chop, bread and butter, and cake. He had a bed and a sitting room. He stayed on three days and then owed fourteen shillings and sixpence. Then in consequence of something the landlady had heard she took him the bill, but made out for four shillings and ninepence only, and asked for payment. Prisoner asked if she wanted it then particularly. She said she did as she had information and had seen newspaper cuttings which led her to believe that he was the man who went about getting apartments and leaving without paying. Prisoner after a time admitted he was the man mentioned, and said he had nothing then but would go and try to get something. He said that his luggage was detained at an hotel. He went away and returned shortly and offered the landlady one shilling and asked her to let him stay. She refused, and he asked for his things and left.

At the conclusion of the evidence for the prosecution the chairman stated that while there was ample evidence of a debt having been incurred and credit obtained, he thought that it was very doubtful if there was sufficient evidence to justify a jury in saying the credit was obtained by fraud. Counsel for the prosecution then proposed to call the hotel-keeper and other witnesses to prove that prisoner had had apartments at their houses and had left owing money. The chairman stated that he was very doubtful if such evidence was admissible, as it involved an inquiry into each of the different cases whether the prisoner had in each been guilty of a criminal offence—namely, obtaining credit by fraud, as obtaining credit was not of itself an offence; and that this fact distinguished the case from those where evidence of different acts, such as passing false coin, can be given in evidence, and that to admit such evidence was, in effect, to try not merely the case in the indictment, but also whether the prisoner had been guilty of fraud in a number of other cases not charged in the indictment at the same time. The chairman, however, admitted the evidence subject to the statement of the present case, and, assuming such evidence to be admissible, it proved the prisoner had gone to several houses and had left without paying, and still owed the money when he went to the house of the prosecutrix.

The chairman directed the jury that to convict the prisoner they must be satisfied that he incurred a debt, that he obtained credit by means of fraud, and that if they were satisfied that the prisoner went to the prosecutrix's house without any intention of paying for his accommodation, they would be legally justified in finding him guilty. The jury convicted the prisoner, and he was sentenced to two months' imprisonment in the third division. The question of law for the determination of the court was whether on the above indictment the evidence of witnesses who proved that the prisoner had taken apartments with them and had left owing money was admissible.

R. W. Coventry, for the prisoner.—This evidence should not have been admitted where the element of accident or mistake is absent; evidence of the nature of that allowed in this case is inadmissible. [Lord ALVERSTONE, L.C.J.—In *Reg.* v. *Francis*, 22 W. R. 663, L. R. 2 C. C. R. 128, it was held that evidence of this sort is admissible if it goes to establish a system on the part of the prisoner.] In *Reg.* v. *Holt*, 9 W. R. 74, 8 Cox 411, it was held that such evidence was not admissible; evidence of this kind, no doubt, is admissible in cases where the indictment is for murder by administering poison for the purpose of showing that death arose from poison, not accidentally taken, but designedly administered by some one, but it is not admissible for the purpose of establishing

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

motives: see *Reg* v. *Flannagan and Higgins*, 15 Cox 403. [WRIGHT, J., referred to *Reg.* v. *Rhodes*, 47 W. R 121, [1899] 1 Q. B. 77.] That case is distinguishable from the present one.

Counsel also referred to *Makin* v. *Attorney-General for New South Wales*, [1894] A. C. 57; *Reg.* v. *Oddy*, 5 Cox 210; and *Reg.* v. *Ollis*, 49 W. R. 121, [1900] 2 Q. B. 758.

J. R. V. Marchant, for the prosecution, was not called upon.

Lord ALVERSTONE, L.C.J.—The case has been ably argued by Mr. Coventry, but his argument really goes to the weight of the evidence and not to its admissibility. In *Makin* v. *Attorney-General for New South Wales*, Herschell, L.C., says: "The mere fact that evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would be otherwise open to the accused." Lord Russell, L.C.J., in *Reg.* v. *Rhodes*, where the disputed evidence related to subsequent transactions, says: "It seems to me quite clear that, if the transactions with Elston and Chambers had taken place before that with Bays and at a period not too remote, the evidence of Elston and Chambers would have been admissible against the prisoner." In *Reg.* v. *Ollis*, where the conviction was affirmed, Lord Russell, L.C.J., says: "At this trial counsel for the prosecution pressed the recorder to admit evidence of the fraud practised on Ramsey as relevant to the charges then before him, and as negativing any reasonable belief on the part of the accused that there was money at the bank to meet these other cheques or any of them." In the same case Wright, J., says: "The evidence tended to show that the conduct of the prisoner, in tendering drafts on a bank at which he had no living account, was not inadvertent or accidental, but was part of a systematic fraud, extending over a period immediately preceding and following the date of the offence charged." The majority of the court in that case held that the evidence was legally admissible. In this case the acts must be taken to have recently preceded the act charged. On the ground of the above decisions the evidence was clearly admissible as tending to establish a system and negativing accident or mistake or any reasonable honest motive that the prisoner could have had. In my opinion the conviction must be affirmed.

WRIGHT, J.—I am of the same opinion.

KENNEDY, J.—I am of the same opinion.

DARLING, J.—I am of the same opinion.

PHILLIMORE, J.—I agree.

Conviction affirmed.

Solicitors for the prisoner, *Blundell, Gordon, & Co.*, for *S. Thornly*, Worcester.

Solicitors for the prosecution, *Ellis, Munday, & Clarke*, for *Lambert & Rogers*, Malvern.

Privy Council.

(From the Court of Appeal for Ontario.)

Nov. 4.

GRAND HOTEL CO. OF CALEDONIA SPRINGS (LIMITED) v. WILSON AND OTHERS. (a.)

*Trade name—Injunction—Local name—"Caledonia Springs"—Words calculated to deceive—*Onus *of showing that goods are distinguished.*

The appellants supplied mineral waters taken from their springs, at a local spa called Caledonia Springs, to agents and others in Ontario and Quebec, and these waters had acquired in the market the name of "Caledonia Water." The respondents obtained other waters, but of similar properties, from borings not far from some of the appellants springs, and sold them under the description of "Natural Saline Water from the New" (or) "from New Springs at Caledonia" and as "Beaver Brand," with a picture of a beaver on their labels as a trade-mark.

Held, that the respondents were entitled to indicate the local source of the waters sold by them, and had sufficiently distinguished their goods from those of the appellants.

This was an appeal from the Court of Appeal for Ontario. The whole circumstances under which the case arose are set out at length in the judgment of their lordships.

Frank Arnoldi (of the Canadian Bar), for the appellants.

Scrutton, K.C., and *R. C. Smith, K.C.* (of the Canadian Bar), for the respondents.

The judgment of their lordships (Lords DAVEY and ROBERTSON and Sir ARTHUR WILSON) was delivered by

Lord DAVEY.—The appellants are the proprietors of certain lands in the township of Caledonia, Prescott County, Ontario. There are on this land three natural springs of mineral waters containing chemical properties which render them serviceable as table waters and for medicinal purposes. The springs are in close proximity to each other, but differ widely in their character. One of these springs is known as the Gas Spring from the quantity of carburetted hydrogen gas which it evolves, another is called the Saline Spring, while the third is known as the White Sulphur Spring. Owing to the presence of these springs the site has for many years past acquired a great reputation as a place of summer resort. The appellants own a large hotel called the Caledonia Springs Hotel, and in the course of time other buildings have been erected which the learned Chancellor of Ontario in his judgment describes as "The Caledonia Springs Village attached to the hotel," and there are a Caledonia Springs Post Office and a Caledonia Springs Railway Station. The springs are called the Caledonia Springs, and the locality itself has also acquired the name of Caledonia Springs, very much like Tunbridge Wells, although in this case there is nothing which could properly be described as a town, and no incorporated village.

There is a fourth spring situate about two miles from the other springs, called the "Intermittent" or "Duncan" Spring belonging, not to the appellants, but to a gentleman named King Arnoldi. The

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

appellants on the 27th of December, 1899, acquired from Mr Arnoldi the right to take water from the Duncan Spring and to use his registered trade-marks for a period of two years, and also for ever to use in connection with the water of the Duncan Spring the words "Magi Caledonia Springs," registered by them. The appellants thus include this spring also in the expression "Caledonia Springs."

The appellants use the water from their springs for the purpose of supplying the visitors at their hotel, and also supply it in barrels to their agents and others in Ontario and Quebec, who bottle it for the purpose of sale to the public. And they have registered as trade-marks certain labels for use on the bottles. The appellants' waters and (it may be assumed) Mr. Arnoldi's waters have acquired in the market the name of "Caledonia Water."

The respondent McDougall was also, until recently, the proprietor of an hotel at Caledonia Springs known as the Queen's Hotel. The respondent McDonell was the owner of land immediately adjoining the land of the appellants. McDougall, having some difficulty with the appellants as to the supply of their water for the visitors at his hotel, in the year 1898 commenced boring on the land of McDonell, who was his brother-in-law, and at the depth of 85 feet a spring of saline water was tapped, and a further boring made a short distance from the first struck of a subterranean spring of sulphur water at a depth of 165 feet. Both springs have a continuous natural flow which rises up the pipes laid in the borings. These borings are situate about a quarter of a mile from the appellants' three springs, and the analysis of the water obtained from them shows a general resemblance to the waters from the appellants' springs. On the 1st of August, 1898, McDonell entered into a partnership agreement with the respondents Lyall and Trenholme for placing on the market the waters from the borings thus made on his land. Arrangements were then made with the respondents Wilson for sale of the waters as agents for the partners at Toronto, and with the respondents J. Tune & Son for their sale at London (Ontario).

On the 5th of February, 1901, the appellants commenced two actions against the respondents Wilson and against the respondents J. Tune & Son. The other respondents were afterwards added as defendants in each action. The two actions were consolidated, and were heard by the Chancellor of Ontario on the 11th of June, 1901, and judgment was delivered on the 18th of the same month.

The plaintiffs in the action claimed an exclusive right to the use of the word "Caledonia" in the phrases (among others) "Caledonia Water," "Caledonia Seltzer," "Mineral Water from Caledonia Springs," and "From New Springs at Caledonia," and the words "Natural Saline Water" and "Natural Seltzer," and prayed an injunction to restrain the defendants from infringing the plaintiffs' trade-marks and also from selling the water as Caledonia Water, or under any name, trade-mark, or designation, using the word "Caledonia" as descriptive of the same or to indicate the source of the water.

The learned Chancellor held that the respondents J. Tune & Son had infringed the appellants' trade-mark, and the Court of Appeal agreed in that finding, and continued the injunction granted against those respondents. There is no appeal as to this matter, and it seems to their lordships clearly right. It is fair, however, to the principal respondents to say that the obnoxious labels were adopted without any direction from them, and when they were made aware of the use of the labels they expressed their disapproval and said they could not undertake to defend it. As regards the labels used by the respondents Wilson, the Chancellor held that the defendants had not infringed the appellants' trade-marks, but as to the trade names "Caledonia Water" and "Water from Caledonia Springs," the case of the plaintiffs was established, and he granted an injunction accordingly.

The respondents appealed, and their appeal was heard ultimately before Moss, C.J., and Maclennan and Osler, JJ. The Chief Justice agreed with the Chancellor, but thought that the terms of the injunction should be varied in one respect. The two other learned judges dissented (except as to the injunction against J. Tune & Son), and the reasons for their judgment were given by Maclennan, J. The appeal was accordingly allowed, and by an order of the 4th of December, 1902, the actions, save in respect of the injunction against the respondents J. Tune & Son, were dismissed with costs. Hence this appeal.

The learned counsel for the appellants did not lay much stress upon the alleged infringement of the trade-marks except as regards the use of the word "Caledonia," and in their lordships' opinion quite rightly. On this point, which is one of fact, their lordships agree with the concurrent findings of the two courts below. Nor do their lordships think there is anything in the make-up of the respondents' goods to which the appellants can reasonably object. A more difficult question is as to the use of the word "Caledonia" as a trade name or as part of the description of the respondents' waters. It must be conceded that the respondents cannot use the word in such a manner as to pass off their goods for those of the appellants. But if they have not done so, they ought not to be restrained by injunction from the use of the word.

The first fact to be noted is that the goods in question are not a manufactured article, or (in other words) the name which it is sought to protect is not the name for the appellants' make of goods, but, to put it most favourably for the appellants, designates water from particular springs belonging to them. The waters derive their virtues from the strata from which they spring, or through which they pass, before they reach the surface (that is to say) from the inherent properties of the soil itself in that particular locality. Another material fact is that the words "Caledonia Springs" and "Caledonia Water" are said to designate the Duncan Spring and its waters equally with the appellants' three springs, although the former is distant two miles from the latter and has no apparent connection with them, except that of being situate in the same township. It is quite true that the same trade name may designate the goods of more than one person, but it is less easy to infer that a geographical description has acquired a secondary meaning when you find that it is used to designate the goods of two or more persons connected only by identity of geographical origin. And whatever force there is in this observation does not appear to their lordships to be materially weakened by the fact of there being other springs in the township which, like the "Duncan" spring, are called by different names. Lastly, it must be observed that in the present case the name of the locality necessarily enters into and forms part of any real description of the respondents' waters, and that the words "Caledonia Springs" have acquired a secondary or perhaps tertiary meaning as the name and the only name of the locality. Their lordships agree with Maclennan, J., that if the respondents' water is likely to be more sought after and more marketable, and if the business of the selling it is likely to be more profitable by reason of the situation of the springs and their nearness to the famous old springs, the respondents are entitled to

the benefit of that circumstance. Indeed, it is impossible to see how the respondents could adequately describe a natural product of the soil which derives its excellence from the inherent properties of the soil in that particular locality without some reference to the place, and using for that purpose in some form the only name by which it is known.

Their lordships are therefore of opinion that the appellants have not a right to the exclusive use which they claim of the word "Caledonia" in connection with their waters. The Stone Ale case, *Montgomery* v. *Thompson*, [1891] A. C. 217, 39 W. R. Dig. 235, does not appear to them to have any bearing on the present case. That was a case of a manufactured article, and was decided on the special circumstances of the case, as clearly appears from the judgments of Lord Watson and Lord Macnaghten. The Glenfield Starch case, *Wotherspoon* v. *Currie*, L. R. 5 E. & I. A. 508, 21 W. R. Dig. 118, differs materially from the present case in the facts on which it was decided, for the term "Glenfield" was not a necessary part of the description of the manufactured article there in question, and there was evidence that the defendant's works were set up at Glenfield for the purpose of passing off their goods as those of the plaintiff. But have the respondents used the word "Caledonia" in such a manner as to pass off their water as coming from the springs of the appellants? Or have they taken adequate care to distinguish their goods from those of the appellants? In considering this question their lordships do not forget the answer given by the respondent Lyall in his evidence when he accepted the suggestion of the plaintiffs' counsel that his object in taking hold of this water from these wells was to sell it as Caledonia water. They do not, however, attach so much importance to this piece of evidence as the learned Chancellor. From the way in which the suggestion was made and accepted they think that Lyall may not have meant more than that he desired to sell it as water from Caledonia in competition with the plaintiffs. The respondents are not proved to have ever themselves sold their water under the description of "Caledonia Water," or "Water from Caledonia Springs," but what is said is that the use by them of the word "Caledonia" in any form enables the water to be sold by the retailer as "Caledonia Water," and is therefore calculated to deceive the ultimate purchaser. Their lordships agree with what has been frequently said in these cases, that even a description of goods which is literally true may be so framed as to mislead, and they bear in mind the cases of which *Johnston* v. *Orr Ewing* (7 App. Cas. 219) is an example, where a trade name or mark which would not mislead the dealer has been held an infringement because it was calculated to mislead the retail purchaser.

The respondents (other than J. Tune & Son) sell their goods under the description of "Natural Saline Water from the New" (or) "from New Springs at Caledonia," and as "Beaver Brand," and they have a picture of a beaver on their labels as a trade-mark. It appears to their lordships that the expressions "the new springs" or "new springs" at once distinguishes their water from the water coming from what the appellants call on one of their labels "the original springs," and no person reading the label could possibly believe he was buying water from the original springs. It is not like the case of manufactured goods where the trade name attaches to the make of a particular manufacturer, and the purchaser might then suppose he was buying a new make of the same manufacturer. In the present case the name is not personal, but local, and attaches only to the particular springs. The learned Chancellor criticizes the use of the word "springs" as descriptive of the source from which the respondents derive their water, but this seems hypercritical. The source is none the less a spring because it finds its way to the surface by an artificial cavity instead of a natural fissure in the soil. The learned Chancellor also criticizes the use of the words "at Caledonia." He says there is no place called Caledonia simply. It is true that "Caledonia Springs" would have been more accurate, but also, probably, in the view of the plaintiffs more objectionable. But whether the words are to be taken as referring to the township or the particular place, their lordships agree with Maclennan, J., that the words "at Caledonia" are not inaccurate, and it was pointed out that the expression is used in the sheet called "Life at the Springs," which is described as published every Saturday "at "Caledonia." It is possible that the common use of the word "Caledonia" in any form may lead to some dishonesty on the part of the retail seller. But their lordships think that, in the peculiar circumstances of this case, the respondents cannot be made responsible for such a consequence. The plaintiffs sold their water as "Caledonia Water" at a time when they had no competitors in the sale of natural mineral waters from the place called Caledonia Springs, but in giving it that name they ran the risk of other persons discovering other springs in the same locality, and being entitled to sell other water as water coming from springs in that locality. Their lordships hold that the respondents are entitled to indicate the local source of the waters sold by them, and so holding, they think that the burden cast upon the respondents of distinguishing their goods from those of the appellants has been discharged. "New Springs" seems at least as distinctive as Crystal Springs, which the respondents originally thought of, or "Beaver Spring," which was suggested by the counsel for the appellants.

They will, therefore, humbly advise his Majesty that the appeal should be dismissed, and the appellants will pay the costs of it.

Solicitors, *Gadsden & Treherne; Poole & Robinson.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Feb. 8.

STOCKDALE *v.* ASCHERBERG. (*a.*)

Landlord and tenant—Covenant to pay "all taxes, rates, assessments, and outgoings"—Tenancy for three years—Requirement by local authority to relay drainage.

By an agreement in writing the plaintiff let to the defendant a house at a yearly rent of £55, and the defendant agreed to "pay all taxes, rates, assessments, and outgoings of every description," landlord's property tax only excepted, and to "keep and leave the premises (including the fixtures) in as good condition as they are now in (reasonable wear and tear excepted) . . . and keep in repair all sash-lines and internal pipes and taps." During the term the local authority served notice on the plaintiff, under the Public Health Act, 1875, requiring him to abate a nuisance that existed on the premises, and for that purpose to relay the existing drain. The plaintiff executed the work at a cost of £83 10s., and sued to recover this amount from the defendant under his contract.

Held, that the defendant was liable to repay this sum to the plaintiff.

Judgment of Wright, J. ([1903] 1 *K. B.* 873, 51 *W. R. Dig.* 84), *affirmed.*

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of Wright, J., at the trial of the action (reported in [1903] 1 K. B. 873).

The action was brought to recover £83 10s. under a contract of tenancy. By an agreement in writing, dated the 25th of March, 1902, the plaintiff let to the defendant a house, 68, Brondesbury-villas, Kilburn, for a term of three years from that date at the yearly rent of £55. By the agreement the defendant agreed to "pay all taxes, rates, assessments, and outgoings of every description for the time being payable in respect of the premises as they become due (landlord's property tax only excepted)." The defendant also agreed to "keep and leave the premises (including the fixtures) in as good condition as they are now in (reasonable wear and tear excepted)," and to "keep the gutters, stack-pipes, w.c.'s, and cisterns clean, and to keep in repair all sash-lines and internal pipes and taps."

On the 4th of September, 1902, a notice was served on the plaintiff by the Willesden Urban District Council under the Public Heath Act, 1875, requiring him to abate a nuisance upon the premises, and for that purpose to take up and relay the drain of the house. The work ordered to be done amounted to the reconstruction of the whole drainage system of the house. The plaintiff executed the work at a cost of £83 10s., and brought this action to recover that amount from the defendant under the contract.

Wright, J., gave judgment for the plaintiff.

The defendant appealed.

Edgar Foa, for the defendant.—Under a covenant like this in an ordinary lease for a long term the tenant would be liable to his landlord for these expenses: *Foulger* v. *Arding*, 50 W. R. 417, [1902] 1 K. B. 700. That case, however, established that the imposition or outgoing must be one which was reasonably in the contemplation of both parties when the lease was made. To decide that question, the nature of the imposition or outgoing, the nature of the premises, the length of the term, and the amount of the rent, and the amount of the expense, must all be considered. In *Valpy* v. *St. Leonard's Wharf Co.*, 1 L. G. R. 305, Farwell, J., held that a covenant to pay "outgoings" in a lease of a cottage from year to year at a rent of £20 did not include the expense of paving a yard at a cost of £58 in obedience to an order of the local authority. That case was distinguished by Wright, J., in the present case. In *In re Warriner, Brayshaw* v. *Ninnis*, [1903] 2 Ch. 367, 51 W. R. Dig. 83, Swinfen Eady, J., held that the tenant was liable, under a similiar covenant to pay all "impositions" in a lease of a house for three years at a rent of £54, to bear the expense of reconstructing the drains in accordance with a notice from the local authority. Then came *Harris* v. *Hickman* [1904] 1 K. B. 13, where a tenant, in an agreement for a three years' tenancy at a rent of £70, covenanted to pay all "outgoings," and after the expiration of the three years he held over, paying rent at the same rate. Wright, J., following *Valpy* v. *St. Leonard's Wharf Co.*, held that the tenant was not liable to bear the expense of certain sanitary work, amounting to £70, required by the local authority to be done, the notice having been served and the work done during the holding over. The true view is that the tenant is liable on such a covenant as the present in the case of an ordinary lease, say, for twenty-one years. But the law has, ever since the Statute of Frauds at any rate, always drawn a distinction between a lease for three years or less, and a lease for over three years. In a lease for three years the tenant does not usually covenant to repair. In the present lease the covenant to repair is of a very limited kind. It would be absurd to suppose that, in these circumstances, the parties ever contemplated or intended that the defendant, who occupied the house for so short a term, should bear the expense of putting in a new drainage system at a cost amounting to about one and a-half year's rent. The Public Health Act, 1875, threw the expense on the landlord, and he must bear it unless by clear and unambiguous words he has thrown the expense on the tenant. In all the older cases where the tenant was held liable under a covenant to pay outgoings the lease was for a long term of years, except *Batchelor* v. *Bigger*, 60 L. T. 416, which was a case of a lease for three years, and where no doubt Kay, J., said that it was difficult to construe the same covenant differently in a lease for three years and in a lease for a longer term.

C. F. Hohler, for the plaintiff, was not called upon.

COLLINS, M.R.—Though everyone must feel considerable sympathy for the defendant who finds himself mulcted in a sum amounting to about one and a-half year's rent of the house for improvements thereto, the expense of which he probably did not anticipate that he would have to bear, still the question is, whether on this agreement of tenancy, the defendant is not bound by his contract to accept that burden. It has been clearly established that the word "outgoings" in a covenant like this covers the particular class of expenditure which is imposed on the owner by the sanitary authority for the purpose of altering the system of drainage and bringing it up to the modern standard of efficiency. No doubt the requirement of the sanitary authority seems at first sight somewhat drastic, but it was clearly a requirement within their powers and one that was rendered necessary by the sanitary condition of the premises. The defendant took the premises in a bad sanitary state, and in these circumstances it is impossible to say that it was outside the contemplation of the parties when they made the contract that the sanitary authority, whose duty it is to see that the sanitary condition of the premises is kept up to the modern standard, might

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

call upon the owner to execute the necessary works, and it is impossible to say that the defendant has not undertaken the responsibility of it. In these matters nowadays the sanitary authority frequently insists upon changes, and in view of that, when the landlord and tenant came to an agreement in perfectly clear terms as to the burden of this expense, it would be straining the words beyond all reason and introducing an element into the contract which it would be very difficult to limit if we are to hold that the defendant was not liable on his covenant for this expense.

The appeal therefore fails.

ROMER and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Sharpe, Parker, & Co.*, for *H. Fielding*, Canterbury.

Solicitors for the defendant, *Potter & Heath.*

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) Feb. 4.

CHANDLER *v.* WEBSTER. (*a.*)

Contract — Impossibility of performance — Coronation procession—Hire of room to view—Abandonment of procession — Money payable before abandonment — Recovery back of money paid.

The plaintiff hired from the defendant a room in a house in Pall Mall to view the Coronation procession on the 26th of June for the sum of £141 15s., payable immediately. The plaintiff paid £100 to the defendant, and subsequently, in consequence of the illness of the King, the procession on the 26th of June was abandoned. The plaintiff sued to recover back the £100 which he had paid to the defendant, on the ground of total failure of consideration, and the defendant counterclaimed for £41 15s., the balance of the £141 15s.

Held, that the further performance of the contract having been rendered impossible by an event which happened without the default of either party, upon the doctrine of Taylor *v.* Caldwell, 11 *W. R.* 726, 3 *B. & S.* 826, *the contract was not avoided* ab initio, *but remained good and valid up to the ascertainment of the impossibility of performance, and anything done and any rights acquired under it up to that time remained good, the parties being merely relieved from the further performance of the contract; that therefore the doctrine as to total failure of consideration was not applicable; and that the plaintiff could not recover back the £100, and that, as the whole sum of £141 15s. accrued due before the abandonment, the defendant was entitled to recover the £41 15s., the unpaid balance of that amount.*

Appeal by the defendants from the judgment of Wright, J., and a cross-appeal by the plaintiff.

The action was brought to recover the sum of £100 which had been paid by the plaintiff to the defendants on the 20th of June, 1902, for the use of a room to view the Coronation procession on the 26th of June, on the ground of total failure of consideration. The defendants counterclaimed to recover the sum of £41 15s., on the ground that the plaintiff had agreed to pay them £141 15s. for the use of the room.

The plaintiff agreed with the defendants to take from them a room on the first floor of 7, Pall-mall to view the Coronation procession on the 26th of June, and to pay them £141 15s. for the use of it. The contract was made in part verbally, but mainly by correspondence, the last letter being written on the 10th of June, 1902, by the plaintiff to the defendant as follows: "I beg to confirm my purchase of the first floor room of the Electric Lighting Board at 7, Pall-mall to view the procession on Thursday, the 26th of June, for the sum of £141 15s., which amount is now due. I shall be obliged if you will take the room on sale, and I authorize you to sell separate seats in the room, for which I will erect a stand. If the seats thus sold in the ordinary way of business do not realize the above amount by the 26th of June, I agree to pay you the balance to make up such amount of £141 15s."

The money was to be paid, as the Court of Appeal found upon the correspondence, at once, or, at any rate, as soon as possible after the making of the contract, and a cheque for £100 was, in fact, sent by the plaintiff to the defendants on the 19th of June. After that date and before the 26th of June the Coronation procession of the 26th of June was abandoned owing to the illness of the King, and the plaintiff sought to recover the £100 as upon a total failure of consideration, and the defendants counterclaimed to recover the £41 15s., the unpaid balance of the £141 15s.

Wright, J., held, upon the construction of the contract, that the £141 15s. did not become payable until the 26th of June, and that, therefore, the defendant were not entitled to recover the £41 15s., the unpaid balance. He also held that the plaintiff was not entitled to recover the £100 paid to the defendant.

J. B. Matthews, for the defendant.

Spencer Bower, K.C., and *Colam*, or the plaintiff.

The following authorities were referred to: *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S 826; *Krell* v. *Henry*, *ante*, p. 246, [1903] 2 K. B. 740; *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, *ante*, p. 181, [1903] 2 K. B. 756; *Blakeley* v. *Muller & Co.*, [1903] 2 K. B. 760, 51, W. R. Dig. 40; *Clark* v. *Lindsay*, 88 L. T. 198, 51 W. R. Dig. 39; *Knowles* v. *Bovill*, 22 L. T. 71.

COLLINS, M.R.—This case is somewhat complicated by the fact of there being an appeal and a cross-appeal. The substance of the case is this: The plaintiff agreed with the defendant to take from him a room to view the Coronation procession on the 26th of June, and he agreed to pay £141 15s. for the use of the room for that purpose. The plaintiff paid to the defendant £100 before the postponement of the procession, leaving an unpaid balance of £41 15s. The procession did not take place on the 26th of June, and the plaintiff sues to recover the £100 paid to the defendant, and the defendant counterclaims to recover the £41 15s. unpaid balance. Wright, J., held that both parties were wrong in their claims, and that neither could recover. Both parties appealed. The defendant contends that, notwithstanding that the procession did not take place on the 26th of June, he is entitled to be paid the unpaid balance. I will deal with that part of the case first. These kind of contracts have been the subject of express decision, and it has been held that the principle laid down in *Taylor* v. *Caldwell* applies to these cases—that is to say, where the parties have made no express provision to have the money repaid if the procession does not take place, or unless from the circumstances a condition is to be necessarily implied that the money shall be repaid if no procession takes place, then, if the procession does not take place, the further performance of the contract is rendered impossible, and the person who has paid money upon the footing of the contract being performed in full and the procession taking place must abide the loss of the amount he has

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

paid, and the party claiming the payment of more money must also abide the loss of it and cannot enforce upon the other party the obligation of paying the balance, as an event has happened which relieves both parties from the further performance of the contract. The question is, how is that principle to be applied to the facts of the present case. The right of the defendant to recover the £41 15s. depends upon whether his right to recover that sum accrued before the abandonment of the procession. The plaintiff can claim to be in no better position by not having paid that sum at the time when he contracted to pay it. Did the contract oblige him to pay the £41 15s. before the time when the procession, on the 26th of June, was abandoned? In my opinion the taking place of the procession was not a condition precedent to the payment of the money. It was part of the contract that the money should be paid immediately, or at any rate as soon as possible, after the contract was made, and that clearly was before the procession was abandoned. It has been established by the authorities that where the obligation to pay is by the contract made so as not to arise until after the taking place of the procession, the liability to pay being based on the procession taking place, the obligation to pay is discharged on the ground that the procession did not take place; but where the liability to pay arises at a date before the abandonment of the procession, the abandonment of the procession leaves the obligation to pay untouched. The defendant is therefore entitled to recover the £41 15s., and his appeal must be allowed.

With regard to the plaintiff's claim to recover the £100 already paid, I have incidentally dealt with that claim when deciding the defendant's counterclaim. Mr. Spencer Bower said that there was a total failure of consideration—that is, that the condition upon which the money was paid was the taking place of the procession on the 26th of June, and that as no procession took place on the 26th of June the money paid can be recovered back. That undoubtedly raises an interesting question. The principle is laid down in *Taylor* v. *Caldwell* that where, by an act which happens without the default of either party, that which is the basis of the contract become impossible of performance, from the time when the fact of the impossibility of performance is ascertained the contract need no longer be performed by either party, but it leaves the contract good and valid up to the time of the ascertainment of the impossibility of performance, and anything done and any rights acquired under it up to that time are to be regarded as having been properly done and duly acquired, the parties being discharged from that time from the further performance of the contract. That is important because in cases to which the doctrine of *Taylor* v. *Caldwell* applies there can be no claim to recover back money paid as upon a total failure of consideration, the reason being that in such cases the contract is not avoided *ab initio*, but remains good in so far as it has been already performed. The principle laid down in *Taylor* v. *Caldwell* is that the contract is not annulled *ab initio*, but the parties are merely relieved from the further performance of it, and therefore the doctrine as to total failure of consideration has no application. No doubt the rule laid down in *Taylor* v. *Caldwell* is a somewhat arbitrary one, but it has been adopted because of the impossibility of working out and adjusting the rights of the parties as upon the footing of the contract being avoided *ab initio*. Wills, J., in *Blakeley* v. *Muller & Co.*, made some very valuable remarks upon the subject. The learned judge there points out why the court must stop at the position of the parties when the procession was abandoned. That decision was adopted by this court in *Civil Service Co-operative* v. *General Steam Navigation Co.*, where the Lord Chancellor referred to and adopted the judgment of Channell, J., in that case. The passage which the Lord Chancellor read from the judgment of Channell, J., supports the proposition that the rights of the parties under the contract must be left as they were at the time of the abandonment of the procession, and the parties are excused from the further performance of the contract. Upon these grounds, in my opinion, the plaintiff is not entitled to recover the £100, and the judgment of Wright, J., upon the plaintiff's appeal was right.

ROMER, L.J.—I am of the same opinion. Though it is a somewhat hazardous task, I will venture to state what seems to me to be the result of the authorities in the class of case which we are considering. Where there is an agreement which is based upon the assumption by both parties that a certain future event will take place, and that event forms the foundation of the contract between the parties, then if, through no default of either party and owing to circumstances which are not in the contemplation of the parties at the time when they made the contract, it happens that before the time fixed for the event it is ascertained that the event cannot take place, the parties are thenceforth both free from any subsequent obligation cast upon them by the agreement; but except in cases where the contract can be treated as rescinded *ab initio*, any payment previously made and any legal rights previously accrued according to the terms of the agreement will not be disturbed. In my opinion, upon the facts here, this case falls within that principle. The contract is one which cannot be treated as rescinded *ab initio*. That being so, any legal rights accrued to either party previously to the abandonment of the procession remain, and for the reasons given by the Master of the Rolls, which I need not repeat, one of those rights is the right of the defendant to obtain payment of the sum of £141 15s. The appeal of the defendant therefore succeeds, and the cross-appeal of the plaintiff must be dismissed.

MATHEW, L.J.—I am of the same opinion. It is clear upon the correspondence that the £141 15s. was due from the plaintiff at once, and therefore the defendant's appeal must succeed. With regard to the cross-appeal I see no ground for suggesting that the £100 was paid upon the understanding that it was to be repaid in the event of the Coronation procession not taking place on the 26th day of June. There was no express contract to that effect, and it was not the intention of the parties that it should be repaid so as to make it an implied term of the contract.

Appeal of defendant allowed; appeal of plaintiff dismissed.

Solicitors for the plaintiff, *Phillips & Boyle.*

Solicitors for defendants, *Russell & Arnholz.*

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Jan. 12.

MANCHESTER v. CARLTON IRON CO. (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Dependants—Payment to or for benefit of dependants—Power to exclude any dependant—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (4) (5) (6).

An arbitrator under the Workmen's Compensation Act,

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

1897, *has no power, when awarding compensation to the dependants of a deceased workman, to direct payment of the compensation money in such a way as may result in the exclusion of any dependant who is not* sui juris.

Appeal from the decision of the judge of the Durham County Court on a special case stated by an arbitrator under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of a deceased workman who met with his death by an accident in the course of his employment. The arbitration was heard before an arbitrator agreed on by the parties.

The arbitrator stated the following special case for the purpose of submitting a question of law for the decision of the county court judge, in pursuance of clause 4 of the second schedule to the Act:

"Joshua Manchester, aged fifty-two, was employed as a hewer at East Howle Colliery, in the county of Durham, at an average weekly wage of 15s. 9½d., with rent allowance and coals. He was killed through being crushed by the engine set on the 25th of February, 1903, and he left a widow, a son aged thirteen, and two daughters aged nineteen and thirteen respectively, none of whom was in any employment. It was agreed before me that the total amount of compensation recoverable was £154 7s. 6d.; and I was requested, on behalf of the applicant, to make an order that the money should be paid to three trustees nominated by the applicant for the benefit of the widow and children of the deceased in manner hereinafter mentioned. The only question which arose for my decision was with respect to the extent of the powers, in relation to the investment or other application of the compensation, conferred upon me by clause 6 of the first schedule of the Workmen's Compensation Act, 1897. On behalf of the applicant it was contended that, under the clause to which I have referred, I had power to order that the compensation money should be invested in the names of three trustees (as asked) to be held and applied by them for the benefit of the widow and her children, the trustees having power from time to time to apply both principal and interest for the benefit of any one or more to the exclusion of any other or others of the four beneficiaries as they (the trustees) thought fit, and that it was not incumbent upon me to make any apportionment specifically allotting to the widow and each of her children her or his separate share of the compensation, the desire of the parties being that the compensation should be treated as one entire fund to be applied by the trustees at their discretion for the benefit of any one or more to the exclusion of any other or others of the widow and her children as their circumstances might from time to time in the judgment of the trustees seem to render expedient. If I have power to make an order, I am of opinion that it would be to the advantage of the widow and her children that the order should be made. Amongst miners, as the sons attain the age of 13 years or upwards, it is practically certain that they will be employed in some capacity in the mine and will become wage earners. The probability accordingly is that, as the son of the widow in the present case attains the age of about fifteen years he will be to a large extent self-supporting, and that the benefit of the compensation, which so long as the son was not earning sufficient wages or no wages at all such son was entitled to, might and should thereafter be applied for the benefit of the widow and her daughters, who were not and were not likely to become earners of wages; moreover, as the son approaches the age of twenty-one years he would not only be entirely self-supporting, but might marry and cease to contribute to the support of his mother, which would render it proper for the trustees to divert the share of the compensation, which his wages had rendered no longer necessary for him, to the benefit of the widow and daughters, who might continue to require the assistance of the compensation. The question of law which I therefore desire to submit is whether the committee or other arbitrator referred to in clause 6 of the first schedule of the Workmen's Compensation Act, 1897, has power (*a*) with, or (*b*) without, the concurrence of the applicant, to direct the payment of compensation to trustees to be invested or otherwise applied by such trustees for the benefit of the widow and other dependants or any one or more of them to the exclusion of any other or others, as regards principal and interest, in such manner as such trustees may from time to time deem expedient."

The county court judge held that it was not competent to the arbitrator to direct payment of the compensation in the manner proposed.

The applicant appealed.

Minton Senhouse, for the applicant.—The question is whether, where a deceased workman leaves dependants, the arbitrator is bound to award a specific sum to each dependant, or whether it is open to him to order the total amount of the compensation to be paid to trustees to be applied by them in their discretion for the benefit of the dependants. The deceased was a member of a workmen's association, and the respondents are members of an employers' association, and a joint committee of these two associations have appointed three persons to act as trustees of all money paid by employers as compensation under the Act. This is a convenient practice and is in accordance with the intention of the Act. By clause 1 (*a*) (i.) of the first schedule to the Act, where death results from the injury, and the workman leaves dependants, a lump sum is to be paid as compensation. By clause 4 such payment is to be made "to or for the benefit of his dependants." By clause 5 any question as to who is a dependant, or as to the amount payable to each dependant, is, in default of agreement, to be settled by arbitration. By clause 6 the sum allotted as compensation to a dependant may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the arbitrator.

Ellis Hill (*Garland* with him), for the employers.

COLLINS, M.R.—I am of opinion that this appeal must be dismissed. The question stated in the special case for the opinion of the court by the county court judge is, in substance, whether it is competent to an arbitrator under the Workmen's Compensation Act to direct payment of the amount which he awards as compensation to the dependants of a deceased workman in such a way that some of the dependants may be excluded, and the distribution which he made in the first instance may from time to time be altered. I am of opinion that there is no power to direct such payment unless the dependants are persons *sui juris* who are in a position to renounce their rights. The arbitrator must conform to the provisions of the Act. In this case no award at all has been made at present. We must look to the first schedule of the Act to see what are the powers of the arbitrator when he comes to make his award. By clause 5 the arbitrator may settle any question as to who is a dependant, or as to the amount payable to each dependant. That is to say, the arbitrator has power to allot the compensation among the dependants in what proportions he thinks right; and, if the widow consents, he may leave her out. By clause 6 he has power to order that the sum allotted to any dependant may be

invested or otherwise applied for the benefit of such dependant. No question is raised here as to that power. All that it is necessary to decide is that the arbitrator has no power to exclude any dependant who is not *sui juris*.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the applicant, *Hyman Isaacs & Lewis*, for *Isadore Isaacs & Heath*, Sunderland.

Solicitors for the employers, *Rowcliffes, Rawle, & Co.*, for *Cooper & Goodger*, Newcastle-upon-Tyne.

High Court of Justice.

Chan. Div.
Kekewich, J. } Jan. 14.

In re DOWDING'S TRUSTS.
GREGORY *v.* DOWDING. (*a.*)

Settlement—Marriage settlement—Covenant to settle after-acquired property of wife—Inclusion or exclusion of life annuities.

The fact that the terms of a covenant contained in a marriage settlement for the settlement of after-acquired property of the wife are sufficiently comprehensive to cover such property as annuities or life interests is not conclusive that such property is to be included in or caught by the covenant. Regard must be had to the intention of the covenantor as shown by the nature of the trusts declared of the after-acquired property covenanted to be settled, and if such trusts as they stand do not fit property of the nature of annuities, such property will be deemed not to be caught by the covenant.

Townshend *v.* Harrowby, 4 *Jur. N. S.* 353, *followed.*
Scholfield *v.* Spooner, 32 *W. R.* 910, 26 *Ch. D.* 94, *distinguished.*

By a settlement dated the 5th of May, 1886, made in contemplation of the marriage shortly afterwards solemnized between the Rev. T. W. Dowding and Margaret Carwithen, spinster, the intended wife (*inter alia*) agreed that all real and personal property (if any) not thereinbefore settled to which she at the time of the then intended marriage, or at any time during her intended coverture, was or should be or become entitled, whether in possession, reversion, or otherwise, except jewels, trinkets, ornaments of the person, plate, linen, china, furniture, prints, books, or other articles of the like nature, and also except any legacies or other property acquired at one and the same time not exceeding in amount or value the sum of £100, should . . . be assured and transferred by the said intended wife and all other necessary parties (if any) to the trustees of the settlement upon trust at such time and in such manner as they should think fit (but as to any reversionary interest, not until it should fall into possession), to sell and convert into money such part of the said property as should not consist of money or of investments of the nature thereinbefore authorized and stand possessed of the said investments and of the moneys to arise from such conversion as aforesaid upon the trusts, and with the powers thereinbefore declared concerning certain funds thereinbefore referred to as the wife's trust fund, and in the meantime and so long as any property thereby agreed to be settled should remain unsettled upon trust to pay the rents and income thereof (in effect) to the person for the time being entitled to the income of the funds comprised in the settlement under the trusts thereof.

The wife's father (who died in 1903), by his will made in 1894, gave to the wife Margaret Dowding "an annuity of £40 for her life," and by a second codicil made in 1896 gave to her "an additional annuity of £60 a year for her life in addition to any benefit which she may take under my will." The will and codicils were duly proved, and the question raised by this summons was whether or not the annuities given by the will were bound by the agreement to settle contained in the settlement, and if they were, how they ought to be dealt with.

T. T. Methold, for the wife, argued that the annuities were not included.

H. T. Methold, for the trustees of the settlement.

S. B. L. Druce, for the infant children of the marriage.

The following cases were cited, and are dealt with in the judgment: *Lewis* v. *Madocks*, (1803) 8 Ves. 150; *In re Bendy*, 43 W. R. 345, [1895] 1 Ch. 109; *Finlay* v. *Darling*, 45 W. R. 445, [1897] 1 Ch. 719; *White* v. *Briggs*, (1848) 22 Beav. 196*n*; *St. Aubyn* v. *Humphreys*, (1856) 22 Beav. 175; *Townshend* v. *Harrowby*, (1858) 4 Jur. N. S. 353; *In re Crawshay*, 39 W. R. 682, [1891] 3 Ch. 176; and *Scholfield* v. *Spooner*, 32 W. R. 910, 26 Ch. D. 94.

KEKEWICH, J.—The question is whether two annuities given to a married lady are caught by a covenant to settle after-acquired property contained in her marriage settlement. It is a covenant although it is in the form of an agreement; it is executed by all the parties and it is a covenant by all. The covenant is in the widest possible terms. I cannot conceive that anyone could put it in wider terms. [His lordship read the terms of the agreement.] There are certain exceptions which I must notice for two reasons—first, because it is said that one of these exceptions includes these annuities, so that they are literally excepted from the operation of the covenant; secondly, because it is always necessary where there are exceptions to a general provision to see what is regarded as excepted in order that from that you may obtain light as to what is intended to be included. The words are "except jewels, trinkets, ornaments of the person, plate, linen, and china, furniture, prints, books, or other articles of the like nature, and also except any legacies or other property acquired at one and the same time not exceeding in amount or value the sum of £100."

It is said that these annuities are legacies within that exception. For some purposes no doubt an annuity is a legacy—a legacy payable by instalments—and if that were the right view to take in this case, the instalments are less than £100, so that no part of them would be settled. But an annuity is not a legacy for all purposes, and in ordinary phraseology an annuity is distinct from a legacy. A legacy is a sum which the legatee is entitled to have paid down; an annuity is a sum which is to be secured by setting apart a portion of the personal estate, and has to be paid in the shape of an annual payment, and in that sense it is not a legacy. In my opinion it would be entirely wrong to hold that these annuities were legacies within the exception.

Then the question is whether these annuities are covered. They are within the words "all real and personal property to which the said Margaret Carwithen at any time during the said intended coverture shall be or become entitled." Of course I am bound to construe these words according to the intention of the parties, and it may appear that an intention may be pre-

(*a.*) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

sumed or proved in some way or other that these annuities are not meant to be caught; but the words themselves are large enough. Nor is it right that annuities, according to the ordinary practice of those who draw marriage settlements, cannot be included in covenants to settle after-acquired property. On the contrary, Mr. Methold confirmed my own impression that the ordinary precedents for covenants of this kind do include annuities and life interests, but when the draft is properly settled there is a direction that annuities and life interests shall be held for the benefit of the husband or wife as the case may be, and possibly where they are for the benefit of the wife to be held for her separate use restrained from anticipation. Therefore, apart from one authority which I will deal with presently, where the question was as to a life interest being included, there is no doubt that an annuity may be properly included. There is nothing foreign to the purpose of a covenant to settle after-acquired property in including an annuity. In one sense, therefore, the covenant fits the property or the property fits the covenant. The difficulty arises from this, that the trust is for conversion, that that which is really the life interest of the wife is to be converted by the sale out and out of the annuity or possibly by investing the annuity when it is received from time to time, and that is to be capitalized, so that the wife or the husband who takes the first life interest would only receive the dividends. That is where the pinch occurs. You can make the covenant fit the annuity, and you can make the annuity fit the covenant, but neither fits the other as it stands—that is to say, not according to the ordinary practice of mankind: it goes against one's general knowledge of the practice to say that that which is an annuity is to be capitalized and only to become a dividend-earning fund. These difficulties have occurred again and again, and several cases have been cited in which this question has been discussed. A great difficulty of this kind occurred in *Lewis* v. *Madocks*. I mention that case because it has given rise to a certain amount of discussion from time to time. There the husband gave a bond with a condition to settle all the personal estate that he should at any time during the coverture be possessed of. The Lord Chancellor pointed out the great difficulty of executing the instrument, but thought that he was constrained by the general words of the bond, and declared that the personal estate of which the husband was possessed during the coverture was liable to the bond. This, in so many words, would appear to include every sovereign that came into his purse during the coverture, and it did occur to me when the question came before me in *In re Bendy* that the Lord Chancellor meant that when you had a general covenant of that kind you must execute it, however absurd it might be, and however great the practical difficulty in doing so. But a similar case came before Romer, J.—*Finlay* v. *Darling*—and he differed, I have no doubt soundly, from the view which I took of Lord Eldon's decision in *Lewis* v. *Madocks*. After shewing that that was a covenant by the husband to settle the whole of his personal estate however acquired, he said this (p. 722): "Lord Eldon pointed out in that case even that income which the husband received would not be bound by the covenant, but he did say that if that income became capital then the capital which accrued to him would be bound. I do not know that that decision went so far as that, but certainly there is a statement of Lord Eldon to that effect. In the first place, I think that his observation must have been limited in its application to the case immediately before him, which, as I pointed out, concerned and dealt with a covenant of a substantially different kind from the covenant before me; and, secondly, I am not sure that Lord Eldon did not mean by the word 'capital' capital which was so held by the husband as to show that he intended it to become part of his personal estate which was bound by his covenant." I quote that as showing that there may be a way out of a covenant of that kind, and that Romer, J., thought that Lord Eldon meant to get out of it in that way, although his language was more general, and that he himself would have been able to do so. *Lewis* v. *Madocks* was also cited in a case of *White* v. *Briggs*, which is reported in a note to *St. Aubyn* v. *Humphreys*, and was referred to by Lord Romilly in his judgment in the latter case, although apparently not cited in the argument. In *St. Aubyn* v. *Humphreys* there was a settlement by the husband of all his personal estate to which he was then or might thereafter become entitled in trust for himself for life with remainder absolutely to his wife. As regards the subject-matter of the settlement, that was not unlike the bond in *Lewis* v. *Madocks*. It was held not to comprise his interest in a fund bequeathed to him for life with remainder to his children. All that the Master of the Rolls says is: "Upon consideration of the case of *Lewis* v. *Madocks* and of *White* v. *Briggs* I am of opinion that I must hold"—and he held—"that the life interest was not caught by the settlement." The judgment of the Master of the Rolls therefore is of no value of itself. He looked at *Lewis* v. *Madocks* and read that with *White* v. *Briggs*, and thought that he was bound by authority to hold as he did. I have not, therefore, the benefit of the independent judgment of the Master of the Rolls, but I have the benefit, in a note to that report, of the decision in *White* v. *Briggs*. That, in my opinion, is a case of great importance. There there was a covenant by the husband to settle one moiety of the property he should acquire during the coverture upon the usual trusts. It was in quite general terms. It was held not to include his life interest in property bequeathed to him for the benefit of himself and his family. Some little account is given there of the nature of the bequest. There was a direction under a will to settle property on the husband and his family. That gave rise to a good deal of litigation, and ultimately Lord Cottenham determined that that direction meant that the husband took a life interest only (2 Ph. 583). Then the reporter tells us this: That he afterwards declared that "the interest which Charles Herbert White took under the will was not subject to the covenant contained in his marriage settlement." Therefore we have a distinct decision of Lord Cottenham—than whom there could not be a higher authority—that a covenant of this kind framed in the most general terms did not include a life interest given to him by will; and the Master of the Rolls followed that. I say nothing about the case cited there of *Duncan* v. *Cannan* (*No.* 2), (1855) 21 Beav. 307, because in my opinion that was a case of a different character.

Then I am referred to a case before Kindersley, V.C., of *Townshend* v. *Harrowby*. There the Vice-Chancellor had to deal with a covenant framed in the broadest possible terms to settle the wife's after-acquired property, and one of the questions was whether a life interest was covered by it. The Vice-Chancellor expressed a decided opinion upon it. He says: "It appears to me that the whole scope of such a clause as this (assuming it in the strongest way against the lady), holding her to be covenantor and the person who is to do the act, that it is beyond the principle upon which the court has interpreted such clauses to hold that that applies to a mere life interest, so as to say that that life interest must be turned into corpus; that each annual or half-

yearly payment on that life income was to be assigned over to the trustees to be capitalized, so that he, as tenant for life under the settlement, would only have the income arising from the investment of each succeeding sale as it accrued due from the property. I consider, therefore, that the life interest to the separate use of Lady Townsend is not affected by this covenant. If it had been an absolute interest to her use, I should consider it was affected, but being a mere life interest, it does not signify whether it is to her separate use or not. It appears to me that it is not within the letter of the covenant." That is a distinct finding by a most experienced judge that a life interest is not within a covenant in general terms to settle after-acquired property. Unless there is some authority to the contrary overruling the decision of Kindersley, V.C., and differing from the decision of Lord Cottenham, I am bound to hold that a covenant of this kind does not cover a life interest. What is there to the contrary? I can see nothing in any one of the cases cited which touches those authorities. The case mainly relied on is *Scholfield* v. *Spooner*, but before dealing with that case I ought perhaps to mention a case before North, J., cited to me—*In re Crawshay*. That does not really touch this case, because North, J., declined to try the question whether any life interest was affected by the covenant in that case, and he held that the particular life interest in that case was not affected because it was not assignable. *Scholfield* v. *Spooner* deserves more attention. On the covenant in that case there can be no question that the framer of the covenant contemplated including in it annuities and life interests, but by some curious omission there was no trust declared as to those annuities and life interests when assigned to the trustees, and it was argued in the Court of Appeal that because there were no trusts declared therefore the court could not hold the annuity there in question to be included in the covenant at all. To that there was a conclusive answer: It is there, and if it is to be included in the covenant it must be brought within the covenant and held upon some trust or other. If there are no trusts declared, then they are to be found by proper construction of the document. That is the substance of the decision. It is perfectly true that in the course of the judgments there are expressions showing that an annuity may be properly included in a covenant of that kind. Fry, L.J., distinctly says so. He says: "But really about that there is no doubt. If you have apt words an annuity may be included." In that case there were apt words, and it was obviously intended that they should be included. There is no objection to an annuity or a life interest being included. *White* v. *Briggs* and *Townshend* v. *Harrowby* were not cited in *Scholfield* v. *Spooner*, and it does not touch the question raised in this case, which is this—whether where the covenant is framed in general terms, and there is nothing in the settlement to bring in an annuity or life interest specifically, the inclusion of an annuity or life interest is consistent with the general intention of the parties in making the settlement. That question was not affected by *Scholfield* v. *Spooner*.

It seems to me that I am in the same position as Lord Romilly found himself in, except that I am more strongly bound. He was bound by *White* v. *Briggs*. I am bound by that case and by *Townshend* v. *Harrowby*. There is no case the other way, and I must hold that, strong and general as the words are—quite strong enough by themselves to include an annuity or a life interest, yet having regard to the general intention of the parties, these annuities are not covered by the covenant.

Solicitor for all parties, *Nicholas Hanhart*.

Chan. Div. } Dec. 8, 9, 16.
Farwell, J. }

BRUNER v. MOORE. (a.)

Contract—Option for six months—Lunar or calendar months—Expiry of period—Agreement for extension implied from conduct and correspondence—Option duly exercised by dispatch of telegram or letter within extended period.

M., an inventor, granted to B. an option to purchase prospective patent rights during "six months" from the 29th of September, 1902. The option had not been exercised on the 16th of March, 1903, when six lunar months expired, but later correspondence contained casual mention of the 1st of April as the date of its expiry. M., who was travelling about, informed B., who was in London, that he would be at Genoa on the 27th of March and in Paris on the 30th. On the 28th B. exercised his option by a telegram to Genoa and a letter to Paris—the latter due in course of post to arrive on the 29th—but through a misunderstanding neither of these reached M. till the 30th.

Held, that the option was for six lunar months; but that an agreement to extend it to the end of March was to be implied from the correspondence and conduct of the parties; and that even if the option expired on the 29th it was duly exercised by the posting of the letter and sending of the telegram before that date.

This was an action for specific performance of a contract dated the 29th of September, 1902, by which the defendant, who was the inventor of a sewing-machine attachment, had granted to the plaintiff the exclusive option of purchasing, during six months from the said date, either for himself or his nominees, all the defendant's right, title, and interest in and to the said invention, and the letters patent for the same which had been or might be applied for in the United Kingdom, Russia, Belgium, Luxemburg, Germany, Italy, and five other countries named, the price for the whole being fixed at £8,000. During the said period or any extension thereof the plaintiff was to have the right of selling, subject to the consent of the defendant, the rights for any one or more of the said countries for a less sum than £8,000, and upon any such sale 80 per cent. of the price thereof was to be paid to the defendant on account of the £8,000, and on payment of the whole of the last-named sum the defendant was to assign to the plaintiff the rights for such of the said countries as had not in the meantime been so sold.

It appeared that the plaintiff had been instrumental in forming a company for the purchase of the British patent for £2,000, and had empowered his solicitor to sell certain shares therein and to pay the proceeds to the defendant in respect of his share in the said purchase-money. Also that the plaintiff had sold the rights for Germany for £2,000 (payable half in cash and the balance secured by a promissory note of the purchaser), and those for Russia, Belgium, and Luxemburg together for £2,000, of which he had received £1,000, the balance being payable one month after the issue of the Russian patent.

The plaintiff had only paid £800 to the defendant in respect of these sales, but he alleged that he had assigned to him the benefit of the contracts, and that all the above-mentioned arrangements had received the defendant's assent. The defendant, however, maintained that his consent had been conditional on payment being made to him in cash, and he counterclaimed for moneys he alleged to be due to him in respect of the sales.

It further appeared that the defendant, in con-

(a.) Reported by R. HILL, Esq., Barrister-at-Law.

travention (according to the plaintiff) of the agreement, had sold the Italian rights for £2,000, subject to a commission of £460 to an Italian agent, and he alleged that in effecting such sale he had acted as the plaintiff's agent and with his consent, and that he was entitled to 80 per cent. of the proceeds after deducting the said Italian commission.

No further sales for the countries comprised in the option had been made, and in a letter from the defendant to the plaintiff dated in February or early in March, 1903, he referred to the option as expiring on the 1st of April.

On the 23rd of March the plaintiff wrote to the defendant mentioning that his option would expire in a few days, and asking for a reply by telegraph as to whether an extension could be granted.

On the 26th of March the defendant, in reply to an inquiry by the plaintiff as to his future address, telegraphed from Rome as follows: "Genoa Friday, Paris Monday," those days being respectively the 27th and 30th of March, and on the 27th he telegraphed "No extension till I see you." Through an error in its address the first of these telegrams did not reach the plaintiff in London till late on the 27th, and on the 28th the plaintiff telegraphed from London to the defendant at Genoa: "Have money ready to carry out option in exchange for documents. When will you be here?" This telegram he confirmed by letter of the same date, addressed to the defendant in Paris.

The defendant did not, as the plaintiff had expected, travel direct to Paris from Genoa, but left the latter place early on the 28th for Monte Carlo, where he remained one night, and consequently the plaintiff's telegram, instead of being delivered to the defendant at Genoa, was forwarded thence to Paris, where it was handed to him on the morning of the 30th, together with the plaintiff's letter confirming it. Their receipt was briefly acknowledged by the defendant, who, after interviews with the plaintiff, wrote on the 7th of April to the plaintiff treating the option as expired, but offering to extend it on certain terms which the plaintiff declined.

The principal questions argued at the trial were: Whether the option expired on the 16th or on the 29th of March—*i.e.*, at the end of six lunar or six calendar months from the date of the contract, and, in the latter case, whether the option was duly exercised by the notice given in the plaintiff's letter and telegram of the 28th of March, seeing that they did not reach the defendant till after the six calendar months had expired.

Jenkins, K.C. (*A. H. Jessel* with him), for the plaintiff.

Upjohn, K.C. (*J. A. Hay* with him), for the defendant.—Month, unless in an Act of Parliament by virtue of the Interpretation Act, means *primâ facie* lunar month. The option was not even exercised within six calendar months, for the plaintiff's telegram and letter were not delivered till the 30th of March. The telegram giving the defendant's address was an intimation that the plaintiff was to find him at Genoa on the Friday, and not that the plaintiff was to do something in London. The question is whether you constitute the Post Office an agent to receive or to convey. The plaintiff has treated it as an agent to receive, but he was only authorized to appoint an agent to convey, and the notice ought to have been personally served. The words "Genoa Friday" could not mean "Genoa Friday and Saturday." Nor was there any exercise of the option evidenced by conduct of the plaintiff, for he did nothing beyond disposing of separate rights for different countries, and in so doing he was not exercising his option but acting as agent to the defendant, to whom he had to account for 80 per cent. of the proceeds. The courts have been very strict in dealing with options, which are unilateral contracts, the execution of which is entirely in the hands of the person to whom the option is granted.

He cited *Simpson* v. *Margitson*, 11 Q. B. 23; *Hughes* v. *Metropolitan Railway Co.*, 25 W. R. 680, 2 App. Cas. 439, 448 (judgment of Cairns, C.); and *Henthorn* v. *Fraser*, 40 W. R. 433, [1892] 2 Ch. 27.

Jenkins, K.C., in reply.—I admit that the word month must be taken to mean lunar month except in a commercial document, but the document in question can be brought within that definition. It is not a contract of sale, and is not revocable; it was an instrument between two business men; it would only become a contract when read in connection with later documents, which I submit cannot be done. I submit that it is time for a decision by the court that the term "commercial document" includes a document leading up to a commercial transaction. As to the sale of the German rights, and those for Russia, Belgium, and Luxemburg, the evidence shows that the defendant was to receive the whole of the proceeds, and not 80 per cent., as provided in the clause dealing with separate sales. This clause, then, was varied at the request of the defendant. As to the Italian patent we are willing that it should be excluded altogether, if the whole purchase-money be reduced from £8,000 to £6,000.

He cited *Hart* v. *Middleton*, 2 C. & K. 9; *Turner* v. *Barlow*, 3 F. & F. 946; *Hutton* v. *Brown*, 29 W. R. 928; and Stroud's Judicial Dictionary (2nd ed.), pp. 1221, *et seq.*

THE COURT referred to *Wilkinson* v. *Calvert*, 26 W. R. 829, 3 C. P. D. 360, 362; and *Barlow* v. *Teal*, 15 Q. B. D. 403, 501, 33 W. R. Dig. 115.

Cur. adv. vult.

FARWELL, J.—This is an action for specific performance of a contract dated the 29th of September, 1902. [His lordship read the material part of the contract.] The first question arises on the option, which is given for value and is therefore not revocable: Are the six months given for its exercise lunar or calendar months? Although in the ecclesiastical courts months mean calendar months (see *Catesby's case*, 6 Rep. 62*b*; 2nd resolution (ed. 1826, vol. 3, p. 379), and *Bluck* v. *Rackham*, 5 Moo. P. C. 305, 308 per Knight-Bruce, V.C.) it is well settled that, at common law, month denotes lunar month—so much so that when it has been desired to make an alteration, recourse has had to be had to statute or statutory rules; *e.g.*, as to the construction of Acts of Parliament, by 13 & 14 Vict. c. 21, and as to Bills of Exchange, by 45 & 46 Vict, c. 61, and as to documents which are part of any legal procedure, under the rules of court by ord. 64, r. 1. It is therefore a question of construction in each case, to which the ordinary rules of construction apply—viz., that words must bear their ordinary primary meaning unless the context of the instrument, read as a whole, or surrounding contemporaneous circumstances, show that the secondary meaning expresses the real intention of the parties, or unless the words are used in connection with some place, trade, or the like, in which they have acquired the secondary meaning as their customary meaning *quoad hoc*. This is a question of fact, which (unless so often proved as to be judicially recognized) has to be proved by evidence; statements by either party as to the sense in which he used or intended to use the words, made subsequently to the execution of the document, and subsequent acts of the parties, are

inadmissible for the purpose of construing the document. This is, in my opinion, the meaning of the judgment in *Simpson* v. *Margitson*, 11 Q. B. Rep. 23, where Lord Denman says (pp. 31, 32): "It is clear that the construction of a written contract, subject to the exceptions mentioned below, is for the judge. It is also clear that "months" denote at law "lunar months" unless there is admissible evidence of an intention in the parties using the word to denote "calendar months." If the context shows that calendar months were intended, the judge may adopt that construction. If the surrounding circumstances, at the time the instrument was made, show that the parties intended to use the word, not in its primary or strict sense, but in some secondary meaning, the judge may construe it from such circumstances, according to the intention of the parties. If there is evidence that the word was used in a sense peculiar to a trade, business, or place, the jury must say whether the parties used it in that peculiar sense. If the meaning of a word depends upon the usage of the place where anything under the instrument is to be done, evidence of such usage must be left to the jury. Also the jury may have to give the meaning of some technical words." I have only expressed my own opinion in consequence of an argument that in addition to the cases mentioned by Lord Denman there was a general exception of all mercantile or commercial documents, founded on a *dictum* of Littledale, J., in *Reg.* v. *Chawton*, 1 Q. B., at p. 250, and repeated in some of the text-books. In my opinion there is not and cannot be any such general exception; if any such exception be set up it must be proved in each case (unless judicially recognized) as a customary usage in the particular trade or place. Erle, C.J.'s, ruling in *Turner* v. *Barlow*, 3 F. & F., at p. 949: "The law in all cases, not mercantile transactions, in the City of London, as to the meaning of the word 'month,' meant 'lunar month.' In all mercantile transactions in the the City of London a month means 'calendar' month"—accords with this. It is a statement of a judicially recognized custom in the city, and I do not think that Littledale, J., meant to do more than refer generally and tersely to the customary qualification of the meaning of the word. A contrary holding would necessitate a definition of "mercantile or commercial transactions"—a task of no small difficulty, unless I adopted the plaintiff's suggestion that all contracts for sale of goods and chattels, including patents, are mercantile transactions.

I hold, therefore, that "months" in this contract means "lunar months," and it is agreed that if this be so the option would expire on the 16th of March. But although the contract bears this primary meaning, and the subsequent acts of the parties are not admissible in order to alter the meaning, there is nothing to prevent the parties from coming to a subsequent agreement, having the effect of extending the period of option—and such agreement need not be in writing (apart from the Statute of Frauds, of which there is no question in the present case), but may be implied from a course of conduct (as in *Const* v. *Harris*, T. & R., at p. 523, and *Pilling* v. *Pilling*, 3 D. J. & S. 162, the principle of which *modus et conventio vincunt legem* is not confined to partnership cases)—and may be the more readily implied where the conduct of the party resisting has induced the other to do work or expend money on the faith of a state of things existing under the supposed new agreement, but non-existent under the old, and even if no such agreement can be implied the conduct may be of such a nature as to raise an equity against the party resisting. It is not necessary to speak of fraud or intentional misleading; it is either a case of sub-contract, or it is an application of the principle enunciated by Lord Cairns in *Hughes* v. *Metropolitan Railway Co.*, 25 W. R. 680, 2 App. Cas. 439. In that case notice to repair within six months was given by a landlord; negotiations for a sale of the reversion ensued, which fell through three days before the six months expired; the landlord served an ejectment on the expiration of the three days, but was restrained in equity. Lords Cairns says (p. 447): "There had been a notice in October to repair in six months. The effect of the letter of November, as it seems to me, was to propose to the appellant, and the further letter of the appellant had the effect of an assent by the appellant, to suspend the operation of that notice in order to enter upon a negotiation for the purchase and sale of the lease. That negotiation was entered upon, and, as I have assumed, came to an end on the 31st of December. My lords, it appears to me that in the eye of a court of equity, or in the eye of any court dealing upon principles of equity, it must be taken that all the time which had elapsed between the giving of the notice in October and the letter of the 28th of November, was waived as a part of the six months during which the repairs were to be executed, and that all the time from the 28th of November until the conclusion of the negotiation, which I have assumed to be on the 31st of December, was also waived—that it was impossible that any part of that time should afterwards be counted as against the tenant in a six months' notice to repair."

Then on p. 448 he says: "It was not argued at your lordships' bar, and it could not be argued, that there was any right of a court of equity, or any practice of a court of equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. My lords, I repeat that I attribute to the appellant no intention here to take advantage of, to lay a trap for, or to lull into false security those with whom he was dealing; but it appears to me that both parties by entering upon the negotiation which they entered upon, made it an inequitable thing that the exact period of six months dating from the month of October should afterwards be measured out as against the respondents as the period during which the repairs must be executed."

Nothing turned on any equitable doctrine of relief against forfeiture, but the House considered that by reason either of agreement or of innocent representation the landlord was prevented from enforcing his right under the lease.

In the case before me the plaintiff was busying himself under the clause in the contract to obtain purchasers of the various patents, and was in constant communication by letter and telegram with the defendant, who was himself desirous of getting speedy sales in order to obtain cash, so much so that he induced the plaintiff, somewhat against his will, to allow him, the defendant, to try and sell the Italian patent whilst he was in Italy. On the 7th of March, 1903, the defendant writes to the plaintiff mentioning the 1st of April, "which is only three weeks off," as

the date for the payment of the purchase-money, and suggesting that this would give the plaintiff or his agent Martin full time to sell the Austrian and German patents, and in other respects asking him to continue to act under the agreement, on the footing that it lasted until the end of the month. On the 17th of March, the day after the six lunar months expired, the plaintiff telegraphed for defendant's assent to a sale of the German patents, and received it on the same day. On the 20th there is a telegram and a long letter relating to others of the patents replied to by the defendant. On the 23rd of March the plaintiff writes that the duration of his option will expire in a few days, and asks for two months' extension, as he would otherwise have to borrow the money to complete. On the 23rd, 24th, and 25th letters and telegrams passed between plaintiff and defendant on the subject of sales of the Swiss and other patents. On the 27th defendant telegraphs "No extension until I see you"; and on the 28th the plaintiff telegraphs "Have money ready to carry out option in exchange for documents, when can I see you?" On the 6th and 7th of April the plaintiff and defendant had interviews, at which they tried to settle the accounts between them; but in no letter and at no time before action did the defendant ever suggest that the option had expired on the 16th of March. The contention is put forward for the first time by counsel at the bar, avowedly without regard to the defendant's own view.

In my opinion the letters of the 7th and the 23rd of March, coupled with the intermediate and subsequent acts of the parties, are evidence of *consensus ad idem*—namely, that the option should extend to the end of the month of March. Even if no actual agreement could be inferred, the letter of the 7th of March, coupled with the expenditure of time, work, and money by the plaintiff consequent thereon and resulting therefrom, in the belief, as appears by the letter of the 23rd of March, that the option extended until the end of the month—operates in equity to prevent the defendant from asserting that the option expired on the 16th of March, just as the letters in *Hughes* v. *Metropolitan Railway Co.* were held to operate to prevent the appellant from enforcing his legal right of entry. It is not necessary (as is also pointed out in that case) to find fraud; innocent representation, if effectual, will raise the equity; here no fraud is alleged, and not only do I see no ground for supposing that the defendant had any intention or even idea of inducing the plaintiff to give his work and time for nothing—knowing that the option had expired—but also I am convinced, from the evidence that I heard, that both parties treated, and intended to treat, the option as open until the end of the month. There is no other conceivable reason for the continuance of the plaintiff's efforts to sell, and of his frequent communications with the defendant on the subject; it is not open to the defendant to suggest that this might have been done for the sake of the 20 per cent. under the clause in the contract, for this premium expired with the option, and great part of the work was done subsequently; and moreover, the defendant, by his counterclaim, denied any right in the plaintiff to retain any of this percentage for work done at any time, and claimed repayment, and he adhered to this claim in the witness box.

I hold, therefore, that the option was extended till the end of March, and on this view the next question does not arise; but, as the point was fully argued, I will express my opinion on it, assuming that the option expired on the 29th of March. The facts are these: On the 22nd of March the plaintiff telegraphed for the defendant's address, and on the 23rd of March wrote the letter to which I have already referred; the defendant received this letter on the 26th, the day he left Rome for Genoa, and telegraphed from Rome to the plaintiff, "Genoa, Hotel Gènes, Friday; Paris, Monday." On the 28th the plaintiff telegraphed to the defendant at Genoa exercising his option under the agreement, but before that message arrived the defendant left for Monte Carlo, and proceeded to Paris on Sunday, arriving on Monday, the 30th. The plaintiff wrote a letter dated the 28th of March confirming his telegram and exercising his option, and posted it on the 28th addressed to the defendant in Paris; this letter would arrive in due course on the 29th, but the defendant did not reach Paris till the 30th. It is now argued (though this again is not the defendant's, but his counsel's suggestion) that this option having expired on the 29th of March, a telegram and letter sent on the 28th, but not reaching the defendant until the 30th, were too late. In my opinion this contention fails also, for the option was duly exercised when the telegram was sent and the letter posted. I take the rule, as stated by Lord Herschell in *Henthorne* v. *Fraser*, 40 W. R. 433, [1892] 2 Ch., at p. 33: "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

In the present case the parties are American citizens, staying temporarily at London hotels when they signed the contract; that contract obviously contemplates the events that in fact happened, that the two parties would separate and would visit various parts of Europe, and would communicate with one another constantly by letter and telegram; if there ever was a case in which the parties contemplated that "the post might be used as a means of communicating" on all subjects connected with the contract, this is that case.

I hold, therefore, that the option was duly exercised. I have already disposed of the point as to the Italian contract; the fact being that the defendant has sold it without authority, and therefore cannot make a title to the plaintiff; the parties, to save the expense of an inquiry, have agreed its value at £2,000; and the judgment will therefore omit the Italian patent, and reduce the purchase-money to £6,000.

I have also dealt with the deferred payments for two of the patents. The plaintiff must pay the £6,000, and take over these payments, but he is not bound to pay until the defendant assigns to him all the patents (except the Italian) not already assigned to the purchasers on sales made under the power in the contract. As the defendant has not yet fully performed his part of the contract by procuring patents in all the countries, I think that the best course will be to make a declaration that the plaintiff is entitled to specific performance of the contract, and that the defendant is bound to obtain and assign the outstanding patents (naming the countries) on payment of £6,000 cash, less the £800 paid for the Russian patent, with liberty to apply. The defendant must pay the costs of the action; and the counterclaim is dismissed with costs.

Solicitors, *W. O. Vizard; Paterson, Candler, & Sykes.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) Dec. 7, 9.

LONDON COUNTY COUNCIL v. PAYNE & CO. (a.)

Weights and measures—Beam scale—Weight indicated exceeding true weight of article sold—Paper bag placed in scoop in which tea is weighed at request of customer—Metal clip fastened to machine—Having in their possession a scale which is false or unjust—Weights and Measures Act, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.

The respondents, who were wholesale tea merchants, received orders from certain customers to supply them with tea in quarter-pound packets weighed in customers' own bags, the net weight of each packet to be a quarter of a pound. In order to meet the wishes of their customers the respondents set aside one of their weighing machines, on one arm of which they attached a metal disc as nearly as possible corresponding in weight with the weight of a bag. The respondents were summoned under section 25 *of the Weights and Measures Act,* 1878, *for having in their possession a scale which was false and unjust.*

Held, reversing the decision of the magistrate, that the respondents should have been convicted, because there was evidence that the beam scales in question could not weigh accurately, and were therefore false and unjust within the meaning of the section.

Case stated by Cecil Chapman, Esq., a metropolitan magistrate.

On the 13th of January, 1903, the respondents appeared at the Southwark police-court to answer two informations which had been laid against them on behalf of the appellants. The first information charged that the respondents did use on the 24th of November, 1902, at their business premises, Boss-street, Tooley-street, Bermondsey, for trade a weighing instrument, to wit, a beam scale, which was false or unjust contrary to section 25 of the Weights and Measures Act, 1878—that is to say, the said beam scale had attached thereto a metal disc. The second information charged a similar offence at the same time and place in respect of another beam scale which had a paper bag placed under the goods scoop thereof. The two informations were by consent heard together, and at the hearing the following facts were proved or admitted by both parties:

The respondents were wholesale tea merchants, and on the 4th of November, 1902, an inspector of weights and measures for the district in which the respondent's premises were situated visited the premises and found in a room where tea was being weighed two beam scale which were in use for weighing out tea.

The first of these had a small metal disc affixed by wire to the arm of the scale on which the scoop for receiving tea was placed, the effect being that the quantity of tea required to turn the scale with a weight of a quarter of a pound in the opposite pan was less than a quarter of a pound by the weight of the disc, which was about two or two and a-half drachms.

The disc was as nearly as might be equivalent to the weight of the paper bag or wrapper in which each quantity of tea was to be placed, and the tea so weighed out for the purpose of obtaining upon each weighing such a quantity of tea, as with its bag or wrapper would weigh exactly a quarter of a pound.

The other beam scale had a folded paper bag placed underneath the scoop in which the tea was being weighed. This bag was used for the same purpose and with the same effect as the disc above referred to.

The respondents thus weighed tea only for those customers who were retail dealers in tea, and who requested to be supplied with it so packed, and these customers themselves supplied the bags or wrappers each of which had printed upon it an intimation that the weight of the paper was included.

There were also in use other scales that were correct and just. Directions had been given by the respondents to their employees, who worked under proper supervision, not to use scales with a metal disc or paper bag to weigh out tea for any customers other than those above referred to. The respondents themselves did not sell tea by retail.

The scales with the disc attached were physically incorrect to the extent and in the mannner described.

The respondents acted fairly towards their customers and only gave them what they asked for.

The appellants contended that the beam scales to which the disc was attached were false or unjust within the meaning of section 25 of the Weights and Measures Act, 1878, and they relied on *Lane* v. *Rendall*, 48 W. R. 153, [1899] 2 Q. B. 673.

The respondents contended that to constitute an offence under this section the scale must be false or unjust with reference to the trade use that in fact was being made of it, and they relied upon *Withall* v. *Francis*, 42 J. P. 612, and *Crick* v. *Theobald*, [1895] 64 L. J. M. C. 216, 43 W. R. Dig. 191.

But for the fact that the customers had requested the respondents to supply tea in such quantities and so packed as aforesaid the magistrate would have, following *Lane* v. *Rendall*, convicted the respondents, but it appeared to him impossible to say that the beam scales were false or unjust in the face of such request. The cases of *Withall* v. *Francis* and *Harris* v. *Alwood*, [1893] 53 J. P. 7, appeared to him to establish the contrary, and he accordingly dismissed the informations.

The appellants appealed, and the question for the opinion of the court was whether upon the facts the respondents ought to have been convicted.

Dickens, K.C. (*Daldy* with him), for the appellants.—Section 25 of the Act of 1878 makes it unlawful for a person to have on his premises "unjust or false scales," and the learned magistrate appears to have thought that as there was no fraudulent motive on the respondents' part they ought not to have been convicted. Under section 26 the consent of the purchaser is material, for under that section fraud has to be proved, but under section 25 the question of motive is wholly immaterial. It is no defence to say that these scales which had been manipulated by the addition to one arm of a small metal disc corresponding in weight to the bag were only to be used for a special purpose. In the interest of the public that argument could not be allowed to stand, for if proper supervision were not exercised the servants of the trader might use them: *Great Western Railway Co.* v. *Bailie*, 13 W. R. 203, 5 B. & S. 928, 34 L. J. M. C. 31. The case of *Lane* v. *Rendall*, 48 W. R. 153, [1899] 2 Q. B. 673, is expressly in point. [He was stopped by the court.]

Avory, K.C., and *George Elliott*, for the respondents.—The facts in this case show that the machine in itself was just and accurate, and in that sense was in compliance with section 25. The metal disc and the paper bag are no part of the machine. The bags supplied by the customers were printed with an intimation that the weight of the bag was included in the weight of the tea. The respondents were merely executing the wishes of their customers. *Lane* v. *Rendall* is dis-

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

tinguishable, because in that case the seller was a retail dealer, and the decision was simply that the purchaser who asked for a pound of tea was entitled to receive a pound of tea and not a pound of tea less the weight of the bag and package. Here what the customer asked for was a specified weight of tea less the weight of the bag. And that was what he got. Moreover, the case of *Great Western Railway Co.* v. *Bailie*, if it can be said to apply here at all, is really an authority in the respondents' favour as showing that the section is directed against machines which are in themseves unjust, and not against the particular use of an accurate machine: *Withall* v. *Francis*, 42 J. P. 612.

Dickens, K.C., in reply.—The metal disc and the paper bag were not placed on the scales with the object of accurately weighing the article to be sold. Therefore *Withall* v. *Francis* is not an authority in the respondent's favour. So long as these additions remained as parts of the machine it was impossible for the scales to accurately weigh out the tea with what was just and true balance.

Cur. adv. vult.

Dec. 9.—Lord ALVERSTONE, L.C.J.—In this case I confess I have felt great difficulty during the argument and I am very anxious not to appear to lay down any general rule or any rule which is not applicable to the particular case. I have come to the conclusion, however, that the argument of Mr. Dickens is correct, and that the appeal must be allowed. There seems to me to be two classes of cases—the cases where scales are kept, used or had in possession—that is, used or kept for use—in a state which makes them false or unjust, that seems to be one class of cases which come under section 25. There is another class of cases where honest scales are honestly used in a particular way for the purpose of carrying out a particular weighing operation. The two cases are illustrated by *Lane* v. *Rendall*, on one side, and by *Withall* v. *Francis* on the other. I am anxious that I should not be thought to lay down any rule that it is an infringement of section 25 honestly to use scales that are otherwise just for the purpose of carrying out a particular operation by temporarily adjusting them for a given purpose, and the difficulty I have really felt in this case is within which class of cases upon the facts this case falls. I have come to the conclusion, for reasons which I will very briefly state, that the case falls within the class of cases in which the person against whom the proceedings have been taken, has had in his possession an unjust balance.

I think the real difficulty is upon these facts to say whether or not what the magistrate has found makes what was being done of the nature of a mere temporary adjustment of an honest balance for use for a particular purpose, or was having in his possession a scale which was inaccurate and unjust, contrary to section 25. I think on these facts it must be taken that not only this scale, but others open to the same objection were regularly kept in that condition. It is found that one of them had a metal disc, fixed by wire, to adjust the weight of the paper. It is found that the other had a folded paper bag placed underneath the scoop in which the tea was being weighed, or in other words the two scales are in such a condition that the material put into the weighing scoop would not be justly weighed. I think it may be possibly not an unfair method of construing section 25 to say that while there may be a temporary use of scales so as to make them carry out a particular weighing operation which is honest and desired to be done, the instrument in its normal condition as kept, must be in a condition to weigh justly, by which I mean accurately, that which is put in to be weighed. In this case the scales as kept will not weigh accurately the tea that is put into the scoop, it will weigh it plus the weight of the paper bag, which is underneath in the one case, and the metal disc which is fastened on in the other.

The case states that "the respondents weighed out tea only for those customers who were retail dealers in tea who requested to be supplied with it so packed." Such customers supplied the bags or wrappers. "At the time of the inspectors' said visit other scales in the same condition as the two scales, the subject of the information, were being used at the repondents' premises for weighing out tea for such customers as aforesaid, and there were also in use a number of scales for weighing out tea in full weights, and all these last mentioned scales were correct and just. Directions had been given by the respondents to their employees, who worked under proper supervision, not to use scales with a metal disc or paper bag to weigh out tea for any customers other than those above referred to." I think that statement shows that these scales complained of were permanently kept in that condition, and that it required what is here spoken of as supervision and superintendence, so that they might not be used for an improper purpose. Therefore it seems to me that that points to a condition of things which, though it may be perfectly innocent in itself, and really no substantial breach, yet still it is a contravention of the section, because the scales are kept in a condition in which they will not accurately and justly weigh that which is put in to be weighed. That the learned magistrate took that view of the facts I think is clear from the grounds upon which he dismissed the summons. He said: "But for the fact that the customers had requested the respondents to supply the tea in such quantities and so packed as aforesaid, I should have followed the case of *Lane* v. *Rendall*." In other words, he really has rather adopted the argument with which we were pressed by Mr. Avory in his most able argument, that the request to carry out this particular weighing operation was an answer to this summons. I say that if I had come to the conclusion that merely and solely for the time when these scales were being used for this particular purpose, a temporary adjustment was made, and that that was not found to be the condition of the scales as kept by the respondents, I should have come to a different conclusion. I think the magistrate has meant to find here that the scales were kept in the condition that they would not accurately weigh—would not justly weigh—what was put in to be weighed; that being so, he has thought that the mere request by customers to have their tea so weighed was an answer to the summons; I have therefore come to the conclusion that the appeal ought to be allowed.

With regard to the authorities, of course, there is *Crick* v. *Theobald*; so far as I can see that has nothing to do with the case. With regard to *Withall* v. *Francis*, that undoubtedly was a case coming within what I have called the temporary use of proper scales for a given purpose, and that is why I am so anxious it should not be thought I am laying down a rule that there is anything unlawful in doing what was recognized by the court as being lawful in *Withall* v. *Francis*. With regard to *Lane* v. *Rendall*, although it is a case exactly on the lines I have indicated, I do not think it can be recognized as laying down the rule apart from the facts of that case, because I have not the slightest doubt that in *Lane* v. *Rendall* the scales were being used for weighing paper and tea under the name of weighing tea; therefore, although no fraud was found, because it was found to be done for other purposes, yet the scales were being in fact

kept and used in the unjust condition which I have already referred to—that is to say, not in the condition of weighing fairly and justly the tea that was put into the scale. This is obviously a technical breach, and one which I do not suppose it will be suggested for a moment that the respondents, who are weighing tea to be put into bags which were going to indicate that the paper bag was to be weighed, were doing anything in the least morally wrong, but I think that they have brought themselves within the mischief, because, after all, as was pointed out in this argument, if supervision is required for scales so adjusted, they may be used at times when that supervision fails for weighing other matters. Therefore I think technically there was a breach of this section, and that the magistrate ought to have convicted, notwithstanding there had been a request by customers to have their tea weighed, so that the weight of the bag might be included. I therefore think the appeal must be allowed.

LAWRANCE, J.—I am of the same opinion, upon the ground that in this case, beyond doubt, the respondents were using, or had in their possession, a weight, measure, scale, and so forth, which was false and unjust at the time of the visit of the inspector. The object of the statute clearly was not that there should be an inquiry, when it has been found that there is a scale being used which is unjust, as to whether any fraud had been committed or not, because if that had been so in every case it would have been necessary for the respondents to come forward and say: "In this case nobody was taken in." The question is not whether it was false and unjust towards the particular customer who was using it, but whether it was false and unjust in fact. Nobody can doubt for a moment it was, if used by anybody else upon the premises, false and unjust at that time. Nobody could doubt if the disc or paper had been concealed, that that would have been a fraud; and one's idea upon section 25 is strengthened by section 26, which is really pointed to fraudulent user. There is no pretence for saying there was fraudulent user here, but it throws the burden upon inspectors of weights and measures to inquire every time whether the person had been taken in or not. The effect of the section seems to me to be perfectly clear; it is: Any persons who have in their possession weights and scales which are false and unjust even if they are false and unjust in a manner not to the injury of the customer (because if that had been so, if it had been concealed from him, there would have been an offence under section 26), seem to me to come entirely under it, and to come within the judgment in *Lane* v. *Rendall*. I therefore think that this appeal must be allowed.

KENNEDY, J.—I am of the same opinion. The informations charge the respondents with using for trade a weighing machine—to wit, a beam scale—which was false or unjust. Now, speaking entirely for myself, it seems to me that the object, for a very obvious public reason, which was sought to be attained by this section, and that which in fact it does not attain as I construe it, is this: That the instrument itself must be such as in its condition, whether on a particular occasion or generally, when it is being used for trade, gives a just and true—that is, a correct result, as regards the weight of the thing being weighed, the thing placed in the scales; and if you have to consider an adjustment for any purpose, such as Mr. Avory in his very able argument contended, then my own personal view of this section is that the trader must make what is shown by the weight on the other side, by the balance, a true result of what is being weighed; but if with the most honest intention, and at the request of the purchaser, you try to obtain the adjustment by an alteration of the machine itself, you are then using a machine for trade which is false or unjust. It seems to me, I confess, that all the argument which seems (in fact, it is stated by the learned magistrate) to have weighed with him—and to have turned the scale, if I may say so, in his mind—as to the acquiescence or request of the purchaser, is *nihil ad rem;* and I will give an illustration which strikes me, at any rate as being an illustration which shews the danger of such a contention prevailing. A man, a trader, has a machine which, either as originally constructed or by reason, we will say, of some accident in the user, becomes to some extent inaccurate, is himself liable under the section, however honest his intent, if in fact he uses or employs an adjustment which is not an adjustment of the thing within the scale—that is, the thing to be weighed, but is an adjustment which affects the truth and accuracy of the weighing machine. Therefore it seems to me that, while I was struck with it at the time, put in the clear and persuasive way in which Mr. Avory put it, there is a fallacy in the analogy suggested of an adjustment of scale by putting in a weight into one scale in order to get a result which could not otherwise be attained, owing, we will say, to the deficiency of a three-pound weight when three pounds was all to be got out of the other side. You are not affecting the truth or accuracy of the machine so as to make it false or unjust if you are putting into the scale to be weighed as part of the thing to be weighed, any weight you like, because then unjust and inaccurate. Enter a purchaser who says: "I want to have tea weighed." The trader says: "Well, I have got a machine for weighing, but it is inaccurate." "Oh, never mind," says the purchaser, "we will get as near as we can." Now, I have taken the strongest case that you could take both of honesty and request; I have no doubt in my mind that if that trader uses a machine that is inaccurate, and the inspector entered the shop at that moment and saw the operation the section would apply. It must apply. You could not say he was not using a machine which was false or inaccurate. The object was the safety of the public in the user, as well as the possession of an accurate machine. An accurate machine is one that shows correctly the weight of the thing put into the opposite scale which is to hold the goods to be weighed. But if by reason of any adjustment of the machine, you make, not the thing weighed, accurately weighed, but make the machine represent that in its result which is not the fair weight of the thing in the scale by an alteration or adjustment of the machine, it appears so me, I confess, entirely speaking for myself, that whether it was with acquiescence or without acquiescence on any one occasion or many occasions there would be user of the machine within the section. There is no reason why you should not put in the scale any weights you like to make the three-pound balance, or because you have got a weight on the other side which is larger than the one you want to obtain, you fill up the tea by putting, honestly, of course, a weight in the scale. There is no objection to that. If you alter the machine itself, so that, as it stands, its contents are not truly represented on the index on the other side, it seems to me the Act has been contravened under this section, and there has been a user of an instrument which is in fact inaccurate and unjust.

Appeal allowed.

Solicitor for the appellants, *W. A. Blaxland.*

Solicitors for the respondents, *Lamb, Son, & Prance.*

IN BANKRUPTCY.

K. B. Div. (Wright and Ridley, JJ.) — Jan. 25.

In re A DEBTOR.
Ex parte ROCK RED BRICK CO. (*a.*)

Bankruptcy—Act of bankruptcy—Bankruptcy notice—Stay of execution—Judgment summons—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g) —*County Court Rules*, 1889, *ord.* 25, *rr.* 17, 25, 26, 27

A creditor having obtained judgment in the High Court issued a judgment summons in the county court against the debtor, and also a bankruptcy notice, under which an act of bankruptcy became completed before an order was made on the judgment summons. After the order had been made another creditor presented a bankruptcy petition founded on the above act of bankruptcy.

Held, that as there was a completed act of bankruptcy before the making of an order on the judgment summons, a receiving order ought to be made.

Appeal from a decision of the registrar of the county court at Leeds, refusing to make a receiving order.

Upon the 21st of September, 1903, the Leeds Patent Brick Co. obtained a judgment against the debtor in the High Court for £43, and took out a judgment summons for the amount on the 25th of September in the county court at Leeds.

The summons was served upon the debtor upon the 2nd of October, and was returnable for the 2nd of November. On the 13th of October the same creditor issued a bankruptcy notice against the debtor founded on the same judgment. This notice was served upon the debtor upon the 17th of October, and the act of bankruptcy thereunder became completed on the 25th of October.

Upon the 2nd of November the judgment summons came on for hearing in the county court, when an order was made for payment of the judgment debt by instalments.

Upon the 3rd of November the Rock Red Brick Co., the present appellants, presented a bankruptcy petition against the debtor, the act of bankruptcy relied upon being non-compliance with the bankruptcy notice issued by the Leeds Patent Brick Co.

The petition was heard upon the 27th of November, when the receiving order was refused, on the ground that a bankruptcy notice could not properly be issued pending the hearing of a judgment summons based on the same debt.

The petitioning creditor appealed.

Ringwood, for the appellant.—The question here is whether the issue of a judgment summons operates as a stay of execution so as to preclude the creditor from issuing a bankruptcy notice upon the same judgment. The learned registrar based his judgment on the decisions in *Jones* v. *Jenner*, 25 L. J. Ex. 319 and *Montgomery & Co.* v. *De Bulmes*, 47 W. R. 22, [1898] 2 Q. B. 420, but they do not appear to be applicable. [WRIGHT, J.—*Jones* v. *Jenner* has no application to this case.] I rely upon *Ex parte Johnston, In re Watson*, 41 W. R. 34, [1893] 1 Q. B. 21. [He was stopped by the court.]

Hansell, for the debtor.—The issue of a judgment summons has the effect of staying all other forms of execution: see the County Court Rules of 1889, ord. 25, rr. 17, 25, 26, 27. [WRIGHT, J.—Those rules cannot limit the power to issue execution in the High Court.] The County Court Rules apply in the High Court for the purpose of judgment summonses. [WRIGHT, J.—Rule 27 can only apply to county court judgments.] Then I say that the principle laid down in *Montgomery & Co.* v. *De Bulmes* is applicable to this case, that where a plaintiff issues a judgment summons in the county court and obtains an order for payment by instalments, he relinquishes his right to issue execution in the High Court.

Ringwood, in reply.—In this case there was a completed act of bankruptcy before the instalment order was made.

WRIGHT, J.—This is a very short point. The receiving order was wrongly refused by the registrar for the simple reason that there was a completed act of bankruptcy available to any creditor before the date when the order for payment by instalments was made. That, to my mind, is an end of the case. Apart from that reason, I should have thought that there was a great deal in Mr. Hansell's point that the principle laid down in *Montgomery & Co.* v. *De Bulmes* ought to apply.

RIDLEY, J.—I agree. I do not see how we can come to any other decision, seeing that the act of bankruptcy was completed before the making of the order under the Debtors Act.

Appeal allowed; leave to appeal granted.

Solicitors for the appellant, *Barton & Pearman*, for *Scatcherd, Hopkins, & Middlebrooks*, Leeds.

Solicitors for the respondent, *Walter & E. H. Foster*, Leeds.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

K. B. Div. (Wright, J.) — Dec. 14; Jan. 18.

In re REIS.
Ex parte THE TRUSTEE. (*a.*)

Bankruptcy—Marriage settlement—Covenant for future settlement of property — Transfer of property to trustees of settlement after act of bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47, *sub-section* 2.

In construing section 47, *sub-section* 2, *of the Bankruptcy Act*, 1883, "*Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy,*" *the words* "*on his becoming bankrupt*" *must be interpreted to mean on his committing an act of bankruptcy within three months of the presentation of a bankruptcy petition on which he is subsequently adjudicated a bankrupt.*

Motion by the trustee in the bankruptcy to set aside a conveyance of property by the bankrupt to the trustees of his marriage settlement made upon the 10th of June, 1903.

In 1879, Reis, the bankrupt, had executed a settlement in consideration of marriage, whereby he covenanted (*inter alia*) that "all real and personal property, if any, except business assets, to which the settlor or his wife may at any time become entitled," should be conveyed to the trustees of the settlement.

In 1880 Reis became bankrupt, but obtained his discharge in 1882.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

In 1894 he was again in difficulty and made a composition with his creditors. After that he started the business of an outside stockbroker and for some years was very successful in business.

In 1901 he bought and furnished a house in Holland Park, the subject-matter of the conveyance now sought to be set aside.

In 1903 he was unfortunate in business; in April his position was serious, and by the date of the mid-May Stock Exchange Account had become worse. He had only four or five creditors of importance, all of whom were members of the Stock Exchange.

On the 23rd of May the trustees of his marriage settlement gave him a written notice requiring him to convey to them the house and furniture in Holland Park.

On the 26th of May he summoned his two largest creditors to meet him in the presence of his solicitor, told them that he was not in a position to meet his liabilities on the impending settlement day, and authorized them to close his account, which they at once did.

On the 10th of June he conveyed the house and furniture to the trustees of his marriage settlement, and on the 12th of June he held a meeting of his creditors and offered them a composition of 2s. in the £1, which was refused.

A receiving order was made against him on the 15th of July; he was subsequently adjudged bankrupt, and a trustee was appointed, who moved to set aside the transfer of the 10th of June.

Upon the hearing of the motion evidence was called on both sides as to what was said by the debtor and his solicitor to the creditors whom they saw on th 26th of May. Wright, J., came to the conclusion on the evidence of the witnesses for the respondent alone that what was said by the bankrupt and his solicitor amounted to notice of intention to suspend payment and consequently that an act of bankruptcy was committed by Reis on the 26th of May. Various points were argued on both sides, but the only arguments which the court considered necessary for the decision of the case appear in the judgment.

Herbert Reed, K.C., David, and *Adler,* for the trustee in bankruptcy.

Horridge, K.C., and *Muir Mackenzie,* for the trustees of the marriage settlement.

Hansell and *Macklin,* for the bankrupt's wife.

WRIGHT, J. (after dealing with the evidence).—Then, that being the conclusion of fact, there was an act of bankruptcy on the 26th of May. On the 10th of June the debtor transferred to the trustees of his marriage settlement the after-acquired property which he had covenanted to settle. A receiving order was made against him on the 15th of July, and the effect of the whole is that the bankruptcy relates back to the 26th of May. Then section 42, sub-section 2, of the Bankruptcy Act, 1883, is: "Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in bankruptcy." On the construction of those words the first question is, What is the meaning of "becoming bankrupt"? There is apparently no authority to guide me in that. There are strong reasons urged for the view that "commencement of the bankruptcy" would have been used if that had been meant. On the other hand it is said that "adjudicated bankrupt" would have been more natural than "becoming bankrupt" if that had been meant. I must construe "becoming bankrupt" by the right of section 43. Section 43, reading only the material words, says: "The bankruptcy of a debtor . . . shall be deemed . . . to commence at . . . the time of the first of the acts of bankruptcy proved to have been committed within three months next preceding the date of the presentation of the bankruptcy petition." If the bankruptcy is to be deemed to have commenced at that time, then as from the date when it is to be deemed to have commenced the bankrupt must be deemed to have become bankrupt.

Then, secondly, comes the question, What is the proper meaning of the words "becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant"? It has been argued that various kinds of constructive transfers are enough. It seems to me that the very object of the language used is to exclude all such arguments, and that it means what it says; that the sub-section is to apply unless there has been an actual legal transfer pursuant to the contract or covenant. The cases of *Ramsay* v. *Margrett,* [1894] 2 Q. B. 18, 42 W. R. Dig. 10, and *In re Satterthwaite,* 2 Mans. 52, which were decided on the Bills of Sale Acts, do not seem to me in point. In *Ramsay* v. *Margrett* there had been an actual verbal sale and payment of consideration. In *Satterthwaite's case* the house and furniture in it had been actually assigned to trustees for the wife and under those circumstances it was held that possession which might on the face of it be ambiguous must follow the title. Here there was no actual transfer until the 10th of June. I think section 47 cannot be construed by any reference to the Bills of Sale Acts, and that there was no actual transfer here at the date of the 26th of May.

Then it remains only to consider whether section 47 is in any way subject to or modified by section 49. That point has not been really argued, and I do not think it could be properly argued. Section 49 seems, on the face of it, only to be applicable where section 47 does not apply, and the enumeration of the cases where section 49 is to apply does not include any description applicable to the facts of this case. The transfer to the trustees was not a payment by the bankrupt to any of his creditors; it was not a payment or delivery to the bankrupt; it was not a conveyance or assignment by the bankrupt for valuable consideration; and it was not a contract, dealing, or transaction by or with the bankrupt for valuable consideration. I think it is not desirable to decide the difficult and doubtful questions which arise on other parts of the case, because it seems to me that I am bound to come to the conclusion to which I have come on the question of fact, and on the construction of section 47. The transfer must be declared void as against the trustee in bankruptcy.

Application allowed.

Solicitors for the applicant, *W. H. Martin & Co.*

Solicitors for the trustees of the marriage settlement, *Norden & Defries.*

Solicitors for the bankrupt's wife, *Spyer & Son.*

K. B. Div.
(Wright and Phillimore, JJ.) Dec. 7, 12.

In re JOHNSON.
Ex parte MATTHEWS & WILKINSON. (*a.*)

Bankruptcy — Settlement of settlor's own property — Limitation of life interest to settlor determinable on bankruptcy — Second bankruptcy — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

In 1893 *the bankrupt had settled property on trustees who were to pay him the income, but upon bankruptcy his rights to the income were to cease, and the trustees were left with the power to apply the income to his support or accumulate it as they thought fit. In* 1900 *he became bankrupt; the trustees raised enough out of the settled funds to pay the debts in full, but the bankruptcy was not formally annulled. In* 1902 *he again became bankrupt, and the trustee in bankruptcy claimed the life income.*

Held, that the trustee could not succeed, as the bankrupt's interest in the income had determined upon his bankruptcy in 1900, *and passed to the trustees of the settlement.*

Appeal from a decision of the county court judge at Manchester.

In 1893 the bankrupt Johnson, who had then just come of age, made a settlement of certain property of which settlement the appellants were the trustees. The bankrupt had never married.

The property settled consisted of a share of the residue passing to the bankrupt under his grandfather's will. The testator, when bequeathing legacies to his sons for their lives, made such legacies determinable upon bankruptcy or upon the assignment or charging of the annual income.

The settlement made by the bankrupt in 1893 did not express the trust and limitations clearly, but by reference to his grandfather's will.

The effect of the two instruments read together was that the settlor assigned property to the trustees on trust to pay him the annual income until he was declared bankrupt or assigned or charged his income. On such events his interests were to determine, and the trustees were to have power to apply the income or any part thereof for his support or otherwise in their discretion, and to apply the residue, if any, for the benefit of his children, if any, or to accumulate it and add it to the settled funds which were eventually to go to relatives.

Johnson was adjudicated bankrupt for the first time in 1900, when the trustee in the bankruptcy moved to set aside the settlement so far as was necessary to pay the debts of the bankrupt, and an order to this effect was made by consent. The settlement trustees raised money enough out of the settled funds to pay all the debts provable in the bankruptcy, but there was no formal order annulling the bankruptcy.

In 1902 Johnson again became bankrupt, and the trustee in this bankruptcy moved to set aside the settlement as before. This time, however, the application was opposed, and with success, the county court judge finding as a fact that at the time when the bankrupt executed the settlement, which was more than two years before the bankruptcy, he was able to pay all his debts without the aid of the property comprised in the settlement.

The trustee then applied for a declaration that the life estate of the bankrupt under the settlement vested in him, and that he was entitled to the income thereof with the arrears.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

The county court judge made an order to that effect, from which the present appeal was brought.

Leigh Clare, for the appellants.—The order was wrong because there was nothing on which it could take effect. All the bankrupt's interest passed to the trustees on his being made bankrupt in 1900.

Carrington, for the respondent.—The first bankruptcy must be treated as having been annulled, as all the debts provable therein were paid in full: *Metcalfe* v. *Metcalfe*, 38 W. R. 397, 43 Ch. D. 633.

Cur. adv. vult.

Dec. 12.—The judgment of the COURT (WRIGHT and PHILLIMORE, JJ.) was read by

PHILLIMORE, J. (after stating the facts).—An owner of property cannot by way of settlement or contract qualify his own interest in property by a condition determining or controlling it, in the event of his own bankruptcy, to the disappointment or delay of his creditors. This was decided in *Wilson* v. *Greenwood*, 1 Swans. 471, and the decision has been followed in a number of cases, many of which will be found enumerated in *Mackintosh* v. *Pogose*, 43 W. R. 247, [1895] 1 Ch. 505.

But this rule applies only to a limitation upon bankruptcy, and to cases where but for this limitation the property or income would have come to the assignee or trustee in bankruptcy, and then only so far as it would have thus come. Thus in *Detmold* v. *Detmold*, 37 W. R. 442, 40 Ch. D. 585, the husband settlor, with a similar clause, suffered an incumbrance of his income by the appointment of a receiver at the suit of a judgment creditor on the 19th of July, 1888. In or about September of the same year he was adjudicated a bankrupt upon an act of bankruptcy committed on the 29th of July. It was held that before the act of bankruptcy there had been a forfeiture by the husband owing to the appointment of a receiver; that the limitation over to the wife upon such forfeiture was good, inasmuch as it defeated a particular alienee, and was not a fraud on the bankrupt laws; that, therefore, the gift over had taken effect before the bankruptcy, the income had become vested in the wife, and there was nothing for the trustee in bankruptcy to take.

Following this authority, the judge in *In re Brewer's Settlement, Morton* v. *Blackmore*, 45 W. R. 8, [1896] 2 Ch. 503, stated as follows the point which he had to determine: "The question is whether the life interest had determined previously to bankruptcy." In that case it was held that what had been done previously to the bankruptcy did not amount to forfeiture or determination of the life interest, and therefore the trustee in bankruptcy took the life interest.

In the case before us the trustee in the first bankruptcy, if he had failed in setting aside the settlement would have succeeded in getting the bankrupt's life interest under it, because to allow the limitation over to take effect would have been in the language of the cases, a "fraud upon the bankrupt laws," or a disposition of property forbidden by law. But though the alienation could not take effect so as to disappoint and delay the creditors in the first bankruptcy, it operated as against the settlor as a forfeiture. He lost all his rights to the residue left after paying those creditors. The income came under the control and discretion of the trustees. If the limitation over had been to a determined person (as to the wife in *In re Detmold*), she would have claimed a vested interest, which could only have been divested by impeaching the settlement—an impeachment which in this case has failed.

The case looks different because the trustees of the settlement have a discretionary power; but the law to be applied is the same. The appeal must be allowed.

Appeal allowed.

Solicitor for the appellants, *W. E. Dowson.*

Solicitor for the respondent, *W. B. Glasier.*

Court of Appeal.

From K. B. Div.
(Lord Alverstone, L.C.J., Collins, M.R., and Romer, L.J.) } Jan. 19.

MAYOR, &c., OF NORTHAMPTON *v.* ELLEN. (*a.*)

Waterworks—Water rate—Supply of water—Differentiation of rates—Corporation of borough—"Rates"—Northampton Waterworks Act, 1861 (24 & 25 *Vict. c. xlvii.*), *s.* 59—*Northampton Corporation Waterworks Act,* 1884 (47 & 48 *Vict. c. ccviii.*), *ss.* 10, 25, 36—*Northampton (Extension) Order,* 1900, *Art.* 36.

By section 59 *of the Northampton Waterworks Act,* 1861 (*which incorporated the Waterworks Clauses Act,* 1847), *the waterworks company might from time to time supply any person with water for such remuneration and on such terms and conditions as should be agreed upon. By the Northampton Corporation Waterworks Act,* 1884, *the waterworks undertaking was transferred to the corporation with all the authorities, rights, powers, and privileges of the company. By section* 36 *of the Act "the corporation may thenceforward charge for the supply of water for domestic use to any dwelling-house a sum not exceeding* 7½ *per centum per annum on the net rateable value of such dwelling-house, as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable, or if there be no such list, then on the net rateable value of such dwelling-house as the same is assessed to the last poor rate." There was no section in any of the Acts which gave any specific directions or powers as to either equality or differentiation of rating. The defendants' dwelling-house was, until* 1900, *situated in Kingsthorpe, a district outside the borough of Northampton, but within the corporation's area of water supply. By the Northampton (Extension) Order,* 1900, *the area of the borough was extended so as to include that part of Kingsthorpe where the defendants' house was situated, and by article* 36 *of the order the general district rates to be levied in the added part of Kingsthorpe were not in any one year for ten years to "exceed such an amount as, when added to the poor rate and the borough rate, and any other rate made by the corporation in the same year," would make up a total rate of* 5*s.* 6*d. in the pound on the rateable value of such hereditament. The rates levied in the added part of Kingsthorpe (other than the water rate) always amounted to* 5*s.* 6*d. in the pound. The corporation had, down to June,* 1901, *been paid a water rate of* 7½ *per cent. from all domestic consumers in the old borough and the added part. In June,* 1901, *the corporation reduced the water rate to* 5 *per cent. in the case of consumers in the old borough, but retained it at* 7½ *per cent. in the case of consumers in the added part.*

Held, (1) *that there was nothing in the Acts to prevent the corporation from differentiating the water rate as above set forth; and* (2) *that the words "any other rate" in article* 36 *of the Northampton (Extension) Order,* 1900, *did not include a water rate, and that the corporation were entitled to charge a water rate from the defendant, though the rate payable by him, exclusive of the water rate, amounted to* 5*s.* 6*d. in the pound.*

Appeal by the plaintiffs from the judgment of Bigham, J., upon a special case stated for the opinion of the court in an action (reported in 87 L. T. 335).

The plaintiffs claimed from the defendant, who was a burgess and ratepayer of the borough of Northampton, £1 4s. 9d., being the amount of a quarterly instalment of the annual water rate for the supply of water for domestic use to his dwelling-house at Kingsthorpe, a district which had formed part of the area of water supply since 1861, and was incorporated with the borough of Northampton by the Northampton (Extension) Order, 1900. The said sum of £1 4s. 9d. was made up of £1 0s. 3d., being one quarter's instalment of an annual rate of 7½ per cent. on the rateable value of £54, and 4s. 6d., being one-one-quarter's instalment of an annual rate of 18s. extra charges for bath and water-closets. The defendant only disputed the payment of the sum of £1 0s. 3d. In 1884 the plaintiffs, in pursuance of powers conferred on them by section 19 of the Northampton Waterworks Act, 1882, purchased the undertaking of the Northampton Waterworks Co. (which company was incorporated by the Northampton Waterworks Act, 1861) by virtue of an Act called the Northampton Corporation Waterworks Act, 1884.

By section 10 of the Act of 1884 the Act of 1861 and the Act of 1882 were to be read as if the plaintiffs had been therein named instead of the company. The plaintiffs' rate for the supply of water for domestic use was based on section 36 of the Act of 1884, which repealed section 49 of the Act of 1861, by which rates varying with different annual values were authorized. Section 36 of the Act of 1884 said that "the corporation may thenceforward charge for the supply of water for domestic use to any dwelling-house a sum not exceeding seven and a-half per centum per annum on the net rateable value of such dwelling-house, as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable, or if there be no such list then on the net rateable value of such dwelling-house as the same is assessed to the last poor rate."

By section 5 the "undertaking" which was transferred to the plaintiffs included (*inter alia*) all authorities, rights, powers, and privileges of the company.

Section 20, sub-section 2, provided that any moneys borrowed in the manner authorized by that section should be a charge on the net revenue of the water undertaking and on the district fund and general district rate, or some or one of them; and such revenue or rate should be deemed to be the local rate within the Local Loans Act, 1875.

Section 24 provided that the corporation should keep accounts in respect of their water undertaking separate from all their other accounts, and should apply all money from time to time received on account of revenue in a certain order, and should carry the balance in any year to the district fund.

Section 25 of the Act of 1884 provided as follows: "If in any year, the amount standing to the credit of the water account be insufficient for the payment of the charges thereon, and the execution of this Act in relation to the water undertaking, the deficiency shall be made up out of the general district rate by carrying an adequate sum therefrom to the credit of the water account, and the corporation from time to time, in preparing the estimates of the amount required in their judgment to be raised by means of a general district rate for the purposes of the borough

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

may include therein such sums (if any) as in the judgment of the corporation are necessary to be provided in aid of the deficiency from time to time arising as aforesaid in the water account, and shall collect the same as part of such general district rate." There was no section in this or any of the other Acts which gave any specific directions or powers as to either equality or differentiation of rating.

The Northampton Waterworks Act, 1861, incorporated the Waterworks Clauses Act, 1847, and by section 59 "the company may from time to time supply any person with water for any purpose for which such supply may be required, for such remuneration and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water, under a special agreement." The defendant's dwelling-house was and had always been situate within the plaintiffs' statutory area of supply, and the plaintiffs did not contend that any special circumstances existed rendering his dwelling-house less favourably situated than the other dwelling-houses within the said area for purposes of supply or rating. The defendant had since the commencement of his occupation of the dwelling-house until the 24th of June, 1901, paid a water rate of 7½ per cent. of the net rateable value. In 1900 the boundaries of the then borough of Northampton were extended so as to include that part of Kingsthorpe in which the defendant's house was situated. Article 36 of the Northampton (Extension) Order, 1900, which was confirmed by the Local Government Board's Provisional Orders Confirmation (No. 14) Act, 1900 (63 & 64 Vict. c. clxxxiii.), was as follows: "The general district rates to be levied in the added part of . . . Kingsthorpe . . . shall not in any one year during a period of ten years from the commencement of this order exceed such an amount in the pound as, when added to the poor rate and the borough rate and any other rate made by the corporation in the same year, will in respect of the assessment of any hereditament included in any such rate make up . . . in the case of the added part of Kingsthorpe a total rate of five shillings and sixpence on each pound of the rateable value of such hereditament." From the commencement of the operation of the said order up to the present time the rates levied in the added part of Kingsthorpe (other than the water rate) had continuously amounted to 5s. 6d. in the pound. From the commencement of the order until the 24th of June, 1901, the plaintiffs continued to demand a water rate of 7½ per cent. per annum from the defendant and all other domestic consumers both in the old borough and the added parts. On and after the 24th of June, 1901, the plaintiffs reduced the water rate from 7½ to 5 per cent. per annum in the case of domestic consumers within the boundaries of the old borough, but retained the rate of 7½ per cent. in the case of the defendant and all other domestic consumers in the added part of Kingsthorpe. This differentiation of the water rate was effected by the plaintiffs in accordance with a recommendation of the town council which stated that the deficiency so created was to be met out of the district rate, and that as the district rate for this purpose would only be chargeable within the old borough, it was obvious that the reduction ought to apply only to the old borough until such time as the rates on the newly added portion ceased to be differential. It was estimated that this reduction would leave a sum of about £3,500 to be contributed out of the district rate of the old borough. The plaintiffs stated that they deemed it equitable to effect the reduction on the ground that a large amount of property in the borough of Northampton which was rateable to the poor and district rates, and which benefited by the presence of an adequate public water supply for fire extinguishing and sanitary purposes, did not pay anything towards the cost of the water undertaking, because the owners and occupiers of the said property did not, in respect of the same, take any water from the water supply of the plaintiffs, and that as a means of enforcing contribution from the said owners and occupiers the plaintiffs had adopted the reduction, so that the said owners and occupiers within the old borough would by their contributions to the district rate fund have to make good any deficiency created by the reduction of the water rate. There were in the added parts a number of residents who did not take the plaintiffs' water supply for domestic purposes, and whose property was therefore not subject to the payment of water rate.

The plaintiffs contended that they were entitled to refrain from reducing the water rate in the added parts from the 7½ per cent. now levied, inasmuch as the ratepayers in the said added parts, being privileged from an increase in the district rate for a period of ten years (which period has not yet elapsed), would bear no part of the extra burden that might be thrown upon the district rate of the old borough by reason of any deficiency resulting from such reduction.

The defendant contended (1) that the said water rate was a rate within the meaning of article 36 of the Northampton (Extension) Order, 1900, and that, inasmuch as the poor, borough, and general district rates payable by him amounted together to the maximum sum of 5s. 6d. in the pound fixed by the said order, the plaintiffs were not entitled to recover from him the said sum of £1 0s. 3d. or any other sum in respect of the water rate. (2) In the alternative, that if he was chargeable with a water rate the plaintiffs were not authorized to demand of him a higher rate than that demanded in respect of domestic consumers in the old borough taking a similar supply under similar circumstances, either upon the contention of the plaintiffs set forth herein or at all, the differentiation of the water rate as effected by the plaintiffs being contrary to the terms and intention of the Northampton (Extension) Order, 1900, not being authorized by the Acts of 1861, 1882, or 1884, and being in breach of the general law of the realm; and the defendant claimed that the plaintiffs were bound to place all domestic consumers in the borough on an equality save in so far as express statutory powers might authorize otherwise. (3) That the plaintiffs were not authorized to estimate for a deficiency on the water account as they had done for the reasons given by them, either accompanied by the aforesaid differentiation or not so accompanied.

The questions for the opinion of the court were: (1) Whether the plaintiffs were entitled to differentiate the water rate as hereinbefore set forth. (2) Whether the plaintiffs were entitled to demand a water rate of the defendant within the period of ten years from the commencement of the extension order, so long as the rates payable by the defendant, exclusive of water rate, amounted to 5s. 6d. in the pound. (3) Whether the plaintiffs were entitled to reduce the water rate for the purpose of creating a deficiency on the grounds hereinbefore stated.

If the court answered the above questions, more particularly the first, in the affirmative, judgment should be entered for the plaintiffs. If the court should answer them, more particularly the first, in the negative, judgment should be entered for the defendant.

Bigham, J., in answer to the first question, held that the plaintiffs had no power to differentiate the rate. In answer to the second question he held that the

water rate was not a rate to be taken into consideration in making up the total rate of 5s. 6d., and he accordingly answered the second question in the affirmative. He answered the third question in the negative. He accordingly gave judgment for the defendant.

The plaintiffs appealed.

C. A. Russell, K.C., and *Ryland Adkins*, for the plaintiffs.

Horace Avory, K.C., *Forder Lampard*, and *Bernard Campion*, for the defendant.

Lord ALVERSTONE, L.C.J.—This is a case of importance, because if Bigham, J.'s, judgment stands, it is a clear and simple decision that by reason of section 36 of the Northampton Corporation Waterworks Act, 1884, the plaintiffs have no power to differentiate the water rate. That is a decision of very great importance, and it is one which has been on several occasions suggested in other circumstances, but has never until the present case received judicial sanction; and I am very anxious to see if the reasons given by Bigham, J., in his judgment for that conclusion were founded upon the considerations urged before us by Mr. Avory on the appeal—namely, that there must be equality of charge for the supply of public commodities, such as water, in the same way as there must be equality of charge in the case of the poor rate. It will be convenient if I state what are the points raised in the case. The action was brought to recover £1 4s. 9d., being the amount of one quarter's instalment of an annual water rate, of which £1 0s. 3d. represented a sum equal to 7½ per cent. upon the rateable value of the defendant's dwelling-house. There is no question that the defendant is liable to pay the water rate, and that the sum claimed is within the maximum charge allowed by the Act. The defendant, however, says that while he is liable to pay a charge based on 7½ per cent., every domestic consumer must pay on 7½ per cent., and that if the other customers are not charged at that rate the plaintiffs cannot recover it from him.

In these circumstances the defendant contends that the plaintiffs have no power to charge under their statutory powers a rate other than an equal rate for all consumers; and, further, that by virtue of the provisional order, which enlarged the boundaries of the borough of Northampton so as to include Kingsthorpe, the total rates, including the water rate, are not in Kingsthorpe to exceed 5s. 6d. in the pound for ten years. In the first place I will deal with an argument advanced by Mr. Avory—namely, that the effect of only charging 5 per cent. for water in the old part of the borough would be that a larger sum in respect of a deficiency in the water account would have to be charged on the general district rate within the old part of the borough, and that, therefore, there would be greater probability of the sum 5s. 6d. being maintained as the total rate to be levied in Kingsthorpe, and the inhabitants of Kingsthorpe would be thereby deprived of the chance of the rate being reduced below 5s. 6d. I confess that I am wholly unable to see how that question can be raised by the defendant in this action. The defendant does not say that the charge for water made upon him is not a lawful charge. He only says that the plaintiffs cannot reduce the rate in the old part of the borough and that the grounds for reducing the rate alleged by them are not valid grounds. Unless, therefore, the defendant can maintain the ground upon which Bigham, J., decided the case—namely, the necessity for equality of charge—he is not entitled to place himself in the position of a ratepayer who complains that the conduct of the corporation is *ultra vires*. I see the difficulty of a single ratepayer raising that question; but I think that a ratepayer might, either with the assistance of the Attorney-General, or by some other proceeding, question the right of the corporation to reduce the rates for the supply of water so as to increase the general district rate and thus to throw an increased burden upon it. That question, however, cannot be raised in this action so as to cut down the right of the plaintiffs to make a perfectly lawful charge within the maximum.

That brings me to the main point in the case—namely, can the plaintiffs differentiate the water rates and does the fact of their doing so make the rate bad? The absence of an equality of charge clause from the Waterworks Acts has been commented on in many cases. The case of *Hungerford Market Co.* v. *City Steamboat Co.*, 3 E. & E. 365, is of importance in this connection, because it raised the question as to the obligation of a company entitled by statute to take tolls for passengers embarking or disembarking at a pier to charge a uniform toll, there being no equality clause in the statute. The court held that there was no such obligation. There are sections in the Northampton Waterworks Act, 1861, which enabled the waterworks company to make contracts of all kinds for the supply of water. By section 59, "The company may from time to time supply any person with water for any purpose for which such supply may be required, for such remuneration and upon such terms and conditions as shall be agreed upon between the company and the person desirous of having such supply of water, under a special agreement." If a water consumer is entitled to make an agreement the effect of which would be that he would pay less for his supply of water than other consumers, that would destroy to a great extent the foundation of Mr. Avory's argument. In 1884 the waterworks company's undertaking was transferred to and vested in the corporation of Northampton. The undertaking has to be carried on by the corporation as a separate and distinct undertaking, the accounts having to be kept separate from all other accounts of the corporation, subject to this, that there is the security of the general district rate for any deficiency in the amount standing to the credit of the water account. The waterworks simply became the corporation's waterworks instead of the company's waterworks. All the authorities, rights, powers, and privileges of the company were transferred to the corporation, and the corporation was placed in the same position as the company in so far as concerned their powers of dealing with their customers. It is said that section 36 of the Act of 1884 imports the obligation of equality of charge, and that the effect of the section is to make a charge which is not equal to all domestic consumers a bad charge. I am unable to take that view. The only effect of the section seems to me to be to alter the statutory mode of payment prescribed by section 49 of the Act of 1861, and to introduce into the calculation the net rateable value of the dwelling-house. It is impossible to say that section 36 overrides the powers of the corporation, by virtue of their being the successors of the company, to enter into agreements with customers as to the supply of water. It is no defence to this action to say that, though the £1 0s. 3d. is due from the defendant, yet by some arrangement, either public or private, the corporation charge other consumers only 5 per cent. It is not, in my opinion, correct to speak of this particular corporation as making a rate for water. That may or may not be the case with other corporations. This corporation charges for a supply of water, the charge being fixed by a percentage on the net rateable value. There is no foundation for saying that the power to

make agreements as to the charge for the supply of water is cut down by section 36. For these reasons I think that the ground upon which Bigham, J., decided against the corporation—namely, that they have no right to differentiate the charge—is bad, and the appeal must be allowed.

With regard to the second question raised in the case, I agree with Bigham, J., that the words of article 36 of the Northampton Extension Order, 1900, "and any other rate made by the corporation," do not include a water rate. The words mean rates in the proper sense of the term, and do not include water rates.

COLLINS, M.R.—I am of the same opinion, and as we are differing from Bigham, J., I will add a few words. The question is whether the corporation are entitled to differentiate the water rate—in other words, whether they are entitled to charge persons in one district one rate and persons in another district another rate. Bigham, J., upheld the contention that the corporation are not entitled to do so. We have to see whether the Act has imposed a limitation on the right of the corporation to charge for water supplied for domestic use to a dwelling-house other than a limitation as to the maximum charge allowable. That is to say, we have to see whether the Act imposes the obligation of equality of charge. We begin the discussion by the admission that there is no express provision to that effect in the Act. It is said, however, that section 36 of the Northampton Corporation Waterworks Act, 1884, imposes the obligation of equality. I do not think that that is the true effect of the section. That section repealed section 49 of the Northampton Waterworks Act, 1861, which prescribed a number of different standards of charge varying with the annual rack-rent or value of the dwelling-house, and provides that "the corporation may thenceforward charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per centum per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable." The section uses the term "water rate." It does not, however, by any other expression indicate whether the rate is to be an equal rate on every dwelling-house in proportion to its net rateable value. It is said that the words "any dwelling-house" mean all dwelling-houses. That suggestion seems to me to impose a gloss upon the words which cannot be supported. But even if the word "all" were substituted for "any," the section only imposes a rate of 7½ per cent. as a maximum charge. Why should we import into the section an obligation of equality of charge? The main reason alleged is that the section calls it a "water rate," and the suggested analogy of a poor rate has been pressed upon us. It seems to me that the basis upon which the obligation of equality of charge rests in the case of a poor rate is entirely absent when one comes to consider the case of a water rate. In the original enactment by which the poor rate was established there is, no doubt, no express provision for equality of rate; but the very reason and essence of the poor rate involve equality, because it is an imposition upon citizens in favour of the community at large to contribute to the poor fund according to their means. What possible analogy is there between that and the case of a person purchasing a marketable commodity, such as water? The latter case is altogether different from the obligation of a citizen to fulfil a public duty and to support a public burden. Further, when one considers that that marketable commodity is necessarily supplied at different cost to different localities, it seems to me to presuppose that there may be an inequality of charge. There is, therefore, no presumption of equality of charge. I have dealt with the case upon principle, because the argument in support of the obligation of equality of charge is founded on the use of the word "rate" in the section and on the fact that a percentage charge is imposed. But there is an authority which assists us in determining the question. In *Hungerford Market Co* v. *City Steamboat Co.* it was held that there was no obligation of equality of charge to different persons for what was the same thing, and that was because there were no express words in the statute requiring equality of charge, and there was no necessary implication to that effect to be derived from any provision in the statute. That case related to tolls to be charged for persons embarking or disembarking at a landing-place. There is no higher implication to be derived from the use of the word "rate" in the present Act than there was from the use of the word "toll" in that Act. For these reasons, as well as for those given by the Lord Chief Justice, I am of opinion that the judgment of Bigham, J., cannot be supported.

ROMER, L.J.—I have come to the same conclusion. My first impression was in favour of the decision of the learned judge in the court below, but having heard all the arguments I have come to the conclusion that there is nothing in the Act to show that all the houses in the borough of Northampton must be charged at the same rate. I will first consider the Waterworks Clauses Act, 1847, which is incorporated with the Northampton Waterworks Act, 1861. Is there anything in the Act of 1847 which shows that the rate must be based on the same percentage of the rateable value of all the dwelling-houses in the district? I cannot find any such provision. As has already been pointed out, there is nothing which makes it *primâ facie* fair and right that all dwelling-houses should pay at the same rate. The cost of supplying two dwelling-houses of the same rateable value with water might very well be different. I cannot find any special provision in the Act of 1847 which supports the defendant's contention. The definition of "water rate" in section 3 says that "the expression 'water rate' shall include any rent, reward, or payment to be made to the undertakers for a supply of water." There are provisions in that Act—for instance, the duty of the undertakers to lay down communication pipes to a dwelling-house upon payment or tender of the proportion of the water rate made payable in advance (section 44), and the provision that if the profits of the undertakers exceed the prescribed rate in any year, the undertakers are to make a rateable reduction in the rates for water (section 80)—which show that there are difficulties in the way of saying that it is not necessary that the rate shall be equal. Still, in my opinion, those difficulties do not outweigh the other considerations, and do not show that the defendant's contention is right.

That being so, I pass to the Act of 1861. It is clear that there is nothing in its wording which would prevent the waterworks company from charging one dwelling-house at a less rate than they charged other houses. Section 59, which gave the company power to make agreements with customers as to the supply of and charge for water, is material in this connection. The Act contemplates that by agreement the company might charge some dwelling-houses less than others. The maximum charge is fixed by a percentage upon the net rateable value of the dwelling-house, and it should not be forgotten that dwelling-houses may not, in a town like Northampton, constitute a

majority of the houses or premises taking a supply of water from the company. There is nothing in the Act of 1861 to show that the company could not, as between different dwelling-houses, have charged a different rate. Then, with regard to the Northampton Corporation Waterworks Act, 1884, it is clear that, whatever powers the company had under the Act of 1861, the corporation now have the same powers. It seems to me that the corporation have the same rights as the company had with regard to charging for water, subject to the provisions of section 10. As to the rest of the case, I have nothing to add to what has been already said.

Appeal allowed.

Solicitors for the plaintiffs, *Sharpe, Parker, & Co.*, for *Herbert Hankinson*, Northampton.

Solicitors for the defendant, *Warren, Murton, & Miller*, for *Lamb & Stringer*, Kettering.

From Chan. Div.
(Lord Alverstone, L.C.J., and Vaughan Williams and Romer, L.JJ.) — Dec. 1, 3.

In re BEACHEY.
HEATON *v.* BEACHEY. (*a.*)

Mortgage—Leaseholds—Mortgage by sub-demise prior to Conveyancing Act, 1881—*Statutory transfer subsequent to Act—"Benefit of mortgage"—Legal estate—Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 27, *Schedule III., Part II.*

On granting or assigning a term of years a deed will pass the legal estate in the term, however inartistic, untechnical, or uncertain the words may be, provided that the intention that the legal estate shall pass is apparent from the terms of the deed, but in the absence of technical or proper words to pass the legal estate it will not be held to pass unless the intention to part with the possession is plain. Thus where a lessee executed a mortgage of his leaseholds by sub-demise before the Conveyancing and Law of Property Act, 1881, *and the executors of the mortgagee, after the passing of that Act, by a transfer in the statutory Form A, given in Part II. of Schedule III., conveyed and transferred "the benefit of the said mortgage" to one of themselves,*

Held, that the legal estate in the mortgaged leaseholds did not pass to the transferee.

This was an appeal from a decision of Kekewich, J.

By an indenture of mortgage dated the 25th of September, 1880, George King demised to John Beachey the residue of a term of ninety-nine years (less the last ten days) in certain property at Newton Abbott for securing repayment of £350 and interest.

By an indenture dated the 9th of February, 1881, King further charged the said property in favour of John Beachey to secure an additional sum of £50.

By his will dated the 25th of September, 1883, John Beachey gave and bequeathed his residuary estate to Richard William Beachey and John Salter upon certain trusts therein mentioned, and he appointed the said R. W. Beachey and John Salter his executors.

By an indenture dated the 29th of November, 1893, which was in the statutory Form A given in Part II. of the third schedule to the Conveyancing and Law of Property Act, 1881, R. W. Beachey and John Salter, as legal personal representatives and mortgagees, "conveyed and transferred" to R. W. Beachey "the benefit of" the said mortgage and further charge.

In December, 1893, George Furneaux was appointed a trustee of John Beachey's will in the place of John Salter.

By an indenture dated the 30th of December, 1893, which was in the same statutory form, R. W. Beachey transferred the said mortgage and further charge to R. W. Beachey and George Furneaux.

In January, 1894, R. W. Beachey retired from the trusteeship, and by an indenture dated the 16th of January, 1894, which was also in the same statutory form, R. W. Beachey and George Furneaux transferred the said mortgage and further charge to George Furneaux.

By a memorandum of deposit and undertaking under hand dated the 28th of December, 1894, George Furneaux deposited the security with the Wilts and Dorset Bank to secure his personal overdraft. And by an indenture dated the 7th of August, 1900, he demised the property to the bank. The present action was brought for the administration of John Beachey's estate.

It was contended on behalf of the plaintiffs, who were beneficiaries under John Beachey's will, that the transfers above mentioned did not avail to pass the legal estate, but that it remained in R. W. Beachey and John Salter upon the trusts of the will.

On the other hand, it was contended on behalf of the bank that the property being leasehold no special form of words was required to pass the legal estate.

Kekewich, J., held that the legal estate did not pass, but remained vested in R. W. Beachey and John Salter upon the trusts of John Beachey's will.

The bank appealed.

E. Ford and *A. à Beckett Terrell*, for the bank.

Warrington, K.C., and *Ward Coldridge*, for the plaintiffs.

E. Ford replied.

The following authorities were referred to in the course of the argument: *In re Ethel and Mitchells & Butler's Contract*, [1901], 1 Cl. 945, 49 W. R. Dig. 127; *Ex parte Smith*, 2 D. & Cl. 271; *Jones* v. *Gibbons*, 9 Ves. 407; *White* v. *Hunt*, L. R. 6 Ex. 32, 19 W. R. Dig. 9; Preston's Conveyancing (3rd ed.), vol. 2, p. 177; Robbins on Mortgages, vol. 2, p. 826; and Bythewood & Jarman (4th ed.), vol. 5, p. 207.

Lord ALVERSTONE, L.C.J.—The only question before us in this appeal is whether the words in the operative part of the transfer of the 29th of November, 1893, are sufficient to pass the legal estate in a mortgage of a leasehold term granted by George King to the testator John Beachey.

It has been very properly admitted by the learned counsel for the appellants that they cannot rely upon the statute as giving any special meaning to the words "the benefit of the said mortgage." The mortgage was not a statutory mortgage, and it is only necessary to look at the language of section 27 of the Conveyancing and Law of Property Act, 1881, to see that the special meaning by virtue of that section can be given to the words which we have here, only where the original mortgage was itself a statutory mortgage. But it is said that the transfer was obviously intended to bear the meaning given by the statute to a transfer of a statutory mortgage. Therefore what we have to consider is, whether, apart from the statute, a conveyance made in the year 1903 of "the benefit" of a mortgage of leasehold property is sufficient to pass the legal estate in the term. Now, I agree that in a conveyance of leaseholds, however inartistic, untechnical, or uncertain the words used may be, if

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

you gather an intention that the legal estate shall pass, that is sufficient to pass it. Looking then at the deed before us, and endeavouring to ascertain the intention from its terms, I should not myself come to the conclusion that it was the obvious intention of the parties, or indeed their intention at all, that the legal estate should pass. I adopt the principle that on granting or assigning a term of years there must, in order that the legal estate may pass, be some words which imply the intention to part with the possession. Now, can we ascertain such an intention from this deed? It first of all refers to the mortgage, then it recites the will of the mortgagee appointing executors, his death, the probate of his will. Then the operative part states that in consideration of the principal moneys and interest "having become the property" of the transferee, the representatives of the mortgagee convey and transfer to R. W. Beachey "the benefit of the said mortgage." It is argued that those words were intended to pass the legal estate in the mortgaged leaseholds, but in my opinion it is quite open to argument whether the words were not designedly used to give the transferee the pecuniary benefit of the mortgage only, without putting him in the position of an underlessee. I agree that possibly, as counsel for the appellants said, making the transferee an underlessee would not have done him much harm, since there was no privity between himself and the original lessee. Indeed, the argument went so far as to say that if the mortgage had been by way of assignment of the original term the result would have been the same. But on reading this deed I do not feel constrained to come to the conclusion that the legal estate was intended to pass by this deed, and it contains no word which would in ordinary conveyancing language be sufficient to pass the legal estate. Not finding either any such intention as I have indicated, or any technical or necessary words capable of passing the legal estate, I am of opinion that we ought not to hold that the words "convey and transfer the benefit of the said mortgage" are sufficient to pass the legal estate. In my judgment, therefore, the decision of Kekewich, J., was right, and this appeal must be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I agree.

ROMER, L.J.—I also agree.

Appeal dismissed.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *H. Fulton*, Salisbury; *Stow, Preston, & Lyttelton*, for *Friend & Tarbet*, Exeter.

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Nov. 9, 10.

SIMPSON v. SIMPSON. (a.)

Settlement—Marriage settlement—After-acquired property—Covenant to settle—Scots domicil—Jus relictæ—Spes successionis.

A mere spes successionis *of a wife to succeed to her husband's personalty in the event of his death leaving her surviving, even though it be coupled with an indemnity in damages by the husband contingently upon the failure of the* spes *by reason of his change of domicil or otherwise, is not caught by, or included in, a covenant in the marriage settlement whereby it was provided that "if at any time during the coverture" the wife should "in any manner become entitled to any personal property for any estate or interest whatsoever" exceeding £200 in value, the same should be brought into settlement.*

Appeal from Buckley, J.

By the ante-nuptial settlement dated the 27th of January, 1873, of William Simpson, then a domiciled Scotsman, and Alice Hall, his intended wife, the husband and wife respectively covenanted that if the wife then was, or if at any time during the intended coverture the wife or the husband in her right should become in any manner entitled to or acquire an absolute power of disposition over any real or personal property which should amount to or be equal in value from any one source at any one time to the sum of £200 for any estate or interest whatsoever (except as therein mentioned), the wife and husband and each of them, and any other necessary parties, should assure the same to the trustees of the settlement to be held by them upon the trusts therein declared.

A separation deed in Scottish form was executed between the husband and the wife (then both resident in Scotland) on the 13th of April, 1895, by clause 7 of which both parties agreed that the separation deed was to be construed according to the law of Scotland, and that whatever the domicil of the parties might be, all questions relating to the personal status and patrimonial interests of both of them should be subject to the jurisdiction of the Court of Session; and the husband covenanted that in the event of his death in the lifetime of the wife the wife's rights in his means and estate should not be less than she would have been entitled to by the law of Scotland if he had been a domiciled Scotchman at the date of his death notwithstanding that he might be in fact domiciled elsewhere at the time of his death.

The husband died on the 15th of July, 1902, possessed of about £16,000 net personal estate, leaving the wife and three children him surviving, and having made a will dated the 24th of November, 1901, in which he described himself as of St. Margaret-on-Thames, Middlesex, "a domiciled Englishman."

The will contained no provision in favour of the wife.

There was evidence of a Scottish advocate to show that in the events which had happened the wife, according to the law of Scotland, would be absolutely entitled on her husband's death to one-third share of the £16,000, as her *jus relictæ*; that according to the law of Scotland and upon the construction of the separation deed the wife had nothing more than a *spes successionis* in her *jus relictæ*, which was a right which vested in her only upon the death of her husband, he being free to dispose of the whole of his property in his lifetime in any manner he chose, and so by his alienation in his lifetime to defeat the prospective right of the widow.

The executors of the husband's will took out an originating summons against the wife and the trustees of the settlement for the determination of the question whether, in the events which had happened, the one-third share to which the wife was entitled belonged to her absolutely or was bound by the covenant to settle after-acquired property contained in the marriage settlement.

All objections as to jurisdiction being waived by all parties, the summons was heard by Buckley, J., who held that, though the *jus relictæ* itself as a mere *spes successionis* would not be within the scope of the covenant, the contractual right which the wife acquired under clause 7 of the separation deed was property which fell within it. Accordingly the learned judge made a declaration that the one-third share of the husband's personal estate, in the events

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

which had happened, should be paid to the trustees of the settlement as after-acquired property covenanted to be settled.

The wife appealed.

Wace, for the appellant.—The main object of a covenant to settle after-acquired property of the wife is to prevent its falling under the sole control of the husband, and it is therefore *primâ facie* not intended to apply to property the wife's title to which does not accrue until after the husband's death; and general words in such a covenant ought to be construed according to that intention: *In re Edwards*, 22 W. R. 144, L. R. 9 Ch. App. 97, approving of *Dickinson* v. *Dillwyn*, 17 W. R. 1122, L. R. 8 Eq. 546, and *Carter* v. *Carter*, L. R. 8 Eq. 551, 18 W. R. Dig. 124. It was followed in *Fisher* v. *Shirley*, 38 W. R. 70, 43 Ch. D. 290. The object of the covenant to settle the wife's after-acquired property was to protect such property against the husband. The contractual right of the wife under the separation deed was not property as to which the covenant could protect the wife, for that could never have become operative until after the husband's death, and therefore not during the coverture. The wife never became during the coverture entitled to any property in the husband's *mobilia*. The agreement in the separation deed related to what was at the date thereof the husband's property; and a covenant to settle after-acquired property is never intended to relate to the husband's property.

He referred also to *Davenport* v. *Marshall*, 50 W. R. 39, [1902] 1 Ch. 82.

C. E. Bovill, for the respondents, the trustees of the marriage settlement.—The wife acquired a contractual right under clause 7 of the deed of separation, and the right was "property" within the meaning of the covenant to settle after-acquired property in the marriage settlement. It was in the nature of a contingent interest defeasible according to the circumstances existing at the husband's death. It was a sum ascertainable on an uncertain event.

He referred to *Lafitte & Co.* v. *Lafitte*, 21 W. R. 750.

Judah Israel, for the executors of the husband's will, took no part in the argument.

VAUGHAN WILLIAMS, L.J.—[His lordship read the clause as to the settlement of the wife's after-acquired property, and continued:] Mr. and Mrs. Simpson agreed to separate, and there was a separation deed entered into. [His lordship read the material clauses of the deed of separation, and continued:] The husband having predeceased the wife, it turned out after his death that he had personal property which would have been subject to the widow's right in respect of *jus relictæ* according to the law of Scotland; and the one-third share of that property to which the widow by Scotch law would be entitled is the sum of £5,333. What we have to consider is whether that sum to which the wife would have been so entitled must be handed over to the trustees of the marriage settlement or not. That depends upon two considerations. We must ascertain first what is the meaning of the words used in the marriage settlement; and, secondly, what is the meaning of the words used in the deed of separation; and see whether the sum to which the wife became entitled under the covenant in the deed of separation falls within or without the operation of the covenant in the marriage settlement. Now, what is the nature of the right which the wife acquires under the deed of separation. She acquires, to my mind, the benefit of a covenant and nothing else. It is the benefit of a covenant of indemnity by the husband against any loss accruing to her by her *spes successionis*—for that is what during the lifetime of the husband her right was—becoming abortive by reason of the husband losing his Scotch domicil and acquiring a different one. I have said that the right, against the loss of which the indemnity was given, is a *spes successionis* and nothing more, and really that proposition is not controverted. Both sides agree to that, and we have the statement of Scotch lawyers in evidence, from which it appears that such is the nature of the *jus relictæ*. It is a right which the wife has to come in and prove against the estate of her deceased husband, secondary to the rights of his creditors. Now, in considering the rights of the wife under this covenant in the deed of separation, it seems clear that it is a covenant to indemnify, and that the wife's right is really a right to damages under the covenant if there is a breach of it; and the moment that is ascertained to be the nature of the right it follows that it is a claim which could not possibly arise during the coverture. It is not a claim which can be ascertained at any time during the coverture. During the coverture it is only a possible claim for damages which may accrue to the wife on the death of the husband. That being the nature of the wife's right, we have to look at the covenant in the marriage settlement and see whether or not this claim falls within the terms of the covenant to settle after-acquired property. That really depends on she meaning of the word "property," in this covenant, and in determining that meaning we must look at the settlement as a whole and construe the settlement by the light of the objects of the settlement; and, in my opinion—when we remember what the objects of such a settlement are as stated by James, L.J., in *In re Edwards*—it cannot be said that this claim falls within the operation of the covenant in the settlement, or that the "property" mentioned in that covenant extends to a claim for indemnity in the nature of damages, a possible claim which could not arise in the lifetime of the husband at all, and of such a nature that it depends upon a contingency, the happening of which cannot be measured by any actuarial tables. It cannot, in my opinion, be said that such a claim falls within the word "property" as used in the marriage settlement. For these reasons I think that the decision of Buckley, J., was wrong, and ought to be reversed.

ROMER, L.J.—With regard to the sum of money now in contention, it is clear to my mind that it represents no property in which the wife can be said to have had any estate or interest during the coverture within the meaning of the covenant to settle after-acquired property contained in the marriage settlement. But it is said that such right or claim as the wife had, by virtue of her position as a wife, coupled with the provisions contained in the 7th clause of the deed of separation constituted "personal property" within the meaning of the covenant to settle after-acquired property. In my opinion this view is not correct. To my mind the effect of the 7th clause was to secure to the wife the *jus relictæ*, to which, as survivor, she would be entitled if the husband died a domiciled Scotchman, coupled with a right or claim to indemnity to a similar extent if, through his change of domicil, the wife should be deprived of her *jus relictæ*. During the coverture it was a mere hope of succession, coupled with a claim for indemnity in case her hope should be disappointed. Now it is beyond doubt that a *spes successionis* would not fall within the covenant to settle after-acquired property. The only question can be whether the claim to indemnity, in case the *spes successionis* fails, can be said to constitute "property" within the meaning of the covenant. In my opinion it cannot be said to represent property to which the wife was entitled

during the coverture within the meaning of the covenant. It was a mere claim for damages, not a debt properly so-called, nor a claim for any sum which could be ascertained during the coverture. It was a contingent claim for damages which could not arise till after the husband's death, and the amount of which could not be ascertained till after the husband's death. To my mind it cannot be said that such a claim falls within any fair construction of the covenant to settle after-acquired property, the covenant being that "if at any time during the coverture the wife should become entitled to any personal property which should amount to or be equal in value from any one source at any one time to £200, it should be brought into settlement." This claim was not personal property of that kind at all. Certainly no one at any time during the coverture could have said in the first place that the claim would ever arise; or, secondly, that it would be property of the value of £200. Bearing in mind what the general object of this covenant to settle after-acquired property is, and the way in which such covenants have been construed by the courts, I come to the conclusion that within any fair construction it cannot be said that such a claim as the one I have indicated is covered by the covenant.

STIRLING, L.J.—I am of the same opinion. Buckley, J., decided two points. First, that the right of the wife under the law of Scotland was not bound by the covenant to settle after-acquired property, and the accuracy of this decision on that point has not been, and in my opinion cannot be, disputed. But, secondly, the learned judge decided that, inasmuch as by the deed of separation the wife acquired a contractual right, that contractual right was "property" which was bound by the covenant, and on that point the question has been argued very fully before us. Now, what was the contractual right which the wife acquired? It was a right that if she should survive her husband her rights should not be less than if her husband were a domiciled Scotchman at the time of his death. That was a right which could only arise and take effect after the death of the husband—*i.e.*, after the determination of the coverture. If the obligation which was imposed upon the husband by that stipulation in the deed of separation was broken, the right would be a right to damages which could only be ascertained on the husband's death—*i.e.*, after the determination of the coverture. The right which was conferred on the wife by the contract gave her no estate or interest in any part of her husband's property. It was simply and solely a right to damages in the events which I have mentioned. This observation appears to me to apply just as much to the reversionary interest which was covered by the fifth clause of the deed of separation as to the other property referred to. The contention is that a right of this nature is "property" within the meaning of the covenant to settle after-acquired property. Having regard to the objects of such covenants, I confess that I should have great doubt in arriving at that conclusion. But, supposing that to be the true view of it, still it was property which was quite incapable of being valued during the coverture, and therefore cannot be said to be of the value of £200 according to the terms of this covenant so as to be bound thereby. On that point, which really does not appear to have been considered by the learned judge in the court below, I think that his decision was wrong and ought to be reversed.

Appeal allowed.

Solicitors for the appellant, *Routh, Stacey, & Castle.*

Solicitor for the respondents, *J. P. Simpson.*

High Court of Justice.

Chan. Div. } Jan. 13, 14.
Byrne, J. }

In re BEARD'S TRUSTS.
BUTLIN *v.* HARRIS. (*a.*)

Will — Construction — Bequest to voluntary schools — Education Act, 1902 (2 *Ed.* 7, *c.* 42).

By his will in 1886 *testator bequeathed shares in a bank to the managers of voluntary schools upon trust to pay the income thereof to the said schools so long as they should be supported by voluntary subscriptions, but, in the event of the said schools ceasing to be so supported or becoming subject to the control of a school board, a gift over.*

Held, that the schools had not ceased to be supported by voluntary subscriptions, and that the gift over had not taken effect in consequence of the Education Act, 1902.

This was an adjourned summons, raising the question whether, according to the true construction of the will of testator, the plaintiffs and one of the defendants as trustees of the said will should transfer to the vicar and churchwardens of the parish of Leonard Stanley, Gloucestershire, seventy-seven shares in Lloyds Bank, representing the present investment of the proceeds of shares bequeathed by the said will to the managers for the time being of the Leonard Stanley National Schools, upon the trusts therein mentioned, and the dividends thereon, as from the commencement of the Education Act, 1902.

The facts sufficiently appear from the judgment.

Cave, for the trustees.

Lawrence, for the Gloucestershire County Council.

Baker, for the managers.

Gatey, for the churchwardens.

BYRNE, J.—In this case the testator made his will in 1886, and thereby gave and bequeathed to the managers for the time being of Leonard Stanley Schools shares in a bank, or, if he should have sold the same, a sum of money, to be held by the said managers, with power to change investments, upon trust to pay the income thereof to the said schools so long as the said schools should be supported by voluntary subscriptions, but in the event of the said schools ceasing to be so supported or becoming subject to the control of a school board, a gift over.

The testator died in 1891. During his lifetime he appears to have found moneys, when wanted, for the purposes of these schools. The schools are built upon property in respect of which only 1s. a year is paid, and there were a certain number of subscriptions. As to what the amounts were, and when they were paid, I have no information, but, up to the time of testator's death, moneys were found by himself and others for the purposes of the schools as required. There was in testator's lifetime an endowment bringing in about £15 a year, which has been continued up to the present time. A Mr. Jones, after testator's death, found moneys from time to time for the school as they were wanted. Year by year there has been some small sum over and above the receipts which has been expended, and it appears that the managers have, on their own credit, got an overdraft at the bank. In all these years there is somewhere about £60 due from the managers. The managers have taken upon themselves the liability to pay, and therefore, if the bank required them to pay, they would have no right to get the money from anywhere else,

(*a.*) Reported by PERCY WINFIELD, Esq., Barrister-at-Law.

and they would have to pay and be subscribers for the necessary amount.

In consequence of the passing of the Act of 1902, if these funds given by the testator are available in addition to the old endowments and to the Government grant, there will be ample funds without calling upon anyone for further subscriptions.

The argument is now originated on behalf of the vicar and churchwardens that the gift over has taken effect, because there has been nothing like subscriptions. It is said that the gift over takes effect either if the schools cease to be supported by voluntary subscriptions or in the event of their becoming subject to the control of a school board. With reference to the latter I am satisfied that that event has not taken place, because these schools were never under the control of a school board. The local education authority is now the county council. It has many duties formerly discharged by the school boards. The Act expressly abolishes school boards. In so many words the county council is a different body. The new education authority is now elected by a different body from the former school board. It has a different constituency and different duties.

The question is, Can the schools now be said to be supported by voluntary subscriptions? How were they supported before testator's death? They were supported by voluntary subscriptions so far as the funds were not sufficient. Now, testator, knowing the position of affairs, gave only the income of this fund in or towards the schools so long as they did not cease to be supported by voluntary subscriptions —that is, in aid of the endowment for the time being existing, and it appears he must have contemplated that these subscriptions would only be such subscriptions as were necessary with the endowment to support the schools. In my opinion there has not yet been any forfeiture under this clause.

Declaration that the gift over had not yet taken effect.

Solicitors for plaintiffs, *Le Brasseur & Oakley*, for *Edward Brownlow Haygarth*, Cirencester.

Solicitors for the managers, *Walker & Rowe*, for *J. Lapage Norris*, Stroud.

Solicitors for the county council, *Field, Roscoe, & Co.*

Chan. Div. }
Buckley, J. } Dec. 16, 17, 18.

In re DALLAS. (a.)

Mortgage—Equitable charge—Future property—Expectancy under will—Priority—Notice—Renunciation of sole executor—Property in court in lunacy—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 79.

The priorities of incumbrancers of future property are regulated by the order in which notices of their charges are given to the legal holder of the property, after it has come into existence, and as between incumbrancers who have so given notice on the same day, in the order of the creation of their charges. A notice given to a person who is not, at the moment when it is given, but afterwards becomes, the legal holder, is ineffectual.

Where the future property is an expectancy under a will, a notice given to a sole executor who afterwards renounces probate, is ineffectual, inasmuch as he has never been the legal holder of the property.

The case is a fortiori where such sole executor is also the beneficiary who has incumbered his interest.

Under such circumstances an administrator cum testamento becomes the legal holder of the property as soon as letters are granted, notwithstanding the fact that the property is then in court in lunacy.

Johnstone *v.* Cox, 30 *W. R.* 114, 19 *Ch. D.* 17, *and* Boss *v.* Hopkinson, 18 *W. R.* 725, *applied.*

Mutual Life Assurance Society *v.* Langley, 32 *W. R.* 792, 32 *Ch. D.* 460, *distinguished.*

This was a reference by the master to obtain the direction of the judge as to the method of ascertaining the priorities of the several incumbrancers of a fund in respect of which a petition had been presented for its payment out of court.

By his will, dated the 7th of July, 1893, Robert Dallas gave a legacy of £10 000 to his son Frederick, and appointed three executors, of whom only one —namely, Frederick—survived the testator.

On the 28th of June, 1898, lunacy proceedings in respect of the testator were taken, a receiver of his property was appointed, and his personal estate was paid into court in lunacy.

The testator died on the 24th of December, 1902. In the interval between the date of the will and the death of the testator, F. Dallas charged his expectant legacy in favour of a number of persons for amounts in the aggregate largely exceeding the sum of £10,000.

On the 9th of January, 1903, F. Dallas renounced probate.

On the 4th of March, 1903, administration with the will annexed was granted to Mrs. Beedell, a daughter of the testator.

By an order, drawn up the 17th of March, and completed on the 27th of March, 1903, the funds in court of the testator were directed to be paid out to Mrs. Beedell.

On the 3rd or 4th of May, 1903, these funds reached her hands.

On the 24th of May, 1903, F. Dallas was adjudicated a bankrupt.

On the 28th of May, 1903, Mrs. Beedell, acting under the provisions of the Trustee Act, 1893, paid the sum of £9,985, representing the legacy of £10,000, less costs, into court.

By an order of the 4th of July, 1903, made on the above-mentioned petition, certain inquiries and an account were directed. The reference to the judge, which was made in pursuance of a direction in the order to that effect, was as to the principle to be adopted in determining the priorities of the incumbrancers, having regard to the notices which had been given.

The particulars as to the steps taken by the several incumbrancers to protect their charges, so far as they were material to the arguments addressed to the court were as follows:

The executor of a deceased member of the firm of Brooks, Jenkins, & Co., two other members of that firm, the British Empire Mutual Life Insurance Society (all of whom were petitioners), and the Staffordshire Financial Co. gave notice, through Messrs. Brooks, Jenkins, & Co., to Mrs. Beedell on the morning after administration had been granted to her (5th March, 1903).

Frederick Stuart gave notice to Brooks, Jenkins, & Co. on the 12th of March, 1903.

Joseph Chapman gave notice to Mrs. Beedell on the 31st of January, 1903.

A. M. Kettlewell, in addition to an earlier charge, took a charge from F. Dallas after the death of the testator, on the 29th of December, 1902.

H. Attenborough gave notice to the administratrix on the 5th of May, 1903.

John Edwards gave notice to Messrs. Brooks, Jenkins, & Co., who had acted both for the receiver

(a.) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

of the income of Robert Dallas and for Mrs. Beedell, on the 23rd of January, 1901.

Buckmaster, K.C., and *Romer Macklin*, for the executor of the deceased member of the firm of Brooks, Jenkins, & Co., and two of the present members of the firm.—F. Dallas could and did effectually charge his expectant legacy under the will of his father. The charge operated as a contract which could be enforced as soon as the property with which he purported to deal came into existence: *In re Clarke*, 36 Ch. D. 348; *Tailby* v. *Official Receiver*, 37 W. R. 513, 13 A. C. 523, 543. Priorities will be regulated by the order in which notice was given, after the property came into existence, to the person who had the legal control of it. That it is of no use to give notice to that person before he has the legal control is shown by *Johnstone* v. *Cox*, 30 W. R. 114, 19 Ch. D. 17, a case on the mortgage of an army commission. Of course it is not necessary in every case for the incumbrancer to give formal notice to the trustee: *Lloyd* v. *Banks*, 3 Ch. App. 488. But the judgment in that case is based on the assumption that the notice must be of such a sort as will influence the trustee in the execution of the trust. The person who receives the notice must be under an obligation existing at the time when the notice reaches him to pay over the fund out of which the debt is to be settled: *Addison* v. *Cox*, 21 W. R. 180, 8 Ch. App. 76, 79. Notice to the solicitors of trustees is not notice to the trustees: *Saffron Walden Second Benefit Society* v. *Rayner*, 28 W. R. 681, 14 Ch. D. 406.

Astbury, K.C., and *J. Gatey*, for the Ocean Accident and Guarantee Corporation (Limited), who were the assignees of the British Empire Mutual Life Assurance Society; and *Ryland*, for the Staffordshire Financial Co., were in the same interest.

H. Terrell, K.C., and *P. S. Stokes*, for Stuart.—Notice to the legal holder of the fund does not create any priority as between persons who took their charges before the fund came into existence, and, consequently, all the charges rank *pari passu*. The doctrine of priority by notice, in its present form, is founded on the decision in *Dearle* v. *Hall*, 3 Russ. 1, where it is put on the ground that the negligence of the prior incumbrancer in not giving notice tends to damnify subsequent incumbrances. And this is the true ground: *Warde* v. *Duncombe*, 42 W. R. 59, [1893] A. C. 390. Looked at from this point of view, therefore, the critical period for giving notices is the date when the second incumbrance is taken. If at this period there is no one in existence to whom notice can be given, the first incumbrancer is not guilty of any negligence towards the second incumbrancer. If notice was not necessary then, it is not necessary at any other time. In so far as the cases on mortgages of army commissions rest on the principle that notice after a *chose in action* has come into existence is essential to complete the title to a charge previously created upon it, that principle must be taken to be overruled by *Tailby* v. *Official Receiver*. [On this part of the case he referred to the army commission cases mentioned in the judgment.] Assuming those cases to have been rightly decided, they are inapplicable here. The critical time there for giving notice was the next morning after the retirement of the officer had been gazetted, and the notice had to be given to the army agents into whose hands the purchase-money had come. There was, therefore, someone to whom notice could be given the moment when the *chose in action* came into existence. But here the *chose in action* came into existence at the death of the testator. At that moment, owing to the subsequent renunciation of probate by the executor, there was no one in existence to whom notice could be given. To extend the principle of those cases so as to cover the present case would give an unfair advantage to the incumbrancers who were the legal advisers of the administratrix. Lastly, if notice is necessary, F. Dallas, the executor, had notice of all the incumbrances. An executor derives his title from the will, not from the probate; he can do anything before probate, except prove his title. Notice to him, therefore, confers a priority which ought not to be taken away by his subsequent renunciation.

A. Adams, for Chapman.—Prior to, and shortly before, the 4th of March Mrs. Beedell had notice of my incumbrance. Priorities, as a general rule, will be regulated by the order in which notices are given to the administratrix after letters are granted. But the authorities show that the notice to an intending administratrix was sufficient to preserve, though not to create, a priority already obtained. No incumbrancer, therefore, whose charge was subsequent in date of creation to mine could, by giving notice to the administratrix after the grant of letters, obtain a priority over me: *Arden* v. *Arden*, 33 W. R. 593, 29 Ch. D. 702, 708; *Lloyd* v. *Banks*, at p. 490; *Meux* v. *Bell*, 1 Ha. 73, 84; *Ward* v. *Duncombe*.

Percy Wheeler, for Edwards.—The solicitors of Mrs. Beedell had notice of my charge before she obtained administration. There ought to be an inquiry whether or not they brought the existence of my charge to her mind after the grant and before the notices relating to the charges of the other incumbrancers were given to her.

Vaughan Williams, for Kettlewell.—My second charge operated as an express notice to F. Dallas, in his capacity of executor, of my first charge. At the date of my second charge he was the proper person to receive notice, for the executor, up till the moment of renunciation, is the legal owner of the property: *Smith* v. *Miller*, 1 T. R. 480. Section 79 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), provides only that on renunciation an executor's rights shall cease, not that they shall be deemed never to have existed. In *In re Wasdale*, 47 W. R. 169, [1899] 1 Ch. 163, it was held that notice to all the trustees of a reversionary fund in existence at the time of an assignment was sufficient to enable the assignee to obtain priority over a person who took his assignment after the death or retirement of all those trustees and who gave notice to the new trustees. The army commission cases show that notice given before the fund is in existence is inoperative: *Somerset* v. *Cox*, 12 W. R. 590, 33 Beav. 634. Therefore the mere fact that F. Dallas knew of the charges is immaterial. It was necessary that he should have express notice while he was an executor. In any event my second charge, which was created after the fund came into existence, will take priority.

Cozens-Hardy, for Attenborough.—The charges rank in the order in which notice was given to the administratrix after the fund had reached her hands. So long as funds are in court priority can be gained only by stop orders, not by notices to the trustees: *Mutual Life Assurance Society* v. *Langley*, 32 Ch.D. (at p. 493).

Hugo Marshall, for Evans.—Between the renunciation of F. Dallas and the appointment of the administratrix, Brooks, Jenkins, & Co. were in the position of trustees of the estate for the whole of the incumbrancers; it was, therefore, inequitable on their part to attempt to obtain priority by first giving her notice of their own incumbrances.

Buckmaster, K.C., in reply.—*Tailby* v. *Official*

Receiver had nothing to do with the question of notice, and is merely a decision that a man can assign a future *chose in action* and that after such assignment, if he become bankrupt, there can pass to his trustee in bankruptcy only such property as the bankrupt still possesses. A trustee in bankruptcy cannot obtain priority over a mortgagee of a *chose in action* belonging to the bankrupt by giving notice, before the mortgagee: *In re Wallis*, 50 W. R. 430 [1902] 1 K. B. 719. In such a case as the present to say that notice does not give priority would be to overrule the army commission cases. *Ward* v. *Duncombe* only decided that it is not necessary to repeat notices on a change of trustees: Lewin on Trusts (10th ed.), p. 865. Notice given to F. Dallas before he renounced probate had no effect. Renunciation operates as from the death of the testator, and, therefore, the executor was never in a position to have legal control over the property. According to *Ward* v. *Duncombe* notice gives priority for several reasons, none of which are applicable to the case of notice given to an executor who afterwards renounces. The argument is stronger where the executor is also the person beneficially entitled to the fund and has incumbered it: *Browne* v. *Savage*, 7 W. R. 571, 4 Drew. 635. The object of giving notice where all the assignments have taken place before the *chose in action* has come into existence, is to prevent further assignments: *Foster* v. *Cockerell*, 3 Cl. & F. 456.

Cur. adv. vult.

BUCKLEY, J., after stating the facts, continued: The notices are of these simple classes—First, there were notices given after the death of the testator on the 24th of December, 1902, but before the renunciation of probate by Frederick on the 9th of January, 1903, to Brooks, Jenkins, & Co. They are a firm of solicitors, but between those dates they were not the solicitors for any person who was the legal holder of the fund. As regards these notices, therefore, there is no question. Secondly, there were notices given by Brooks, Jenkins, & Co. to Mrs. Beedell, before she obtained administration, on the 4th of March, 1903. Thirdly, there were notices given by Brooks, Jenkins, & Co. to Mrs. Beedell on the 5th of March, 1903. And fourthly, there was a notice given to the administratrix after the date in May, 1903, when the fund reached her hands. The questions to be determined are, first, whether notice is necessary at all? and secondly, if it is necessary, at what time and to whom is it to be given?

During the period between the date of the will and the death of the testator, Frederick Dallas had no property at all. He had merely a possibility or expectancy of property, based on the fact that if his father died without having revoked the legacy the property would be his. Now, that an equitable incumbrance can be given on an expectancy or on future property is settled law. A passage in the judgment of Cotton, L.J., in *In re Clarke* (at p. 351), explains the operation of a charge so given: "It is clear that an assignment cannot at law pass future property, but it may be made effectual against future property on the ground that a court of equity will in a suitable case enforce it as a contract." And in *Tailby* v. *Official Receiver*, Lord Macnaghten, at p. 543, says: "It has long been settled that future property, possibilities, and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention, an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence if it is of such nature and so described as to be capable of being ascertained and identified." That proposition is not contested.

When there is a dealing with such a class of property, there is no legal holder to whom an equitable incumbrancer can give notice, because there is no fund in existence, and therefore it is impossible to give notice. The question then arises whether it is necessary to give notice at all. Now in this connection there is a considerable body of cases which arose before purchase in the army was abolished, and which appears to me to be in point. An officer's commission was not his property, but was something which might, in an event, be represented by money. He had a possibility which would become property if he left the army. When that event happened, the money which represented the value of the commission was placed in the hands of the army agents, and became the property of the officer immediately his retirement was gazetted. The cases to which I refer, eight in number, are *Buller* v. *Plunkett*, 9 W. R. 190, 1 J. & H. 441, *Yates* v. *Cox*, 17 W. R. 20; *Boss* v. *Hopkinson*; *Somerset* v. *Cox*; *Calisher* v. *Forbes*, 20 W. R. 160, 7 Ch. App. 109; *Addison* v. *Cox*; *Johnson* v. *Cox*; and *Roeburgh* v. *Cox*, 30 W. R. 74, 17 Ch. D. 520. All those case were decided in accordance with the same principle. Before the moment at which the fund became the property of the officer, there was no property of which there was a legal owner. It followed that notices which were given to the army agents before the appearance of the gazette were idle. It was not open to an incumbrancer to say that the army agents, on the appearance of the gazette, ought to remember a previous notice which was altogether void. Immediately after the appearance of the gazette, therefore, equitable incumbrancers took care to give notice. The rule was that, as between those who gave notice on the same day, the incumbrancers took priority according to the dates of their charges. Refinement in these cases was carried to such an extent that it was held that notices which were given the day before the critical date were bad if they were given during office hours, but good if they were given after office hours, because in the latter event they would be presumed to have been given on the morning of the critical date. In all cases it was held that the rights of incumbrancers were regulated according to the priority of their notices.

Two principles follow from these decisions. The first is, that where the subject of the incumbrance is an expectancy, notice is necessary; and the second is, that priorities rank according to the dates on which notice is given after the fund has come into existence. Those being the principles on which the army commission cases were decided, I think that there is no distinction between them and such a case as this. During the life of his father Frederick Dallas had an expectancy; the officer was in the same position while he was still in the army. On behalf of the respondents arguments have been advanced which are not wanting in courage. Their contention, briefly is, that all the army commission cases were wrongly decided, in consequence of the House of Lords having, in two later cases, given decisions which are said to have been founded on principles irreconcilable with those on which the army commission cases were decided. Among the judges who gave decisions in the army commission cases were Page-Wood, V.C., James, L.J., Mellish, L.J., Jessel, M.R., and Lord Selborne, L.C. —a formidable list.

I proceed to deal with the two cases in the House of Lords which are said to have overruled these

decisions. The first is *Tailby* v. *Official Receiver*. In that case Tailby was the assignee of a book debt from Wilson Brothers, and gave notice to them. The assignor became bankrupt, and the debtors paid Tailby. The official receiver in the assignor's bankruptcy sued Tailby for the amount of the debt as money had and received, and after many vicissitudes, in which each court in its turn overruled the decision of the court immediately below it, the official receiver failed in the House of Lords. The whole question for decision was whether the property there referred to was sufficiently identified, so as to be capable of assignment by virtue of the doctrine laid down in *Holroyd* v. *Marshall*, 11 W. R. 171, 10 H. L. C. 191. The House expressed no opinion as to the question before me, and the case is not in point.

The other case is that of *Ward* v. *Duncombe*. When the judgments in that case are read, it will be found that what was established was this—that the doctrine of notice rests on the principles, first, that an equitable assignee ought to take such steps as will or may prevent the assignor from retaining the apparent ownership of the fund; and secondly, that he must take such steps as will give him a right *in rem* against the fund, as distinct from a right against the conscience of the assignor; and that that must be done, as far as possible, by taking possession. Now, the rule in *Dearle* v. *Hall* has often been criticized, notably in *Ward* v. *Duncombe*, where it was said that it was not to be extended. But *Ward* v. *Duncombe* has left the doctrine itself wholly untouched, though whether it has left it as resting on the negligence of the prior incumbrancer is not so clear. If that be the whole effect of *Ward* v. *Duncombe*, how does it touch the equitable assignment of a possibility of any kind? In my opinion it does not touch it at all. The argument is that at the moment at which the equitable incumbrance was taken, it was impossible for the incumbrancer to give notice, and that, therefore, he need never give notice. That argument is in direct contradiction to the army commission cases which are binding on me, and which have not been affected by the cases in the House of Lords to which I have referred. To put the argument of the respondents in a different form, the proposition being granted that an equitable incumbrance on an expectancy only operates as binding the conscience of the assignor, it is said that no subsequent incumbrancer can get more than the assignor could at the date of the subsequent incumbrance conscientiously given him. Or, again, it was said that there was no legal holder of the fund in existence at the time when the second incumbrance was taken, and that it being, therefore, unnecessary to give a notice at that time, it was never necessary to give notice. In support of that proposition, a sentence from the judgment of Fry, L.J., in *In re Wyatt*, 40 W. R. 177, [1892] 1 Ch. 188, the case which was afterwards affirmed by the House of Lords under the name of *Ward* v. *Duncombe*, at p. 274, was cited, "The time of the taking of the subsequent charge, or, more exactly, the time when inquiry was or ought to have been made of the trustees, and not the period of distribution, appears to be the critical moment." The argument which was based on that sentence shows the fallacy into which one is likely to fall if one reads a sentence divorced from its context and the circumstances to which it was addressed. That language was used in a case where of two trustees one had notice of an incumbrance and was succeeded by another trustee who had no knowledge of it. The question was whether a second incumbrancer could say that the trustee who had notice was dead, and that he was entitled to priority because the doctrine could not apply. The question in this case is that, there being no legal holder of the fund until the death of the testator, but after his death there being a legal holder, ought the incumbrancer to give notice to him? To the argument that it is not necessary for him to do so, the army commission cases are a complete reply, for in those cases the equitable incumbrancer did get more than the assignor could conscientiously give him. Notice, therefore, in my opinion, is necessary.

The next question is, what notice is necessary, and to whom must it be given? There is a sentence in Lord Selborne's judgment in *Addison* v. *Cox*, at p. 79, which is the substratum of all the decisions on the mortgages of army commissions. He says that notice must be given to a person who "is himself bound by some contract or obligation, existing at the time when the notice reaches him," to pay over the fund out of which the debt is to be satisfied. He says that notice to the agent at the time when he was not so bound is futile. In the first place, therefore, notice must be given to a person who is bound by a contract or obligation. Next, notice is operative if it is given under such circumstances as would lead a man of business to have knowledge. As was said by Lord Cairns, L.C., in *Lloyd* v. *Banks*, at p. 491, "If it can be shown that in any way the trustee has got knowledge of that kind—knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created." Further, suppose that there are several trustees, notice to one of them will be sufficient, provided that he be not a trustee who is standing in such a position as that it will be his interest to conceal the incumbrance. None the less will this be the case if the trustee who has received notice dies before the fund comes into possession. That was the decision in *In re Wyatt*, which was affirmed in *Ward* v. *Duncombe*. And an effective notice, once given, will not be displaced by any subsequent change of trustees: *In re Wasdale*. But this last proposition is subject to the exception established by *Timson* v. *Ramsbottom*, 2 Keen 35, a decision which was commented on in *Ward* v. *Duncombe*, at p. 381. Moreover, if the assignor be the only one of several trustees who receives notice, then according to the rule in *Browne* v. *Savage*, notice to him will not be sufficient. The reason is given by Kindersley, V.C. (at p. 640). He says, "In the case where the assignor is himself one of the trustees, he being the only one of the trustees who has any notice or knowledge of the assignment which he has made, if he should afterwards apply to another person to advance him a sum of money on an assignment of his interest, concealing the fact of the prior assignment, such proposed assignee could not, by any caution in making inquiry of all the trustees, discover the fact of the prior assignment; for it is the interest of the trustee, who is the proposed assignor, to conceal the prior assignment, and the other trustees know nothing about it."

I pass on to consider who were the persons who actually had, and who were the persons who ought to have had, notice. Now, the first proposition which has been advanced is based on the fact that Frederick Dallas, the sole surviving executor, was the assignor, and, therefore, knew of the assignments. The question is, Was he, when the testator died, the legal holder of the fund, so that his knowledge, so acquired, operated, on the principle of *Lloyd* v. *Banks*, in favour of all the assignees? The answer to that question

depends on the effect of his subsequent renunciation of probate. Section 79 of the Court of Probate Act, 1857, and section 16 of the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), are sections dealing with the renunciation of probate by an executor, or his death without probate, or his failure to appear when cited. The section dealing with renunciation by a person appointed executor provides that "the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." On that first ground, therefore, I should be able to say that an executor who subsequently renounced, as a result of that renunciation, stood from the first in such a position as never to have been the legal holder of the fund. The same conclusion may be reached by a consideration of the circumstances on general grounds. According to *Ward* v. *Duncombe* it is necessary to give notice to the person who has the disposal of the fund. An executor who renounced never was a person who had the disposal; he could not have been in a position to have it unless he had intermeddled, and thereby disqualified himself from renouncing. He was not, therefore, a person to whom effective notice could be given. A further question has been raised. Suppose a sole executor to have been served, and to have subsequently renounced probate, would it be his duty to hand on the notice to an administratrix when she was appointed, and would that notice, when it reached her, have a retrospective effect? The answer to that question is in the negative. An executor who renounces has no duties to the estate. His position is that the testator has nominated him to the office, and it is true that his tenure is by virtue of the will, and not of the probate. But he is not bound to accept the office, and if he refuses it, he does not owe the estate the duty of handing on notices which in his hands were of no effect. Apart from those grounds, Frederick's position was both that of executor and assignor. If under any circumstances notice to him could be effectual, this further question arises, in a case where the sole legal owner of the fund is also the equitable assignor, does the knowledge which he possesses enure for the benefit of the equitable incumbrancers. On the application of *Browne* v. *Savage*, it does not. Notice to one of several trustees, that one being the assignor, is not sufficient. The same principle applies in the case of an equitable assignor. Accordingly, notice to Frederick who had knowledge, was not sufficient to protect equitable incumbrancers.

If the executor who renounced was not the proper person to receive notice, who was that person? There came into existence on the 4th of March, 1903, a legal holder of the fund, in the person of Mrs. Beedell. In the interval between the death of the testator and that date the legal ownership was somewhere, but it was not in any person who was in fact served with notice. On the 4th of March, 1903, she became administratrix, and therefore, the person to be served.

Substantially that determines all the questions which are before me. But I proceed to notice several subsidiary arguments. I will deal first with the argument which was advanced on behalf of Joseph Chapman. It was said that the order in which notices were given to the administratrix, is to regulate the priorities, with the exception that, as against a person who gave notice to her before she obtained administration, an incumbrancer subsequent in point of date cannot, by giving notice to the administratrix, obtain priority. I fail to see that that proposition has any foundation. There were cited in support of it *Arden* v. *Arden*, *Meux* v. *Bell*, and *Lloyd* v. *Banks*. I do not see that those cases have any bearing upon the point. In none of them was notice given to a person who, at the time of receiving the notice, was not a trustee. I cannot understand how notice to a person who is not the legal holder of the fund can have any effect.

Then on behalf of John Edwards, whose notice was given on the 23rd of January, 1901, to the solicitors who acted for the administratrix, it was argued that, if Mrs. Beedell heard of that notice after she became administratrix, it would be good notice to her; and it was suggested that there ought to be an inquiry as to whether she did or did not hear of it. I fail to see that there is anything in the point.

Another argument for which there is, again, no foundation, was that the first charge which was executed after the death of the testator, and of which notice was given, took priority over all the others. The last contention was that the fund did not actually reach the hands of the administratrix until the 5th of May; and that, until that date, notice to her was ineffectual. The argument in support of it was based on *Mutual Life Assurance Society* v. *Langley*, and was that so long as the fund was in lunacy, priority could be obtained, if at all, only by stop orders. In that case the fund in court was in Chancery, and the trusts were being administered by a Chancery court. Under those circumstances the court stands in the position of a trustee. Accordingly it was there held that the priorities of different assignees were regulated by the dates on which they obtained stop orders. But the distinction between that case and the one before me is clear. The Court of Lunacy is only in the position of a custodian of property on behalf of a person who is unable to control it. When he dies there is no basis for its jurisdiction, because there is no lunatic. The person on whom the lunatic's property has devolved is, for all purposes, the legal owner of the fund. That argument, therefore, fails.

The result is that I arrive at the conclusion that the priorities of the incumbrancers rank according to the dates of the notices which were given to Mrs. Beedell after administration was granted to her, and that as between the incumbrancers who gave notice on the same day their priorities will rank according to the date of their charges. I wish to add one word more. The respondents say that, if my interpretation of the law is correct, it will be very difficult for equitable incumbrancers to protect themselves. The same condition of affairs was apparent in the army commission cases. It was necessary for the incumbrancers to look out for the appearance of the gazette. The difficulty was often provided against by writing a letter daily to the army agents. It is said that there is not the same faculty for ascertaining where and to whom letters of administration have been granted as existed for ascertaining the date when the retirement of an officer was gazetted. But that difficulty has nothing to do with the law. If it be the law, as I hold it is, that an equitable incumbrancer can obtain priority only by giving notice to a legal holder, it may be necessary, as in the old days, that he should post a letter every day.

Solicitors, *Brooks, Jenkins, & Co.; Mellor & Co.; Smiles & Co.*, for *Duignan & Elliot*, Walsall; *G. S. Warmington & Co.; Woodhouse & Davidson; Hicks, Arnold, & Mozley; A. J. Spreckley; Attenborough & Son; Marshall & Marshall.*

Chan. Div. }
Joyce, J. } Nov. 19.

In re WILLIAMS.
HOLDER *v.* WILLIAMS. (*a.*)

Administration— Retainer—Real representative—Proceeds of sale of real estate—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2, *sub-section* 3.

The Land Transfer Act, 1897, *does not give an administratrix a right of retainer out of the proceeds of sale of the intestate's real estate for a debt due to her from the intestate.*

Adjourned summons.

This was a creditor's action for the administration of the estate of Henry Williams, who died intestate on the 13th of May, 1902.

The defendant, Ann Williams, was his widow and administratrix. The estate was insolvent.

On the 19th of March, 1903, the defendant took out this summons, asking (1) that she might be at liberty to complete a contract which she had entered into for the sale of the intestate's real estate for the sum of £1,000, and the goods and chattels in or about the premises for £306; (2) that it might be declared that the defendant was entitled out of the sum of £77 9s. 6d., or other the balance in her hands, or out of the respective sums of £1,000 and £306 to retain the sum of £600 due to her from the intestate's estate with interest at £4 per cent. in priority to the other creditors of the estate.

The defendant had lent her husband this £600 in March, 1901, to help him in his business.

The question now raised was whether the defendant was entitled to retain this sum against the proceeds of sale of the real estate. It was admitted that she had such right against the personal estate.

Hughes, K.C., and *W. Howland Jackson,* for the defendant.—Before the Land Transfer Act, 1897, was passed the personal representative was entitled to retain a debt due to him out of the "legal assets." That Act now makes the real estate legal assets: Carson's Real Property Statutes, p. 408. The real estate, so far as the right of retainer is concerned, is in the same position as personal estate. The defendant is entitled to retain in respect of a loan to her husband: *In re May, Crawford* v. *May,* 38 W. R. 765, 45 Ch. D. 499. The proviso in section 2 (3) does not affect the right of retainer. For the whole of the personal estate is practically gone, and the real estate comes to be applied in payment of debts.

Younger, K.C., and *P. F. Wheeler,* for the plaintiff.—The right of retainer is not extended to real estate by the Land Transfer Act. The right has been always looked on as an anomalous and unjust right, and is not to be extended except by very express language: *Crowder* v. *Stewart,* 29 W. R. 331, 16 Ch. D. 368; *In re Jones, Calver* v. *Laxton,* 34 W. R. 249, 31 Ch. D. 440. The Land Transfer Act, 1897, was intended to "establish a real representative," and made the personal representative the real representative, putting additional duties upon him, but the Act has not altered the rule as to the costs of administering estates in an administration action: *In re Jones, Elgood* v. *Kinderley,* 50 W. R. 215, [1902] 1 Ch. 92. Nor has it altered the rule as to retainer. Cases before the Act show the limits to which retainer must be confined: *Bain* v. *Sadler,* 19 W. R. 1077, 12 Eq. 570; *In re Illidge, Davidson* v. *Illidge,* 33 W. R. 18, 27 Ch. D. 478. Section 2, sub-section 3, is conclusive against this claim.

Hughes, K.C., in reply.—If the right of retainer is anomalous, a greater anomaly would arise if this claim is not allowed, as the administratrix would be placed in an inferior position to the other creditors: *In re Illidge, Davidson* v. *Illidge.*

JOYCE, J.—This summons raises an important and interesting question. The first part of the Land Transfer Act, 1897, entitled "Establishment of a Real Representative," vests the real estate of a deceased person in his personal representative as thereby provided. The present case is one of an administratrix. The deceased being indebted to her, it is contended on her behalf that she is entitled to retain out of the proceeds of sale of real estate belonging to the intestate a sufficient sum to pay the debt which is due to her, in preference to the other creditors. That is a somewhat startling proposition, bearing in mind what has been said by various judges, and in particular by Malins, V.C., in the case of *Crowder* v. *Stewart,* upon the subject of retainer—viz., that "the right of retainer is a relic of old law not founded on justice, and working the greatest possible injustice." There is no doubt about the truth of that. But I have to consider the terms of the Land Transfer Act, and if their necessary effect is to give to the personal representative this extended right of retainer, she must have it. The object of the first part of the Act was to establish a real representative, and I can find nothing express in the title or any part of the statute to the effect that there is to be an extension or alteration of the rights of an executor or administrator with reference to retainer. It appears to me that the very part that is relevant was, speaking generally, to simplify and improve the machinery for the administration of real assets without altering in any manner the ultimate rights of the persons beneficially interested in the proceeds of such assets. I agree with what was said by Kay, J., in *In re Jones, Calver* v. *Laxton*—viz., that "the right of retainer, as it produces inequality, is never assisted," and I do not think that a statute the object of which is to establish a real representative by vesting the real estate of the deceased person in the personal representative should be construed to give incidentally to such representative a new right of retainer or priority, unless I am compelled so to determine. Now, am I compelled to hold that the extended right of retainer claimed in the present case has been conferred by the first part of the Land Transfer Act? I think not. For it appears to me, after some consideration, that there is a comprehensive overriding proviso at the end of section 2 (3) which prevents the right of retainer contended for being claimed successfully. [His lordship read the sub-section, and continued:] Now, that enactment, omitting immaterial words, provides that nothing in the Act contained shall alter or affect the order in which real assets are now applicable in or towards the payment of debts. By real assets I understand the several kinds of real assets—*e.g.,* real estate belonging to the deceased and real estate appointed under a general power, and there are other differences and distinctions. And by debts I understand the different species of debts, as, for instance, debts due to the Crown or other preferential liabilities and debts due to the legal personal representatives and other persons respectively. To introduce a new right of retainer or priority in favour of the personal representative as against real assets would, in my opinion, be to alter or at least affect the order in which real assets were previous to the statute applicable in or towards the payment of debts. Therefore upon this short ground, though there are other arguments against the contention of the administratrix well worthy of consideration if need be, I hold

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

that she is not entitled to any such right of retainer as claimed against real assets.

Solicitors, *Jackson & Jackson*, for *Heath & Eckersall*, Cheltenham; *Badham & Comins*, for *Brookes & Badham*, Tewkesbury.

Prob. Div. & Adm. Div. Admiralty. } Nov. 2.

"THE DUC D'AUMALE." (a.)

Ship—Salvage—Tug in tow—Rights of innocent parties.

A tow was brought into distress by the negligence of the master of her tug, and the tug thereupon salved her.

The Court held that nobody connected with the tug could claim as salvors.

Action.

This was an action for salvage under the following circumstances:

The plaintiffs were the owners, master, and crew of the tug *Challenge*, belonging to the Elliott Steam Tug Co., and the defendants were the Compagnie Maritime Francaise, who were the owners of the barque *The Duc D'Aumale*.

The material facts were briefly as follows: On the 21st of June, 1903, *The Duc D'Aumale* left the Millwall Docks, London, in tow of *The Challenge*, bound for Cherbourg.

On the following day, when off Dungeness, during a dense fog *The Duc D'Aumale* was run into by the steamship *Camrose*, but the tug and tow were alone to blame. *The Challenge* then towed *The Duc D'Aumale* to Calais, and in respect of that service claimed salvage.

The defendants contended that inasmuch as the defendants were wrongdoers they were not entitled to profit by their wrongdoing, but the question was raised whether the innocent members of the crew of *The Challenge* were or were not entitled to an award, it being admitted on both sides that the master of the tug was himself alone to blame.

Aspinall, K.C., and *Nelson*, for the plaintiffs, cited *The Sappho*, L. R. 3 P. C. 690; *The August Korff*, [1903] P. 166, 51 W. R. Dig. 153; *The Ripon City*, [1897] P. 226, 45 W. R. Dig. 153; *The Five Steel Barges*, 15 P. D. 142, 38 W. R. Dig. 192; *The Romance*, [1901] P. 15, 49 W. R. Dig. 167; *The Devonian*, 49 W. R. 665, [1901] P. 221; and *The Glengaber*, 3 A. & E. 534.

Carver, K.C., and *Noad*, for the defendants, cited *The Minnehaha*, 15 Moo. P. C. 133; *The Cargo Ex Capella*, 1 A. & E. 356; and *The Robert Dixon*, 28 W. R. 716, 5 P. D. 54.

BARNES, J., in giving judgment, said: In this case the Elliott Steam Tug Co., and others, the owners, master, and crew of the steam tug *Challenge*, are seeking to recover salvage for services rendered to *The Duc d'Aumale*, her cargo and freight. It was admitted also that what was decided in the previous case which I heard—the suit between *The Camrose* and *The Challenge* and *The Duc d'Aumale*—namely, that the collision which took place was caused by the negligence both of *The Challenge* and of *The Duc d'Aumale*, and that the negligence on *The Challenge* was that of her master. That has been admitted in the present case, so that the facts are not in dispute. They give rise to certain questions of law. *The Challenge* and *The Duc d'Aumale* were somewhat to the west of Dungeness when the collision took place, and after the collision *The Challenge* towed *The Duc d'Aumale* to Calais. The services for which salvage is claimed consisted in what was done subsequent to the collision and up to the time when the vessel was left at Calais. It is said, first of all, that the plaintiffs, the owners, master, and crew of *The Challenge*, can recover no salvage remuneration at all, because the collision and what happened afterwards, and as a consequence of it, were due to the negligence which I have referred to on board *The Duc d'Aumale* and on board the tug. I deal for a moment with the general question, because a second question has been discussed—namely, whether anybody out of the crew or the owners of the tug—anybody other than the person who was the actual negligent person—can recover salvage. The first point appears to me to depend upon the decisions and principles which have guided this court in arriving at its judgments on the subject of salvage services. There is only one matter to refer to further before dealing with this case. Counsel for the plaintiffs relied on the towage contract which was entered into between the owners of *The Duc d'Aumale* and the Elliott Steam Tug Co. under which *The Duc d'Aumale* was to be towed from London to Cherbourg. There are conditions on the back of it which he said affected the present case. Those conditions are very long. I have read them carefully, and I take the view presented by the defendants' counsel in connection with the exceptions referred to, that they really are exceptions which excuse the owners from liability, but do not affect this present question of salvage services. What is the general position in dealing with the case of tug and tow where what has happened is due to the negligence both of the tug and of the tow? The question has been discussed in one or two cases, amongst others in *The Minnehaha*, 15 Moo. P. C. 133, in which that well-known judgment, which is set out in so many subsequent cases, and in the text-books, is to be found. There is one passage in it which is of importance, viz.: "If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct, or by negligence, or by the want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage." It has been said that such observations do not apply where both tug and tow are negligent, but in my judgment that cannot be said of such a case as *The Altair*, decided by myself and reported in [1897] P. 105. There a tug was held responsible for the direction of the course, and, having been found negligent in respect of it and in not taking soundings, her claim for salvage was dismissed. There was in that case a counterclaim by the defendants. It was also dismissed, because their master was held guilty of contributory negligence in allowing the tug to run on instead of ordering her to haul off when approaching a difficult port in foggy weather. There was negligence of both tug and tow, and both claim and counterclaim were dismissed. *The Robert Dixon*, 5 P. D. 54, has been cited to me, but I do not think there was any point of negligence on the part of both tug and tow. But one part of the judgment of the late Lord Esher, then Brett, L.J., is very important, where he says: "The plaintiffs, being under a towage contract, bring this action, in which they assert that the towage service was altered into salvage; and it seems to me that the plaintiffs are in this position, that it lies on them to show that the change occurred without any want of skill on their part, but by mere accident over which they had no control. The burden of proof on both the affirmative and the negative issue is on the

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

plaintiffs—that is, both that there was an inevitable accident beyond their control and that they showed no want of skill." It appears to me, apart from the question of individuals, with which I will deal in a moment, that where there is an occurrence—I will not use the word accident—which requires services of a salvage nature, and that occurrence has originated in the negligence of both tug and tow, the tug cannot claim any salvage for services afterwards rendered in extricating the ship from the difficulty in which she has been placed by that joint negligence. The next point which has been taken is that at any rate those persons on the tug who were not negligent, and even her owners, because they were not negligent properly, can recover for salvage services. Counsel for the plaintiff argued for the crew, other than the master, on this point, and for the owners. As far as the owners are concerned, it seems to me that this point depends partly upon this contract which he referred to and which to my mind does not affect the question of salvage at all; and that they really stand or fall by the negligence of their master, and cannot recover, for the reasons I have already given, for salvage services. I do not think it true in this case to say, as he contended, that the tug was under no obligation whatever afterwards to do anything for the ship. It seems to me not carrying out the principles to be found in *The Minnehaha* in that part of the judgment set out at the top of p. 154. I cannot regard the tug, in a case of this kind, as released from all duty towards the tow. It seems to me that after the accident happened she was not relieved from all obligation toward the ship, but that if salvage services were performed in getting the ship out of the difficulty, there would be, to use the language of the Privy Council in *The Minnehaha*, "services of a different class and bearing a higher rate of payment," and it would be "held to be implied in the contract that the tug" should be "paid at such higher rate." But in this case there would be no payment for reasons I have already given, because there was negligence on the part of the master contributing to the situation from which the ship had to be relieved. So I cannot accept the view that the tug was under no obligation whatever to the tow, as contended for by the plaintiffs' counsel. A good deal seems to me to follow from that, because I have no doubt whatever, for the reasons I have given, that the tug owner and the master cannot recover in this case, because of the negligence of the master. But the contention further is that the crew at any rate can recover—those, I mean, who are not responsible for this disaster. So far as I know it is the first time this point has been raised, so as to endeavour to separate the crew from the master or the negligent person in a case of this kind of tug and tow. There has been one or two cases which have practically no bearing, to my mind upon this particular question. There is first of all *The Sappho* L. R. 3 P. C. 690, where services were performed to ships belonging to the same owner, and the master and crew were held entitled to salvage. There is also the case of *The Glengaber*, L. R. 3 A. & E. 534, where by the improper navigation of a steam tug a vessel at anchor was sent adrift and placed in jeopardy. Another steam tug, *The W.*, rendered assistance to the drifting vessel, and it was held that the owners of *The W.* were entitled to an award, although some of them were also owners of the vessel which occasioned the mischief. Sir R. Phillimore, in giving judgment in that case, said: "With regard to *The Warrior*, it has been contended that that vessel is not entitled to be considered as a salvor, because it appeared in evidence that some of her owners were also owners of *The Black Prince*. This objection, if allowed to prevail, could not affect the claim of the crew, nor could it affect those owners of *The Warrior* who are not owners of *The Black Prince*, and in my opinion it cannot be sustained. I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief. I shall therefore hold that *The Warrior* is entitled to salvage reward." That judgment, in the part which I have read, showed the difference between the claim of the crew and the claim of those owners who were not owners of *The Black Prince*, and he allowed the whole claim—at least, he allowed, as I understand, salvage for all. But that case differs from the view expressed by Butt, J., in *The Glenfruin*, 33 W. R. 826, 10 P. D. 103, where it was held that the master and crew were entitled to salvage. The head-note to that case is as follows: "A steamship, laden with cargo, became disabled at sea in consequence of the breaking of her crank shaft. Such breakage was caused by a latent defect in the shaft, arising from a flaw in the welding, which it was impossible to discover. Her cargo was shipped under bills of lading which contained among the excepted perils, 'all and every the dangers and accidents of the seas and of navigation of whatsoever nature or kind.' Another vessel belonging to the same owners towed the disabled vessel to a place of safety. In an action of salvage brought by the owners, master and crew of the salving vessel against the owners of cargo on the salved ship: Held, that the master and crew were entitled to salvage, but that the owners were not, for that there was an implied warranty by them that the vessel was seaworthy at the beginning of the voyage." He awarded salvage to one owner who was not owner of the ship under contract, and he awarded some to the master and officers of the crew of the other ship—the independent ship. I can understand quite well that where the vessel which renders salvage services is entirely unconnected with the ship that is salved, those persons, like the master and crew or owners, who are in no way owners of the ship that is salved, or under no liability to persons on board that ship—I can quite understand that those independent persons can recover salvage without any difficulty in the way of it. But I do not think that applies to the case of a tug and her tow. I cannot help thinking one must consider a little upon what principle the court proceeds in awarding salvage. The court is guided—I am speaking generally and without that minute consideration which I should give if I were writing my judgment—by due regard to the benefit conferred, combined with regard to the general interests of ships and commerce; I mean the policy of what is to be done comes into consideration as well as the mere benefit received. It seems to me that both as a principle and a matter of good policy it would not be desirable to encourage a crew to recover a salvage reward in such cases of tug and tow where their master has been one of the causes of the disaster from which the ship to which salvage service has been rendered was rescued. There is a case which supports that view—the case of *The Cargo ex Capella*, 1 L. R. A. & E. 356. In that case Dr. Lushington said: "In my mind the principle is this, that no man can profit by his own wrong. . . . The rule would bar any claim for services rendered to the other ship which was co-delinquent in the collision; but the present claim, it is to be observed, is a demand for salvage against the cargo, the owners of which were perfectly innocent." That, therefore, was a claim by the master and crew of one of the colliding vessels. In the case of *The Glenfruin*, to which I have referred, the people of the salving vessel had

nothing whatever to do with the accident that happened to the salved vessel. In the case of *The Glengaber*, the steam tug which came up and rendered assistance had nothing to do with the accident which originally brought about the difficulty; and it is a remarkable fact, I think, that no case had been cited to me in which any similiar suggestion has been made of the crew in a towage case recovering salvage where the master and owners could not. The point must have arisen. It was capable of being made in *The Cargo ex Capella*. It was capable of being made in *The Altair*, and in other cases. But it has never been suggested, and it seems to me that it may be that the right view to take is this, that the tug owners are not relieved entirely from their contract by what has happened, and when they proceed to render services afterwards they are extricating themselves and their ship from a difficulty in which both are placed by joint negligence. In this case what the tug did was, in fine weather, to tow this ship to Calais. The owners and master could not recover, and the crew did nothing more than their ordinary duties on the tug, without any risk, that I can see. They do nothing more than, it seems to me, their ordinary duties towards their owners and master. It may very well be that there might be a case of joint negligence producing a disaster to a tow, where a man might be put on board the tug, or required to perform services entirely outside the ordinary duties of tug and tow. When such a case arises it can be dealt with. But this case, I think, can be dealt with on that argument alone with which I have already dealt. It seems to me it would be bad policy to encourage sailors, as it were, to hope and expect that their master might get the ship he was towing into danger, so that they would have to render services for which they could recover. I think that would be introducing something extremely novel into this court, and what seems to me to be a dangerous kind of policy. On the whole, although this matter has been very fully discussed, and I have given judgment without reserving it, it seems to me that I am right in holding that no salvage award can be recovered in this case by anybody connected with the tug. One word more. I only wish to refer to the cases of *The Bernina* and *Milburn* v. *The Jamaica Fruit Co.* They appear to me to have nothing whatever to do with the present case. My judgment therefore must be that the suit of the plaintiff is dismissed. I think, in the circumstances under which the case has come before the court—they are peculiar—the proper order is that each should pay their own costs.

Solicitors for the plaintiffs, *Lowless & Co.*

Solicitors for the defendants, *Crump & Sons.*

House of Lords.

From C. A. (England). } Dec. 15.

WAKEFIELD CORPORATION v. COOKE AND OTHERS. (a.)

*Local government—Street—Paving expenses—Decision of justices that street is a highway repairable by the inhabitants at large—*Res judicata*—Wakefield Corporation Act,* 1887 (50 & 51 *Vict. c. lxxi.*), *ss* 29, 30, 31—*Private Street Works Act,* 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Upon an objection by the owners of premises in a street to a scheme for certain private street works which the local authority proposed to execute under a local Act (which contained provisions identical with sections 6, 7, *and* 8 *of the Private Street Works Act,* 1892), *the justices decided that the street was a highway repairable by the inhabitants at large, and upheld the objection. Subsequently the local authority proposed to execute private street works in the street under a different scheme.*

Held, upon objection taken by the owners of premises in the street, that the matter was res judicata, *by reason of the former determination of the justices.*

Reg. *v.* Hutchins, 29 *W. R.* 724, 6 *Q. B. D.* 300, *distinguished.*

Decision of the Court of Appeal (51 *W. R.* 305, [1903] 1 *K. B.* 417) *affirmed.*

Appeal from an order of the Court of Appeal (Vaughan Williams, Stirling, and Mathew, L.JJ.) (51 W. R. 305, [1903] 1 K. B. 417), reversing a judgment of the Divisional Court (50 W. R. 254, [1902] 1 K. B. 188).

The special case is set out at some length in the court below. Shortly the facts are as follows:

The General Works Committee of the Corporation of Wakefield passed a resolution in November, 1900, in pursuance of section 29 of their private Act, 1887 (sections 29, 30, and 31 of the Wakefield Act are identical with sections 6, 7, and 8 of the Private Street Works Act, 1892), that the corporation should do certain sewering, flagging, &c., in the private street known as Sludge-lane. This resolution was confirmed, and at a subsequent meeting of the corporation the provisional apportionment of expenses was approved, and copies served on the owners of the premises as required by the Act. Several of the owners of these adjoining premises duly objected that Sludge-lane was a highway repairable by the inhabitants at large. Upon the application of the corporation, after the expiration of the time for sending in objections the justices appointed a time for hearing objections, and upon the hearing it was contended that the matter was *res judicata* by reason of a former decision of the justices in 1898, that Sludge-lane was repairable by the inhabitants at large, and the justices took this view and so held.

The Court of Appeal considered the matter was *res judicata.*

C. A. Russell, K.C., and *W. Senior,* for the appellants.—The decision of the magistrates no more concludes the matter in the present case than it did in *Reg.* v. *Hutchins,* 29 W. R. 724, 6 Q. B. D. 300. The Wakefield Act does not make the finding of the magistrates final, and that finding is not a judgment *in rem.*

Danckwerts, K.C., and *Compston,* for the respondents.—The decision of the magistrates in 1898 is conclusive. The case of *Reg.* v. *Hutchins* does not apply. In 1898 the justices determined the *status* of this street. A decision on *status* is a judgment *in rem.* The case comes within the definition of *status* given in the first edition of Smith's Leading Cases, p. 439, and left unchanged by a long succession of editors.

They also referred to *Reg.* v. *Hartington Middle Quarter,* 3 W. R. 285, 4 E. & B. 780; *Reg.* v. *Haughton,* 1 W. R. 164, 1 E. & B. 501; and *Reg.* v. *Blakemore,* 2 Den. C. C. 410.

W. Senior replied.

The Earl of HALSBURY, L.C.—Although I do not deny the local importance of this case, and indeed the importance of it generally, it seems to me that it lies within a comparatively short compass. I think that the matter becomes clear if we look at the corresponding section of the Public Health Act, 1875, s. 150,

and observe what has been the question in doubt in some of the cases under that Act, and then compare it with the local Act with which your lordships are dealing here.

In the Public Health Act the mode in which the matter is dealt with is this: "All streets being or which at any time become highways repairable by the inhabitants at large," are by section 149 given to the jurisdiction of the urban authority. Then section 150 gives the urban authority jurisdiction in certain cases over "any street within any urban district (not being a highway repairable by the inhabitants at large)." The urban authority is empowered to give notice to the owners of property in a private street which requires them to flag, channel, and so forth, to deal with the particular place which is under their authority by reason of section 150, and if the owner does not do what he is ordered to do by the urban authority they can do it themselves; whereupon the magistrates are empowered to enforce by a proper order the payment of those expenses. In *Reg.* v. *Hutchins* what happened was this: The magistrates before whom the question came as to whether or not a certain sum of money (£400 odd) had been incurred, thought proper to enter into the question of whether or not it was properly proved that this was not a public street, but a private road within section 150. I have looked to find some jurisdiction given to the magistrates to enter into that question, and I can find none. The only thing which I can suppose is that it was argued that, inasmuch as this power given under section 150 depends upon the question of the street with which they are dealing not being a highway repairable by the inhabitants at large, that was one of the necessary facts to be proved to give the magistrates jurisdiction in order to issue their process and enforce the payment of those expenses. I must say, so far as that case is concerned, I entirely concur with the judgment. The magistrates had no such jurisdiction at all; they were not invested with any such power at all. The only thing which the Legislature confided to them was that they should issue process to compel payment of something which the urban authority had themselves paid by reason of the disobedience of persons upon whom the notice had been served. As to that case, I think it was quite rightly decided.

But let us turn for a moment to the statute which is before your lordships, and the distinction will be at once apparent. Instead of its being left to the determination of the local authority to give notice, and when that notice is disobeyed to do the work themselves, and thereupon when they have done the work themselves to sue for the amount against the person who disobeyed their order—instead of that, a whole machinery is created by which the question of whether or not the street is repairable by the parish shall be determined by a particular tribunal—a tribunal erected for this express purpose; and when we look to see what that particular forum erected for that purpose is to determine, it is sufficient to see the number of objections which can be made and what has to be determined: "(*a*) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act" (that is a question which relates to a different class of things that the urban authority have got to do). "(*b*) That a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large." So that, instead of being, as it is, under the Public Health Act, 1875, something removed from the jurisdiction of the justices, who have only power to issue process and enforce the payment of a sum of money payable under the circumstances stated in section 150 of that Act, in this Act, the very question whether or not a particular road is or is not a highway repairable by the parish is expressly remitted to that tribunal for the purpose of determination.

For my own part, I am wholly unable to see anything more in the nature of a judgment *in rem* than that; and although I desire not to be bound by it, because I think it unnecessary after what I have said to enter into that question, yet I must say that where you have a corporation on the one side and objectors capable of coming in, and receiving notice to come in, in respect of a particular matter, on the other side, it comes very near to showing that it is a proceeding between the same parties—an adjudication between the same parties.

For my own part, I am quite prepared to base my opinion upon the subject upon the hypothesis that it is a judgment *in rem*. It is a judgment as to the *status* of that street; and that judgment as to the *status* of that street is, it is said, subject to appeal. Counsel for the appellants, I think, told us that it was subject to appeal to quarter sessions. He has not pointed out to us where the appeal comes, and I have not found it; but whether it is subject to appeal or not seems to me to be immaterial. If there is no appeal, it is a final adjudication and determination. If there is an appeal, I presume, from what has happened, the question was in this case determined adversely to those who are at present the appellants against the judgment of the Court of Appeal. In any case it appears to me that this question has been finally and absolutely determined; and I must say that I rather concur with what has been suggested by Vaughan Williams, L.J., that the probability is that a section of this character or a statute of this character was introduced by reason of the difficulty that had arisen under the Public Health Act. If you look carefully into the matter you find that there is no one who has any power of litigating the question when once the local authority has thought proper to give the notices. There is no forum that I can see created by the statutes before whom that question can come, and all that is to be done is that they are to recover the expenses against any person who has disobeyed the order. Probably there must be some method of removing the order if made without jurisdiction—perhaps it might be moved by a *certiorari* to the King's Bench; but certainly no such proceeding is contemplated by the Public Health Act as is created by the Wakefield Act.

Under these circumstances it appears to me that it is an order made by the justices who are called on by the provisions of the statute to exercise that jurisdiction. They have exercised that jurisdiction. They have acted within their powers, and it seems to me that the adjudication which they have made is conclusive, and properly conclusive, getting rid of a great many awkward questions which might otherwise be raised. This appeal, therefore, ought to be dismissed with costs, and I move your lordships accordingly.

Lord MACNAGHTEN.—I am of the same opinion.

Lord SHAND.—I am of the same opinion. I entirely concur in what has been said by the Lord Chancellor. I desire only specially to add that I think that Vaughan Williams and Mathew, L.JJ., have stated clearly the distinction which exists between this case and the case of *Reg.* v. *Hutchins*, which deprives that case of any authority in the present case.

Lord DAVEY.—I am of the same opinion. The point on which I differ from the judgment of Lord Alverstone, L.C.J., may be put very shortly, and it is this: He seems to have thought that the primary jurisdiction of the justices under section 31 of the Act

of 1887 was either to quash or to amend the proceedings, and that the power to determine the matter of the objection was merely incidental and leading up to that jurisdiction. I take a wholly different view of the construction of that section. I think that their primary jurisdiction is to proceed to hear and determine the matter of all the objections—that is their first and their main duty; and then, as consequential upon that, they may, but they are not bound to do so, on the application either of the objectors or the corporation, proceed either to quash in whole or in part or to amend the resolutions, &c., which form the subject of the proceeding.

This view shows the distinction between this case and *Reg.* v. *Hutchins*, which the Lord Chief Justice thought governed this case. I cannot put the distinction between this case and that more clearly than it has been put by Vaughan Williams, L.J. Shortly stated, it is, in my opinion, this—that in *Reg.* v. *Hutchins* Lord Selborne, L.C., and the learned judges who sat with him thought that the matter on which the decision of the magistrates was said to be *res judicata* was one which they had no jurisdiction to entertain *per se*—that they had no jurisdiction whatever to decide whether a road was or was not a highway; they had jurisdiction to decide whether a sum of money was due from a particular individual to the corporation, and for the purpose of determining that question it might be necessary for them incidentally to express an opinion upon the question of whether a road was a highway repairable by the inhabitants at large or not; but, supposing that to be so, that would not make an incidental determination of that kind *res judicata* in a subsequent proceeding in which that question came into prominence. But I doubt very much indeed whether the justices had any jurisdiction at all even to deal incidentally in that way with the question whether or not it was repairable by the inhabitants at large, or whether they ought not merely to have ordered a sum of money—the contribution—to be paid. However, that question is not before your lordships, and it is unnecessary to express an opinion upon it.

I agree with Vaughan Williams, L.J., also that this decision of the magistrates, if not in form a judgment *in rem*, was at all events in all its essentials a judgment *in rem*. And I also agree that if it be not strictly a judgment *in rem* so as to make it conclusive upon all the world, all persons who were called by being served with notice of the proceedings and had an opportunity of attending and supporting or opposing the objection, must be bound by the decision of the magistrates, and none the less because they did not think fit to attend, but left the objection to be fought by other people.

Lord ROBERTSON.—I was at first inclined to share the doubts of Stirling, L.J., but the argument of counsel for the respondents has satisfied me that the judgment of the Court of Appeal is right. The question is whether the local Act has given the justices jurisdiction to determine whether the street in dispute is a highway repairable by the inhabitants, as a substantive issue *in rem*, or merely as a *medium concludendi* of the liability or non-liability of the objectors. If the former be the true view, then a decision on that issue, raised by one of the class interested, is good against all the rest. There is nothing contrary to principle, and much convenience, in a local tribunal being so authorized to adjudicate on a local matter with full notice to all concerned, and the question is merely whether in this instance that has been done by the Legislature. On the whole, I have come to think that it has, and that the appeal therefore fails.

Lord LINDLEY.—I am entirely of the same opinion. It appears to me that the question turns entirely on the fact which occurs in this case, and did not occur in *Reg.* v. *Hutchins*, that the objection raised for the purpose of being decided in accordance with the Act, and the question which was decided in accordance with the Act, was whether Sludge-lane was a street repairable by the inhabitants at large or not. If there had been no such matter raised, *Reg.* v. *Hutchins* would have had an important bearing on the present case; but as it is, I have not the slightest doubt that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors, *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *C. J. Hudson*, Wakefield; *S. F. Taylor*, for *J. B. Cooke*, Wakefield.

Court of Appeal.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Feb. 16.

GRIFFIN v. HOULDER LINE (LIMITED). (*a*.)

Master and servant—Employers' liability—Accident—Compensation—Dock—Ship in dock—Sailor—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1901 (1 *Ed.* 7), *s.* 104.

A sailor who meets with an accidental injury while engaged in clearing out the hold of a ship lying in dock is entitled to the benefit of the Workmen's Compensation Act, 1897.

Per Collins, M.R., *and* Cozens-Hardy, L.J., Mathew, L.J., *dissenting*.

Appeal from a decision of the judge of the City of London County Court in an arbitration under the Workmen's Compensation Act, 1897.

The question was whether a sailor working on board a ship lying in a dock is entitled to the benefit of the Workmen's Compensation Act.

The following statement of facts was agreed upon by the parties: "The applicant, Elizabeth Ann Griffin, is the widow and administratrix of Edward Latimer Griffin, deceased. The said deceased was an able seaman, and on the 21st of November, 1902, he signed articles at Liverpool to serve on board the respondents' steamship *Royston Grange* as an able seaman upon a voyage from Liverpool, where the ship was then lying, to the River Plate and back to this country. The said deceased duly joined the ship pursuant to the said articles on or about the 22nd of November, 1902, and sailed in her from Liverpool to Newport, Monmouth, at which port the vessel called to take in her bunker coal for the voyage. The vessel arrived in the Alexandra Dock, Newport, on the 24th of November, 1902, and at midnight on the 28th of November she had finished receiving her bunker coal and was moved out to the buoys in the docks preparatory to proceeding to sea on the following morning. While engaged clearing up the No. 5 hold on the 29th of November a piece of dunnage wood known as a 'tom,' and used for the purpose of supporting a deck beam when heavy weights were stowed above, was knocked down by a fellow-servant of the deceased and fell across his

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

ankle and instep, causing a fracture of the ankle and instep which necessitated an operation. The wages of the deceased were 18s. 10d. per week. The said voyage upon which the deceased signed articles ended upon the vessel's arrival in London on the 3rd of March, 1903. In addition to the aforesaid wages the deceased was entitled to be fed whilst he was on board the steamer, and the cost to the respondents of so maintaining him would have amounted to above 10s. per week."

At the hearing of the arbitration the county court judge found that the deceased died on the 10th of March, 1903, and that his death was due to the accident which happened on the 29th of November, 1902. The main question was whether the employment of the deceased was an employment to which the Workmen's Compensation Act applied. The county court judge was of opinion that the Act was not intended to apply to a sailor working as a sailor. If the ship had been alongside a wharf and the sailors had been working as stevedores, then, in his opinion, they would not have been working as sailors, and the Act would have applied. But in this case he thought that the deceased was working as a sailor and nothing else. He therefore held that the case did not come within the Act.

The applicant appealed.

Robson, K.C., and *G. A. Scott*, for the applicant.

Carver, K.C., and *Dawson Miller*, for the respondents.

Feb. 16.—COLLINS, M.R., read the following judgment: I agree with the judgment about to be read by Cozens-Hardy, L.J., but as we are not unanimous, I will state my opinion in my own words. The question is whether a sailor who met with an accident while engaged in clearing out the hold preparatory to receiving cargo in a ship which was lying at anchor in a dock can take proceedings against the owners of the ship under the Workmen's Compensation Act. The county court judge has decided that he cannot, on the broad ground that the Act does not apply to sailors. It is not contended that there is any provision expressly excluding sailors from the Act. The question, therefore, must be, Do they come within the class of persons to whom the Act gives a remedy?

Section 1 of the Act provides as follows: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." Therefore the applicant must be a workman, and the employment must be one to which the Act applies. By section 7, sub-section 2, "workman" is defined as including "every person who is engaged in an employment to which the Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing." By sub-section 1 of section 7, "this Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a . . . factory." And by sub-section 2 "undertaker" in the case of a factory means the occupier; and by the Factory Act, 1901, s. 104, "the person having the actual use or occupation of a dock . . . or of any premises within the same or forming part thereof . . . shall be deemed to be the occupier of a factory.

It was once thought that, as the Act does not in terms constitute a ship a factory, employment in a ship in a dock was not employment in a factory, and the inference was also drawn that, as ships were not made factories, the Act was not intended to include sailors. The House of Lords, however, held in *Raine* v. *Jobson*, 49 W. R. 705, [1901] A. C. 404, that a workman employed in a ship which was in a dock was employed in a factory. The fact that he was employed in a ship did not negative his being employed in a factory. Therefore, if the exclusion of sailors from the Act is rested on the fact that employment in a ship cannot be employment in a factory, the foundation for such contention is destroyed by that case. This court has applied the principle of *Raine* v. *Jobson* to more than one case where workmen sent by their employers to do painter's or joiner's work in a ship in a dock have been held to be within the Act and to be entitled to compensation against their employers as the undertakers—*i.e.*, the users or occupiers of a dock within the above definition. Unless, therefore, there be some special exclusion of sailors from the Act, a sailor clearing out a hold in a ship in dock is precisely in the same position to claim compensation against his employer as he would be if instead of being a sailor he had been a coal-heaver in a coal bunker and his master had been a coal merchant instead of the owner of a ship. But there is no such exclusion to be found in the Act. The foundation for such suggestion, as I have pointed out, fails; and a sailor when employed as a workman in a ship in a dock is just as much drawn within the Act as any handicraftsman under the same circumstances. His position, of course, while at sea is quite different; he must get himself physically into a factory before he can get the benefit of the Act. The difference of his position at sea is pointed out by Lords Halsbury and Shand in the case cited. It seems to me, therefore, that the authority of *Raine* v. *Jobson* concludes this case, and that the appeal must be allowed.

MATHEW, L.J., read the following judgment: I regret to be unable to deal with this appeal from the point of view of my learned colleagues. I think Judge Rentoul was right in his decision that the appellant was not entitled to compensation under the Workmen's Compensation Act for the loss of her husband, Edward Latimer Griffin.

The material facts are these: The deceased man had joined the respondents' ship, *The Royston Grange*, at Liverpool under signed articles which bound him to serve the respondents as an able seaman on a round voyage to the River Plate and back to a home port. The vessel went from Liverpool to the Alexandra Dock, Newport, to take in her bunker coal, and, when the coaling was completed, she was moved out to buoys in the dock preparatory to proceeding to sea. While there the deceased man was employed in what was admitted to be the ordinary duty of a seaman—viz., in clearing up No. 5 hold for the reception of cargo. The accident to which his death was due occurred while he was so engaged. The learned county court judge came to the conclusion that Griffin was not protected by the Act, and that the claim of his widow for compensation failed.

Upon the argument of the appeal it was not disputed that, if the accident had occurred while the ship was at sea, the widow could not have maintained her right to compensation. But it was argued that the legislation embodied in the Factory Act, 1901, had altered the *status* of seamen on board when the vessel was not at sea and was lying in dock. The ship, it was said, while in dock was occupying part of a factory, and the sailors therefore were employed in a factory and were protected by the Workmen's Compensation Act. In support of this contention reliance was placed on the provisions of the Factory Act, 1901, and the judgment of the House of Lords in *Raine* v. *Jobson*. But I am unable to discover either in the statute

or in the decision of the House of Lords any indication of an intention to extend the Workmen's Compensation Act to a class which had not been previously included in that statute. Full effect may be given to the Factory Act and the decision, if both are treated as applicable to the class of workmen with which the Workmen's Compensation Act was clearly intended to deal—viz., workmen as distinguished from seamen. The argument for the appellant would lead to this extraordinary and, as it seems to me, unreasonable result—that a seaman while at sea would be outside the operation of the Act, but would become entitled to protection when in a position of comparative safety. I can see no reason for thinking that such a result could have been intended as the consequence of the application of the provisions of the Act of 1901 to the Workmen's Compensation Act. Further, I consider it unlikely that any change would have been made in the law which would affect existing as well as future contracts with seamen without a clear intimation to shipowners of their altered position. I am of opinion that the appeal should be dismissed.

COZENS-HARDY, L.J., read the following judgment: The applicant is the administratrix of Edward Latimer Griffin, an able seaman on board the respondents' steamship *Royston Grange*. On her voyage from Liverpool to the River Plate the vessel proceeded to Newport to take in bunker coal. She arrived in the Alexandra Dock on the 24th of November, and at midnight on the 28th of November she had finished receiving her bunker coal and was moved out to the buoys in the dock preparatory to proceeding to sea on the following morning. While there, in the discharge of his duties as a seaman, Griffin met with an accident which resulted in his death. His Honour Judge Rentoul has held that as the deceased was a sailor, working as a sailor, he is not within the Act.

By section 7 of the Act the term "workman" includes every person who is engaged in the employments to which this Act applies, whether by manual labour or otherwise. The Act applies only to employment by undertakers as defined in the Act, including, *inter alia*, employment in or on or about a factory, and "factory" includes a dock, and the undertaker of a factory is the occupier thereof.

Now, it is clear that a ship, as such, is not a factory within the meaning of the Act, but I think it must be admitted, since the decision in the House of Lords of *Raine* v. *Jobson*, and the decision in this court of *Bartell* v. *Gray & Co.*, 50 W. R. 310, [1902] 1 K. B. 225, that a ship occupying a berth in a dock occupies part of a factory, with the result that the vessel in question was within the operation of the Act, and the shipowners were undertakers within the Act at the time when the accident happened. Unless, therefore, there are some words to be found expressly excluding seamen as such from the benefit of the Act, I think that the applicant must succeed. I can find nothing to put seamen in a worse position than would be any carpenter, painter, or other mechanic on board a ship while in dock. The observations of Lord Halsbury and of Lord Shand in *Raine* v. *Jobson*, to the effect that it was not within the contemplation of the statute to deal with the relations between shipowners and sailors when engaged in their occupation of sailing upon the seas, do not seem to apply where the vessel is not at sea, but where, within the meaning of the statute, it is lying in and occupying part of a factory. In my opinion, this appeal must be allowed.

Appeal allowed.

Solicitors for the applicant, *Burn & Berridge.*

Solicitors for the respondents, *W. A. Crump & Son.*

From K. B. Div.
(Lord Alverstone, L.C.J., Collins, M.R., and Romer, L.J.) Jan. 22.

PRICE & CO. v. UNION LIGHTERAGE CO. (LIMITED). (a.)

Contract—Carrier—Exemption—Negligence of servants—"Loss of goods which can be covered by insurance."

Goods were shipped at a jetty on the River Thames in the defendants' barge for carriage by them to a place higher up the river. The carriage was subject to the following clause: "The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman." After shipment the goods were lost, owing to the negligence of the defendants' servants.

Held, that, though the loss was one which would be covered by an ordinary marine policy on goods, the clause did not in sufficiently clear and unambiguous terms exempt the defendants from liability for loss arising from the negligence of their servants.

Judgment of Walton, J. (51 *W. R.* 477, [1903] 1 *K. B.* 750), *affirmed.*

Appeal from the judgment of Walton, J., in favour of the plaintiffs (reported in 51 W. R. 477, [1903] 1 K. B. 750).

The plaintiffs claimed damages for the loss of a quantity of oil belonging to them which was shipped at a jetty at Thames Haven in a barge belonging to the defendants, under a contract by which the defendants agreed to receive and lighter the oil for the plaintiffs to Belvedere, up the River Thames. The contract was not contained in any written document, but it was admitted that by the course of dealing between the parties the lighterage was subject to the terms of a clause which was printed on the forms of stationery used by the defendants in their business, and was as follows: "The rates charged by us are for conveyance only, and we will not be liable for any loss or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman. We will not be responsible for any consequences arising from strikes or other labour disturbances."

The oil, which was not covered by insurance, was shipped about high water, early in the afternoon of the 31st of October, 902, and the barge when loaded was allowed to remain moored to the jetty until after low water. As the barge rose with the rising tide its gunwale caught under a projecting part of the face of the jetty, against which it was lying, and as the tide rose the barge was held down, and so was submerged and sunk, and the oil was lost.

Walton, J., found that the loss was caused by the negligence of the defendants' servants in leaving the barge unattended alongside the jetty while the tide rose. Upon the question whether the above clause exempted the defendants from liability for a loss caused by the negligence of their servants, he said that such a loss as occurred in this case would be covered by an ordinary marine policy. But there was a well-established rule of construction that if the carrier wished to exempt himself from liability for the negligence of himself or his servants he must do so in express, plain, and unambiguous language. An exemption in general words, not expressly relating to negligence, even though the words were wide enough

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

to include loss by the negligence or default of the carriers' servants, must be construed as limiting the liability of the carrier as insurer, and not as relieving him from the duty of exercising reasonable skill and care. If the carrier desired to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words; in other words, if a carrier wished to exempt himself from negligence, he must insert in his contract a negligence clause. The clause in this case must be read as meaning, "I will use reasonable skill and care in the conveyance of the goods, but I will not undertake any liability as insurer for loss or damage which can be covered by insurance with underwriters." He accordingly gave judgment for the plaintiffs for £370 3s. 7d.

The defendants appealed.

Carver, K.C., and *A. M. Talbot* (*Loehnis* with them), for the defendants.—The exemption clause is wide enough to include loss arising from the negligence of the carriers' servants. If the loss would be covered by an ordinary marine policy on goods, the exemption clause applies. A loss arising from the negligence of the carriers' servants would be covered by an ordinary marine policy. Every loss would not be covered by such a policy. For instance, loss caused by mishandling of goods, bad stowage, and misdelivery would not be so covered. It is not necessary that the carrier should exempt himself in express terms from liability for loss by negligence. It is sufficient if the words used are clear and unambiguous, and include an exemption of negligence. The rule of construction has been laid down in many cases, such as *Phillips* v. *Clark*, 5 W. R. 582, 2 C. B. N. S. 156; *Grill* v. *General Iron Screw Collier Co.*, 16 W. R. 796, L. R. 3 C. P. 476; *Taylor* v. *Liverpool and Great Western Steamship Co.*, 22 W. R. 752, L. R. 9 Q. B. 546; *Steinman* v. *Angier Line*, 39 W. R. 392, [1891] 1 Q. B. 619; *Burton* v. *English*, 32 W. R., at p. 656, 12 Q. B. D., at p. 223. In *Taubman* v. *Pacific Steam Navigation Co.*, 26 L. T. 704, the exception was for loss "under any circumstances whatsoever," and it was held to include loss caused by the gross negligence or wilful default of the defendants' servants. The words in the present exemption clause are plain and capable of only one meaning when read in the ordinary commercial or business sense. In *Sutton & Co.* v. *Ciceri & Co.*, 15 App. Cas. 144, 38 W. R. Dig. 28, the exception of "insurance risks" was held not to cover breakage of the goods. But breakage is not a risk that would be covered by an ordinary marine policy on goods. The decision in *Mitchell* v. *Lancashire and Yorkshire Railway Co.*, 23 W. R. 853, L. R. 10 Q. B. 256, upon which Walton, J., relied, is not consistent, upon the question as to the construction of the agreement, with *Ashenden* v. *London, Brighton, and South Coast Railway Co.*, 28 W. R. 511, 5 Ex. D. 190.

They also referred to *Thomas* v. *Brown*, 4 Com. Cas. 186.

J. A. Hamilton, K.C., and *Bailhache*, for the plaintiffs.—There is a well-established rule of construction in these cases, which has been laid down in the series of cases which have been referred to—namely, that a carrier, to exempt himself from liability for loss arising from the negligence of himself or his servants, must express that exemption in clear and unambiguous terms. A lighterman is, as regards conveyance of goods on the river, a common carrier: *Liver Alkali Co.* v. *Johnson*, L. R. 9 Ex. 338, 23 W. R. Dig. 39. It is against his general liability as an insurer of the goods he carries that this exemption clause relieves him, and not against loss caused by negligence. If the goods owner insured the goods with another person, that other person, upon payment, would have recourse to the carrier. The words in the clause, "without recourse to lighterman," refer to recourse in respect of the general liability of the lighterman as an insurer of the goods. *Sutton & Co.* v. *Ciceri & Co.* is conclusive to show that this exemption clause does not apply.

A. M. Talbot replied.

Lord ALVERSTONE, L.C.J.—In my opinion the judgment of Walton, J., is right and must be affirmed. A principle of construction in cases of this kind is now well-established, and it appears in different forms in various cases. Where an exemption clause in a contract is capable of two constructions, one of which will relieve the carrier from liability for loss provided there is no negligence on his part, and the other will relieve him from liability for loss even though caused by negligence on his part, the court will construe the contract as not exempting the carrier from liability for negligence. To exclude liability for negligence express words must be used. That is the principle upon which Walton, J., acted, and it is a principle to be derived from the reasoning in the various cases, one instance of which is *Taylor* v. *Liverpool and Great Western Steamship Co.* That being so, we have to consider what the construction of this particular exemption clause is. I agree that we must construe the words in their ordinary commercial or business sense. We have not to consider an exemption clause in respect of loss "under any circumstances whatsoever," which was the clause in *Taubman* v. *Pacific Steam Navigation Co.*, a case which it is not necessary for us to consider now, but which may some day have to be discussed. The contract here runs as follows: "The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman. We will not be responsible for any consequences arising from strikes or other labour disturbances." Are those words sufficiently clear and unambiguous to exempt the carrier from liability for loss caused by the negligence of himself or his servants? It is quite possible to construe the words themselves as excluding every loss no matter how caused, because every loss can now be covered by insurance. That, however, is not the decisive element. In such a contract as this relating to a common carrier do the words include an exemption from liability for loss by negligence? One has only to look at the cases which are conveniently collected under section 105 in Carver on Carriage by Sea, as, for instance, *Taylor* v. *Liverpool and Great Western Steamship Co.* and *Sutton & Co.* v. *Ciceri & Co.*, to see that the courts have always held that the words include only those losses which are not caused by the negligence of the carrier or his servants. There are many cases to which the exemption clause in the contract of carriage can apply independently of those cases in which the loss is caused by the negligence of the carrier. This is a class of contract where the words have received a business construction, and they are not sufficiently explicit to exclude the liability of the carrier for negligence. The defendants are therefore liable, and the appeal must be dismissed.

COLLINS, M.R.—I am of the same opinion. I have carefully read the judgment of Walton, J., and I so entirely agree with it that I am unable to add anything to it.

ROMER, L.J.—I am also of the same opinion.

Appeal dismissed.

Solicitors for the plaintiffs, *J. A. & H. E. Farnfield.*

Solicitor for the defendants, *C. E. Harvey.*

From Chan. Div.
(Vaughan Williams, Romer, and Stirling, L.JJ.) Dec. 15, 16.

In re WELSBACH INCANDESCENT GAS LIGHT CO. (LIMITED AND REDUCED). (*a.*)

Company—Memorandum of association—Different classes of shareholders—Rights of shareholders defined by memorandum—Power in memorandum to modify rights—Validity of power.

A provision in a memorandum of association of a limited company, which memorandum provides for the division of the capital into different classes of shares and prescribes for the rights and privileges of the different classes of shareholders inter se, *that the rights thus attached to the different classes of shares may from time to time be modified as provided by the articles of association, is valid; and consequently a scheme for the reduction of the capital of the company, which involves such a modification, will be sanctioned by the court, provided that it involves no unfairness to the shareholders whose rights are thereby affected.*

This was an appeal from an order of Buckley, J., confirming a special resolution for the reduction of the capital of the company.

The company was incorporated under the Companies Acts, 1862 to 1893, with limited liability on the 9th of December, 1897.

The memorandum of association, after stating the objects of the company, which were (*inter alia*) "to acquire and take over as going concerns and amalgamate the undertakings" of four then existing companies, "and all or any of the assets and liabilities of any of" those companies, provided by clause 5 that "the capital of the company is £3,500,000 divided into 300,000 preference shares of £5 each, 1,350,000 ordinary shares of £1, and 650,000 deferred shares of £1 each." By clause 6, "The rights following shall be attached to the aforesaid shares *inter se*, subject as hereinafter provided—namely: (*a*) The said preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum on the capital for the time being paid up thereon respectively, and shall rank both as regards such dividend and as to capital in priority to all other shares in the original capital, but shall not confer any further right to participate in profits or assets; (*b*) subject as aforesaid, the ordinary shares shall confer on the holders the right to a fixed cumulative dividend at the rate of 7 per cent. per annum on the capital for the time being paid up thereon respectively, and shall rank both as regards such dividend and as to capital next after the said preference shares; (*c*) subject as aforesaid, the said deferred shares shall confer the right to a fixed cumulative dividend at the rate of 7 per cent. per annum on the capital for the time being paid up thereon respectively, and shall rank both as regards such dividend and capital next after the ordinary shares; (*d*) subject as aforesaid, any profits which it may at any time be determined to distribute amongst the members, and in the winding up any surplus assets after repayment of capital shall be divided as to one-half between the holders of the ordinary shares aforesaid in proportion to the ordinary shares held by them respectively, and as to the other half among the holders of the deferred shares aforesaid in proportion to the deferred shares held by them respectively; (*f*) the rights for the time being attached to the said several classes of shares respectively may be modified or dealt with in the manner mentioned in clause 52 of the accompanying articles of association, but not otherwise, and that clause and also clauses 157 and 159 of the said articles shall be deemed to be incorporated herein and have effect accordingly."

Clauses 157 and 159 applied in the event of a winding up of the company.

By clause 50 of the articles the company was empowered from time to time by special resolution to reduce its capital in the manner provided by section 3 of the Companies Act, 1877.

By clause 52: "Whilst the capital is divided into different classes of shares, all or any of the rights and privileges attached to such class may be modified by agreement between the company and any person purporting to contract on behalf of that class, provided that such agreement (1) is ratified in writing by the holders of at least two-thirds of the issued shares of that class, or (2) is ratified by an extraordinary resolution passed at a separate general meeting of the holders of the shares of that class, and all the provisions hereinafter contained as to general meetings shall, *mutatis mutandis*, apply to every such meeting, but so that the quorum thereof shall be members holding or representing by proxy two-thirds of the issued shares of the class." The articles also provided that all the provisions therein contained should, so far as circumstances would admit, apply to stock as well as to shares.

By clause 122: "The profits of the company, which in respect of each year or other period it shall be determined to distribute among the members shall be applied according to their rights and interests."

By clause 123: "The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits."

By clause 124: "No larger dividend shall be declared than is recommended by the directors; but the company in general meeting may declare a smaller dividend."

By clause 125: "The declaration of the directors as to the amount of the profits of the company shall be conclusive."

All the preference and all the ordinary shares were issued and paid up in full. Of the deferred shares only 629,539 were issued, and they were paid up in full.

The preference shares were afterwards converted into preference stock, and the ordinary shares into ordinary stock. Both were afterwards reconverted into £1 shares.

In December, 1901, an advisory committee appointed by the shareholders reported that in their opinion the company had been largely over-capitalized, and recommended that the capital should be largely reduced and readjusted.

On the 7th of May, 1903, three agreements were entered into between the company and three persons respectively purporting to act on behalf of the three classes of stockholders respectively. Each of these agreements contained recitals to the effect that the company's paid-up capital was to a large extent unrepresented by available assets, and that a scheme for the reduction of capital and modification of class rights had been prepared and embodied in a series of resolutions which it was proposed to pass as special resolutions in the terms indicated in an annexed form of notice,

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

and that the proposed special resolutions involved modifications of the rights and privileges attached to the preference and ordinary stock and deferred shares respectively. And it was agreed (1) that so soon as the agreement should be ratified as below mentioned the company should be at liberty to pass special resolutions in the terms indicated in the annexed form of notice and to apply to the court for an order confirming the reduction of capital as by such resolutions was provided for; (2) the rights and privileges attached to (*a*) the preference stock, (*b*) the ordinary stock, and (*c*) the deferred shares should be modified so far as to allow the said special resolutions to be passed and have effect; (3) the company was to convene the requisite meetings for passing the said special resolutions and to use its best endeavours to procure the passing thereof. Each agreement was conditional on its being ratified in one of the modes prescribed by clause 52 of the articles. The above-mentioned annexed notices of meetings which were to be held set forth the resolutions which it was proposed to pass.

These agreements were on the 20th of May, 1903, respectively ratified at meetings of the preference stockholders, the ordinary stockholders, and the deferred shareholders respectively in accordance with clause 52 of the articles. On the same day an extraordinary general meeting of the company was held at which the following special resolutions were (*inter alia*) duly passed, and they were afterwards duly confirmed on the 11th of June, 1903: "(4) That the £1,500,000 preference stock of the company be, and the same is, hereby reconverted and divided into 1,500,000 preference shares of £1 each, and that the £1,350,000 ordinary stock of the company be, and the same is, hereby reconverted and divided into 1,350,000 ordinary shares of £1 each. (5) That the capital of the company be reduced to £1,345,000, divided into 1,500,000 preference shares of 13s., and 1,350,000 ordinary shares of 5s. each, and 650,000 deferred shares of 1s., and that such reduction be effected as follows: (1) By cancelling paid-up capital which is unrepresented by available assets to the extent of 7s. in respect of each of the preference shares, and by reducing the nominal amount of such preference shares accordingly to 13s. each; (2) by cancelling paid-up capital which is unrepresented by available assets to the extent of 15s. in respect of each of the ordinary shares of the company, and by reducing the nominal amount of such ordinary shares to 5s. per share; (3) by cancelling paid-up capital which is unrepresented by available assets to the extent of 19s. in respect of each of the outstanding deferred shares of the company, and by reducing the nominal amount of such deferred shares and of the unissued deferred shares to 1s. per share." Another special resolution was also passed that the articles of association of the company be altered by adding at the end thereof the following additional provisions—namely, clause 163, to the effect that immediately after the confirmation by the court and the registration of the order and a minute approved by the court in accordance with section 15 of the Companies Act, 1867, the directors should by resolution consolidate the preference shares into preference stock and the ordinary shares into ordinary stock, and should thereupon by resolution divide each holding of preference stock into two sections—namely, one of 6 per cent. cumulative preference stock and the other of ordinary stock, such sections bearing the same ratio to each other as forty to twenty-five, and the directors should by resolution reconvert the said stock of each class into shares of £1 each, and should thereupon by resolution convert the deferred shares, if any, into ordinary stock, and upon such conversion should reconvert such ordinary stock into ordinary shares of £1 each to the extent that the capital might consist in part of 600,000 6 per cent. cumulative preference shares of £1 each and in part of ordinary shares of £1 each conferring the rights next specified—namely, "As from the time when the said order and minute shall have been registered as aforesaid the profits of the company from time to time available for dividend shall be applicable as follows: (1) To the payment of the cumulative dividend on the preference shares or stock as from the registration aforesaid; (2) to the payment of the dividend on the ordinary shares or stock as from the time when the said order and minute shall have been registered as aforesaid, the surplus assets available for distribution amongst the members in a winding up shall be applicable, first, to the payment off of the preference shares or stock at the rate of £150 for every £100 of such stock; and secondly, the surplus shall be divided amongst the holders of the ordinary shares or stock rateably in proportion to the amount of such shares or stock held by them respectively. The provisions hereby made in regard to the rights of the members of each class as regards dividends and distribution of assets in a winding up shall take effect by way of modifications of the rights originally attached thereto, and accordingly such members shall not be entitled to any rights inconsistent therewith, and in particular all arrears of undeclared dividends up to the time when the said order and minute shall be registered shall be extinguished."

Before the meetings were held the directors sent to the shareholders a circular in which they said that if the proposed scheme were not adopted the payment of dividends would have to be indefinitely postponed.

These resolution having been passed, the company presented a petition for the confirmation by the court of the resolutions for the reduction of the capital.

The petition alleged that previously to the passing of the resolutions paid-up capital to an amount exceeding £2,134,039 had been lost, or was unrepresented by available assets, and particulars of the alleged loss were stated.

The petition also stated that "no dividends have been paid on the preference stock and shares in the capital of the company since March, 1900. On the ordinary shares a dividend of 7 per cent. until the 31st of March, 1899, and an interim dividend of 2½ per cent. on account of the year ending the 31st of March, 1900. Nothing has since been paid. The deferred shares received a dividend at the rate of 7 per cent. for a period of about three months to the 31st of March, 1898, and nothing has since been paid."

It was also alleged that the proposed reduction of capital "does not involve either the diminution of any liability in respect of any unpaid capital or the payment to any shareholder of any paid-up capital."

Evidence was adduced to prove the alleged loss of capital.

The petition was opposed by the United States Debenture Corporation, who were holders of preference stock.

Buckley, J., held that the alleged loss had been proved, that the proposed reduction was in accordance with the legal rights of the shareholders having regard to clause 52 of the articles, and that the proposed reduction was fair and equitable. He accordingly made an order confirming the resolution.

The corporation appealed.

Younger, K.C., and *Kirby*, for the appellants.—The rights of the preference shareholders are defined by the memorandum of association. They are therefore conditions which cannot be altered.

Ashbury v. *Watson*, 33 W. R. 882; *Collins* v. *Birming-*

ham Breweries, 15 Times L. R. 180; *Andrews* v. *Gas Meter Co.*, 45 W. R. 321, [1897] 1 Ch. 361; *Underwood* v. *London Music Hall (Limited)*, 49 W. R. 507, [1901] 2 Ch. 309; *Allen* v. *Gold Reefs of West Africa*, 48 W. R. 452, [1900] 1 Ch. 656; *British and American Trustee and Finance Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399; *In re Barrow Hæmatite Steel Co.*, [1900] 2 Ch. 846, 49 W. R. Dig. 84, were referred to in the course of the argument.

Eve, K.C., and *Martelli*, for the company.

VAUGHAN WILLIAMS, L.J.—In my judgment this appeal fails. I do not know that there is really much to be said, so far as I am concerned, except that I entirely agree with the judgment of Buckley, J., and the reasons which he gave for it.

There are only two points for consideration. The first is the proof of the alleged loss of capital. If you go through the figures, and deal with them as Buckley, J., has done, there cannot, in my opinion, be any doubt that the loss has been proved.

Now, assuming the loss be proved, there is very little else to be said. If the memorandum of association gave to a class of shareholders certain privileges and rights unconditionally, then I agree fully that *Ashbury* v. *Watson* is conclusive to show that the company could not alter or modify the privileges thus unconditionally given by the memorandum. But that is not the case here. Far from the privileges being given unconditionally, it is obvious that they are given conditionally, as is shown by clause 6 (*f*) of the memorandum of association. [His lordship read the clause, and continued:] The result is that these privileges are not unconditional, but conditional; and it seems to me that all the proper steps have been taken to bring about the modification of rights and privileges of the preference shareholders.

Under these circumstances I see no reason why the sanction of the court to this scheme should be refused upon the ground that it in any way modifies the rights of the preference shareholders. The rights of the preference shareholders, as was pointed out by Buckley, J., are now those which have been brought about by the modification; and under these circumstances the scheme is in no way inconsistent with those rights.

That being so, the only matter left to consider is whether the scheme is unfair. I entirely agree with Buckley, J., that, whether a scheme does or does not accord exactly with the legal rights of the shareholders, the court may always consider whether it is a fair or an unfair scheme. In my judgment this is a fair scheme. I cannot help saying, although this is in no way conclusive upon the question of fairness, that the court always does take into consideration the wishes of the shareholders who are affected by the scheme; and in this case the majorities which have been obtained, to my mind, go far to show that the shareholders, and in particular the preference shareholders, regarded this as a fair scheme. And, after all, these modifications might have been brought about and have bound the preference shareholders, even though there had been no scheme for the reduction of capital.

I think, under these circumstances, we ought to affirm the judgment of Buckley, J., and with costs.

ROMER, L.J.—I agree that this appeal must be dismissed. The only point really in the case was that the provision in clause 6 (*f*) of the memorandum was invalid. In my opinion that is a perfectly good provision. The rights and privileges of the different classes of shares *inter se* constitute a matter not specially provided for by the Legislature. There is no reason why those rights and privileges should not be altered from time to time, or why the alteration should not be duly provided for. Such a provision is not like one concerning the object of the company or the total amount of its capital. Those matters, as is provided by section 8 of the Companies Act, 1862, must be fixed by the memorandum of association. They must be specified in the memorandum of association, and cannot afterwards be changed at the will of the company; but there is no legislative provision as to the rights and privileges of the different classes of shareholders *inter se*, and the company may properly provide for any modification of those rights and privileges by either the articles or the memorandum. A fallacious argument was adduced on behalf of the appellants, that the rights and privileges of the preference shareholders were fixed by the memorandum of association, clause 6, paragraphs (*a*) to (*d*) inclusive, and that those paragraphs constituted a condition of the memorandum which could not be altered. The answer to that argument is perfectly clear. The condition as to the rights and privileges of the preference and ordinary shares *inter se* contained in the memorandum is not that which is expressed by the paragraphs (*a*) to (*d*), but that which is expressed by those paragraphs plus paragraph (*f*). I have no doubt that the provision contained in paragraph (*f*) is perfectly valid, and that being so the whole argument for the appellants in substance goes by the board, and I think the appeal must fail.

STIRLING, L.J.—I am of the same opinion. The main argument in this court has been upon a point which, as I understand, was not made before Buckley, J., and certainly is not dealt with in his judgment—namely, that paragraph (*f*) of clause 6 of the memorandum of association was beyond the powers of the company. [His lordship read clauses 5 and 6 of the memorandum, and clause 52 of the articles, and continued:] It was decided by this court in *Ashbury* v. *Watson* that when the memorandum of association of a company stated that the holders of a portion of its shares were to have a right to receive a preferential dividend, and there was no power to modify that provision contained in the memorandum, it was a condition which could not be altered by the company, regard being had to the provisions of section 12 of the Companies Act, 1862. By that decision I am bound, and I have no desire to depart from it. But how does it apply to the present case? It is said that these paragraphs (*a*), (*b*), and (*c*) of clause 6 define the rights of the shareholders and constitute "conditions" within the meaning of the decision in *Ashbury* v. *Watson*, and so they do. Then it is said that effect is not to be given to paragraph (*f*) in the same clause. There I part company with the argument. Clause 6 provides that the rights mentioned shall be attached to the shares "subject as hereinafter provided," and if paragraphs (*a*), (*b*), and (*c*) are conditions within the meaning of the decision in *Ashbury* v. *Watson*, paragraph (*f*) is equally a condition within the meaning of that decision and of section 12 of the Companies Act, 1862. The same document which confers a preference on one class of shares contains also provisions which make the rights and privileges of the preference shareholders capable of alteration, and unless it can be established that such a stipulation is forbidden by law, effect must be given to it as well as to the conditions contained in paragraphs (*a*), (*b*), and (*c*).

Then how is it made out that this provision contained in paragraph (*f*) is forbidden by law? There is certainly no decision to that effect. No provision has been pointed out in the Companies Act which says that that shall not be done. But it is said that you could not insert such a clause with reference to the objects for which the company is to be established.

I agree that in that case such a clause would be invalid, but why? Section 8 of the Act of 1862 specifically provides that the memorandum of association shall contain certain things, and, amongst others, the objects for which the company is to be established. That is a provision of the Act which must be complied with in substance and not merely in form. A memorandum which contained a provision that the object of the company should be such as the company might from time to time in general meeting determine, would not be a compliance with section 8. Again, if the memorandum provided that the objects of the company should be specified objects numbered (*a*), (*b*), (*c*), and so on on to the end of the alphabet, and then wound up with a general clause, "and such other objects as the company may in general meeting determine," that, as it seems to me, would equally fail to comply with the requirements of the statute, and for that reason would be invalid. But the Legislature has not thought fit to require that the company shall in its memorandum state definitely anything as to the priorities of the different classes of shares into which the capital may be divided. All that section 8 requires to be stated with regard to the capital is the amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount, and that requirement is satisfied by clause 5 of the memorandum in the present case.

In these circumstances it seems to me that there is nothing which entitles the court to say that such a clause as paragraph (*f*) of clause 6 is forbidden by law, and in fact I think that if we were so to hold we should be departing from what was laid down by this court in *Andrews* v. *Gas Meter Co.* There the memorandum stated that the nominal capital of the company was "£60,000, divided into 600 shares of £100 each, every share being sub-divisible into fifths, with power to increase the capital as provided by the articles of association." The company issued preference shares in accordance with the articles of association, which were altered for that purpose, and it was held that that was valid. Lindley, L.J., in giving the judgment of the court after referring to *Harrison* v. *Mexican Railway Co.*, 23 W. R. 403, L. R. 19 Eq. 358, before Jessel, M.R., and *In re South Durham Brewery Co.*, 34 W. R. 126, 31 Ch. D. 261, and *In re Bridgwater Navigation Co.*, 36 W. R. 769, 39 Ch. D. 1, both before the Court of Appeal, said: "These decisions turned upon the principle that although by section 8 of the Act the memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares, and the terms on which additional capital may be raised, are matters to be regulated by the articles of association rather than by the memorandum, and are therefore matters which (unless provided for by the memorandum as in *Ashbury* v. *Watson*) may be determined by the company from time to time by special resolutions pursuant to section 50 of the Act."

Now, that principle seems to me to apply here, for the rights of the various classes of shareholders are by the memorandum of association made subject to alteration by reference to the articles of association. On these grounds I think that the point which was raised for the appellants ought not to prevail; and in other respects I agree with the judgment of Buckley, J.

The only point which strikes me with regard to the fairness of the arrangement is this, that at first sight it does seem as if the rights of the preference shareholders had been somewhat seriously trenched upon. But when we find such a clause in the articles of association as clause 52, and moreover, that these alterations in the rights of the various classes of shareholders have been considered first of all by a committee consisting of business men chosen by the shareholders themselves, and that they have subsequently been sanctioned by large majorities at the various meetings of shareholders which have been held, it would require a very strong case to induce this court to interfere. I entirely agree with what has been said both by Buckley, J., and by this court on the present occasion that in all these cases the court is not under an obligation to confirm any scheme for reduction by whatever majorities it may be sanctioned, but has a discretion which it is bound to exercise in a proper case, but at the same time, in exercising that discretion, when we find that the determination of such matters as variations in the rights attached to different classes of shareholders has by the constitution of the company been left to the decision of the shareholders themselves, the court ought to be very careful how it interferes with the *bonâ fide* judgment of business men on a matter of business in which they themselves are largely interested. It has been suggested that the shareholders voted under the influence of a statement made in a circular issued by the directors, that if this course were not adopted the payment of dividends would be indefinitely postponed. But when we find that by clause 123 of the articles of association it is left to the committee to determine what amount shall be distributed amongst the members by way of dividend, and that by clause 124 no larger dividend shall be declared than is recommended by the directors, and we also find that the directors have taken the view that in the present state of the authorities it would be unwise for them to act upon some cases—such as *Lee* v. *Neuchatel Asphalte Co.*, 37 W. R. 321, 41 Ch. D. 1, and *Verner* v. *General and Commercial Trust*, [1894] 2 Ch. 239, which, though they are binding on this court, have not received finally the sanction of the House of Lords, and, as appears from what was said in *Dovey* v. *Cory*, 50 W. R. 65, [1901] A. C. 477, may in any event require great care in their application—it seems to me impossible to say that that statement in the circular was such a departure from the law as to compel us to hold that the sanction of the shareholders was obtained unfairly. I think it was a matter which might reasonably and properly be taken into consideration by those to whom the circular was addressed. I agree with what was said by Buckley, J., and I think, therefore, that the appeal fails.

Solicitors, *Ashurst, Morris, Crisp, & Co; Francis & Johnson.*

High Court of Justice.

Chan. Div. | Byrne, J. | Jan. 26.

In re ARTIZANS LAND AND MORTGAGE CORPORATION (LIMITED). (*a*.)

Company—Winding up—Arrears of dividends—Sums due as return of capital in pursuance of reduction of capital—Statute of Limitations—Specialty or simple contract debts.

The right of a shareholder in a limited company to sue for dividends on ordinary shares in arrear for more than six years, but less than twenty years, is not barred by the Statute of Limitations, as such arrears are in the nature of specialty, and not simple contract, debts. The same

(*a*.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

principle applies to sums due for capital returnable to the shareholders in pursuance of a resolution for reduction of capital sanctioned by the court.

This was a summons by the liquidators in the voluntary winding up of the above company for the direction of the court as to matters arising in the distribution of the assets of the company.

The company was incorporated in 1892 under the Companies Acts as a limited company, with a capital of £187,500 divided into 187,500 shares of £1 each.

By special resolution passed in May, and confirmed in June, 1893, it was resolved that the capital should be reduced from the above amount to £93,750, divided into 187,500 shares of 10s. each, and that the reduction should be effected by making a return to the shareholders of 10s. per share. This resolution was confirmed by order of the court in August, 1893.

In pursuance of this resolution the directors of the company in June and July, 1893, forwarded circulars to the shareholders informing them of the order of the court for the reduction of capital, and that the amount of capital which they were entitled to have returned would be paid to them upon their lodging their share certificates with the company.

A second number of circulars was issued in October and November of the same year calling the attention of the shareholders to the former circular, and asking them to lodge their certificates with the company.

All the shareholders who communicated with the company in response to these circulars had the 10s. in respect of each of their shares returned to them. A considerable number, however, did not send in any claims either then or later.

A special resolution was passed in April, and confirmed in May, 1903, to wind up the company voluntarily, and three persons were appointed joint liquidators.

The unreturned money to which the shareholders would have been entitled if they had lodged their certificates amounted to £940.

The liquidators took out this summons in the winding up for a declaration that the claims to the return of 10s. per share of the shareholders who had not been paid were barred by the Statute of Limitations; and also that the claims of all persons in whose favour dividend warrants upon the shares were issued more than six years before the commencement of the winding up were barred in the same way.

The respondent Lamb had been appointed by an order of the court to represent the former class of shareholders, the respondent Gill the latter class.

Whinney, for the liquidators.—The return of the capital was sanctioned under the authority of the *British and American Trustee and Finance Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399, 414. Immediately upon the resolution of June, 1893, being sanctioned the shareholders became entitled to sue for the capital which was to be returned to them: *Dalton* v. *The Midland Counties Railway Co.*, 13 Com. Bench 474; *Moore* v. *Garwood*, 4 Exch. 681; *Johnson* v. *Goslett*, 4 W. R. 655, 25 L. J. C. P. 274. The shareholders having omitted to sue for more than six years are barred by the statute. This is settled law as regards dividends where more than twenty years have run: *In re The Severn and Wye and Severn Bridge Railway Co.*, 44 W. R. 347, [1896] 1 Ch. 559. The capital sums due to be returned, but unpaid, stand upon the same footing. These are simple contract and not specialty debts. The special resolution is not under seal. Section 16 of the Companies Act, 1862, only makes these articles of association binding as a deed upon the members, not upon the company. The company are not bound by any trust as regards these sums which would prevent the time running under the statute: *Moseley* v. *Cressey's Co.*, 14 W. R. 246. L. R. 1 Eq. 405, Christian, L J., in *Smith* v. *The Cork and Bandon Railway Co.*, Irish Reps., 5 Eq. 65. That case, however, and also *In re The Drogheda Steam Packet Co.* (*Limited*), L. R. Ir., [1903] 1 Ch. D. 512, are distinguishable from this case as regards the length of time during which the shareholder can sue, as in those cases there were certificates issued under the seals of the companies.

H. Greenwood, for the respondents.—The resolution and the circulars to the shareholders constituted an appropriation for the shareholders of the moneys to be returned, and created a trust to which the Statute of Limitations does not apply. A company is a statutory partnership, and the statute does not apply during its continuance: Kay, J., in *Barton* v. *The North Staffordshire Railway Co.*, 36 W. R. 754, 38 Ch. D., p. 463. In *Dalton* v. *The Midland Counties Railway Co.* and *Smith* v. *The Cork and Bandon Railway Co.* the right of the shareholder arose out of a contractual relation. Here the question is really one of administration of the assets of the company. The shareholders represented by Mr. Lamb have paid 20s. for their shares and received nothing back, and they must be dealt with on that footing in the distribution of assets: *In re The Wakefield Rolling Stock Co.*, 40 W. R. 700, [1892] 3 Ch. 165. As regards the unpaid dividends, the case of *In re The Severn and Wye and Severn Bridge Railway Co.* is not the same as this case, as there was in that case no notice given to the shareholders of part of the assets being set aside for them. In any case, the claims of the shareholders are specialty rights, and are therefore not barred: *In re The Drogheda Steam Packet Co.* (*Limited*) and *In re The Cornwall Minerals Railway Co.*, 46 W. R. 5, [1897] 2 Ch. 74.

BYRNE, J.—I will first consider the question of the unclaimed dividends. I think that the authorities are clear that as regards them the statutory period is twenty years, and that consequently there is no right to deal with these dividends now otherwise than by paying them to the persons in whose favour they have been declared. Amongst other cases I have been referred to, the case in the Irish Court of Appeal of *Smith* v. *The Cork and Bandon Railway Co.*, where the company had declared a dividend in favour of its shareholders without providing for its preference shareholders whose dividends were more than six years in arrear. Two points were dealt with, one as to the statutory period of limitation, the other as to whether the company were in the position of trustees so as to prevent the statutory time running. The opinion of the court was that there was no such relationship between the company and its shareholders. Incidentally also it was stated that the period of limitation was twenty years. In *In re The Severn and Wye and Severn Bridge Railway Co.*, Romer, J., dealing with a case of a declaration of dividends upon ordinary shares, held that upon the declaration a debt became payable to each shareholder in respect of his dividend for which he could sue at law. Here again the learned judge had not to decide, and did not decide, whether the statutory period was or not twenty years, but he did decide that the company was not a trustee. The latest case to which I have been referred is the Irish case of *In re Drogheda Steam Packet Co.*, where dividends on ordinary shares had been declared more than six and less than twenty years before they were claimed by the shareholders, and it was held that the share certificates constituted a specialty debt recoverable after six years. The Master of the Rolls, after referring to *Smith* v. *The Cork and Bandon Railway Co.*, says (L. R. Ir., [1903] 1 Ch. D., p. 516), "Then is there a distinction in the case of an ordinary share-

holder? The dividends in each case are payable out of the same fund but the preference shareholders come first." These cases, although not in strictness binding upon me, are guiding authorities upon the question. The only distinction that can be suggested between those cases and the one before me is that whereas in the case of preference shareholders there is usually a statement on the share certificates that the shareholders are entitled to a certain dividend, and whereas in *Smith* v. *The Cork and Bandon Railway Co.* there was upon the certificate a statement to that effect, in the case of ordinary shareholders the certificates only refer to the rules and regulations of the company. That distinction cannot be relied upon.

I now come to the question of the return of the capital. I cannot distinguish between this fund and that of the undrawn dividends in respect of the statutory period. They stand upon the same footing. In each case the claims depend upon rights arising out of the articles which are referred to in certificates under the seal of the company. I think that the same principle which applies to the unpaid dividends, applies also to the unpaid returns of capital, and that consequently the statutory period in each case is twenty years. This conclusion renders it unnecessary for me to consider whether or not the company holds the unpaid returns of capital as a trust fund for the shareholders who have not claimed. In any case this fund is not distributable now.

Solicitors, *E. C. Rawlings & Butt.*

Chan. Div. } Farwell, J. } Dec. 5.

In re GENERAL ACCIDENT ASSURANCE CORPORATION (LIMITED). (*a.*)

Company—Mortgage security—Dissolution of company—Purchaser of assets—Vesting order—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 26, *sub-section* (*ii.*); *s.* 35, *sub-section* 1, *clause* (*ii.*) (c); *and s.* 36.

Where a company entitled to a mortgage debt and to leasehold premises comprised in the mortgage has been dissolved under section 143 *of the Companies Act,* 1862, *a purchaser from the company can, under the Trustee Act,* 1893, *obtain an order vesting in him the right to sue and recover the mortgage debt, and vesting in him the leasehold premises comprised in the mortgage.*

Petition.

This was a petition by the General Accident Assurance Corporation (Limited), asking that an order might be made under sections 26 and 35 of the Trustee Act, 1893, vesting in them a mortgage debt and certain leasehold premises.

On the 13th of April, 1899, McPherson assigned certain premises in Cable-road, Hoylake, by way of mortgage to the Scottish General Fire Insurance Corporation (Limited) (hereafter called the corporation), for the unexpired residue of a term of ninety-nine years, to secure the repayment with interest of a sum of £300.

By an agreement dated the 10th of May, 1900, it was agreed that the General Accident Corporation (Limited) (hereinafter called the purchasing company) should take over the business, property, and assets of the corporation as a going concern. The contract provided that the corporation should go into voluntary liquidation with the object of carrying the sale into effect, that the corporation or its liquidator should execute and deliver to the purchasing company all such deeds, transfers, and assurances as should be required for vesting in the purchasing company the business, property, and assets, and that until such vesting was completed the corporation should stand possessed of the same in trust for the purchasing company.

In May, 1900, the corporation went into voluntary liquidation, and all the business, property, and assets of the corporation, including the mortgage of the 13th of April, 1899, were made over to the purchasing company.

On the 13th of December, 1901, the final accounts and report of the liquidator were filed with the Registrar of Joint Stock Companies, and the corporation was dissolved on the 13th of March, 1902, in accordance with section 143 of the Companies Act, 1862.

No deed transferring the mortgage of the 13th of April, 1899, to the purchasing company was ever executed.

The petition of the purchasing company asked that an order might be made under sections 26 and 35 of the Trustee Act, 1893, vesting in them the mortgage debt and premises comprised in the deed of the 13th of April, 1899, for all the estate of the corporation therein.

The Trustee Act, 1893, provides: Section 26. "In any of the following cases—namely, . . . (ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person . . . (c) cannot be found . . . the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct."

Section 35, sub-section 1. "In any of the following cases—namely, (ii.) Where a trustee entitled, alone or jointly with another person, to a *chose in action* . . . (c) cannot be found . . . the High Court may make an order vesting the right to . . . sue for or recover a *chose in action* in any such person as the court may appoint."

G. Cave, for the petitioner, contended that this was a case where the "trustee cannot be found" within the meaning of sub-section (ii.) (c) of section 26 and section 35 of the Trustee Act, 1893, and that under section 36 of the Act any party interested in a mortgage can apply for a vesting order.

T. B. Napier, for the mortgagor, supported the application.

FARWELL, J., in giving judgment, said: I think the case falls within the purview of the sections, and I will make an order vesting in the petitioners the right to sue for and recover the mortgage debt, and also vesting in them the leasehold premises comprised in the mortgage of the 13th of April, 1899, for such estate and interest as was vested in the corporation at the date of its dissolution.

Solicitors, *Smiles & Co.*, for *H. G. C. Day*, Liverpool.

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Chan. Div.
Buckley, J. } Dec. 9, 10.

CAVENDISH v. STRUTT. (a.).

Practice—Costs—Taxation—Party and party—Refresher fees—Discretion—R. S. C., 1883, *ord.* 65, *rr.* 8, 27 (29) (48).

In a taxation of costs between party and party the taxing-master has a discretion to allow the payment of refresher fees in excess of those prescribed by ord. 65, *r.* 27 (48).

In re Ermen, 51 *W. R.* 475, [1903] 2 *Ch.* 156, *and* Stewart & Co. *v.* Weber, 19 *Times L. R.* 722, *followed.*

Summons to review taxation.

The plaintiff brought an action to set aside a voluntary settlement made by him, of which the defendants Charles Henry Strutt and Alfred Washington Ranger were the trustees.

After a long hearing Byrne, J., set aside the settlement, and ordered the defendants Strutt and Ranger to pay to the plaintiff and to certain other defendants their costs of the action, such costs to be taxed by the taxing-master.

The taxing-master having taxed off certain items, the plaintiff carried in objections to the taxation under three heads, two of which were not pressed at the hearing of the present summons.

The third related to the disallowance of the amount by which the refresher fees actually paid to counsel exceeded the maxima set forth in ord. 65, r. 27 (48). The objection was that, having regard to the length of the trial, and the peculiar circumstances of the case, these maxima were wholly inadequate. The taxing-master, however, while agreeing with this contention on its merits, considered that he had no discretion to allow larger fees, and disallowed the objection.

The plaintiff took out a summons to review this decision.

Buckmaster, K.C., and *Mark Romer*, for the plaintiff.—Ord. 65, r. 8, provides that solicitors shall be allowed the fees in App. N, "and no higher fees shall be allowed in any case, except such as are by this order otherwise provided for." Rule 27 (48) of the same order lays down certain maximum fees for refreshers which are to be adhered to in all cases of party and party taxation. Rule 27 (29), which came into operation in January, 1902, provides that, on every taxation, the master shall allow all costs necessary for defending the rights of any party, except where the costs are incurred through over-caution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses. That sub-rule has been held to create a general exception within rule 8, and to make all allowances in App. N. discretionary: *McIver* v. *Tate Steamers* (*Limited*), 50 W. R. 642, [1902] 2 K. B. 184; *In re Ermen*, 51 W. R. 475, [1903] 2 Ch. 156. By parity of reasoning, the master has a discretion to exceed the maxima for refresher fees provided by rule 27 (48). Kennedy, J., decided the exact point in our favour in *Stewart & Co.* v. *Weber*, 19 Times L. R. 722.

Sargant, for the defendants Strutt and Ranger.—On the construction of rule 27 (48) it is clear, from the decision in *In re Harrison*, 33 Ch. D. 52, and the proviso at the end of the sub-rule, which was inserted in consequence of that decision, that, in a party and party taxation, the master has no discretion to allow refreshers exceeding the maxima there laid down. The Rules of the Supreme Court are to be construed like statutes, and the principle of *Seward* v. *Vera Cruz*, 33 W. R. 477, 10 A. C. 59, 68, that subsequent general legislation does not necessarily repeal antecedent special legislation, is to be applied. Rule 8 is general legislation, applying to the bulk of taxable items. Rule 27 (48) is special legislation, applying only to refreshers. Rule 27 (29), being subsequent general legislation, applies only to the general matters dealt with in rule 8, and does not touch rule 27 (48). This construction is aided by the circumstance that the wording of rule 27 (29) is inapplicable to refreshers; for it cannot be said that refreshers in excess of the *maxima* set forth in rule 27 (48) are "necessary or proper for the attainment of justice, or for defending the rights of any party." *McIver* v. *Tate Steamers* (*Limited*) and *In re Ermen* are inapplicable to the present case. Even if rule 27 (29) does apply to refreshers, it leaves the matter where it stood before; for refreshers in excess of the maxima are unusual fees: *In re Harrison*. They are, therefore, special fees within the negative words of rule 27 (29), and cannot be allowed. These considerations were not presented to the court in *Stewart & Co.* v. *Weber*, and that decision ought not to be followed.

BUCKLEY, J., after referring to the two objections which were not argued, continued: The question I have to decide is whether on a taxation of costs between party and party, the taxing-master has under the rules as they now stand, a discretion to allow a refresher fee in excess of the maximum fee allowed by ord. 65, r. 27 (48). The language of that sub-rule is that the taxing officer "may allow" fees of certain amounts. The rule has no negative words; it does not provide that he shall not allow more. On its true construction, however, I think that to be its effect. In *In re Harrison* (at p. 69), Cotton, L.J., after expressing a doubt, said that the rule must be read as restricting the fees. That case was decided before the proviso now at the end of the sub-rule was inserted. The history of that proviso is as follows. In *In re Harrison* the question was raised whether in a taxation between solicitor and client the limit imposed by sub-rule 48 applied. The Court of Appeal held that it did apply. The proviso was introduced to give the taxing-master a discretion to allow a larger taxation as between solicitor and client. The discretion was not then extended to taxation as between party and party.

I start, therefore, with the proposition that sub-rule 48 is to be read as if it provided that in a party and party taxation the taxing-master may allow by way of refresher so much and no more. The question then arises whether the new sub-rule 29 has given the taxing master a further discretion to go beyond the limits of sub-rule 48, in a taxation between party and party. In my opinion it has. It was decided in the Court of Appeal in *McIver & Co.* (*Limited*) v. *Tate Steamers* (*Limited*) that where the case is one to which ord. 65, r. 8 applies the master has a discretion to make an allowance in respect of a solicitor's attendance in excess of the maximum allowance for such attendance specified in Appendix N to order 65, No. 147. Rule 8 does, whereas sub-rule 48 does not, contain negative words—"and no higher fees shall be allowed in any case." These words are controlled by the exception—"except such as are by this order otherwise provided for." The Court of Appeal rested their decision, not on the words of the exception, but on the conclusion they arrived at, that sub-rule 29 gave the taxing-master on every taxation a discretion to allow such costs as appeared to him to be necessary or proper within the language of the sub-rule. Sub-rule 48 does not contain negative words of prohibition

(a.) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

of a higher fee than the maximum, with a qualification superimposed upon those words; but except on this ground the present case is not distinguishable from *McIver & Co. (Limited)* v. *Tate Steamers (Limited)*.

In construing the rules. I must read them as a whole. So reading them. I find that sub-rule 29 qualifies sub-rule 48, and gives the taxing-master a discretion as to allowing fees under sub-rule 48 which he did not previously possess. The old sub-rule 29 applied to party and party taxation, and was in a negative form. It said that, "as to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper"; whereas the new sub-rule 29 applies to every case of taxation, and is in an affirmative form. The Rule Committee struck out the old rule and substituted the new one. I am bound to hold that they did that deliberately, with a view to adding to the power of the taxing-master. The taxing-master says that if this construction of the rule is adopted, it will tend to abolish the distinction between solicitor and client and party and party costs. I do not think so. Sub-rule 29 consists of two parts. The first sentence, which is general, applies to every taxation; the taxing-master is to allow "all such costs, charges, and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." The second part applies only to taxation as between party and party: it says, "but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing-master to have been incurred or increased through overcaution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses." That is to say, as against the party who incurred the same, costs are to be treated as between solicitor and client, and then considerations would apply different from those which obtain in a case where the taxation is between party and party. The result is that in party and party taxations there is created a new discretion in the taxing-master, limited by the language used in sub-rule 29; by that I mean this limitation is imposed on him, that he must find the higher amount which he allows to be necessary or proper for the attainment of justice or for defending the rights of any party. If the taxation is between solicitor and client, he is not thus bound. He may then allow "costs incurred or increased by payment of special fees to counsel, or special charges or expenses to witnesses," which he is not to allow in a taxation as between party and party. The latter part of the sub-rule includes what is called a "special fee" paid to counsel who only undertook to appear on being paid fees larger than they were usually paid, but it is not limited to that. "Special fees" are equivalent to extraordinary or unduly generous fees, which would not be allowed in a taxation as between solicitor and client paid to a particular counsel, which owing to his position are large. The discrimination was not between the fees which were mentioned in Appendix N and the refresher fees which were mentioned in sub-rule 48, but between fees which are necessary or proper in the one case and fees which are unusual, extraordinary, or due to the eminence of counsel in the other.

Mr. Sargant has pressed this argument upon me, that I ought to regard this as a case where there has been special legislation in detail, and subsequent general legislation, and as one which falls within the principle laid down in *Seward* v. *Vera Cruz*, "that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from, merely by force of such general words." That is not a proper principle to apply to this class of case. These rules have introduced into them from time to time alterations and variations. Each time the rules are altered it is the recasting of a general body of rules, in the construction of which, when altered, you have to make up your mind as to what is the effect of the rules considered as a whole.

The second argument of Mr. Sargant is that, assuming sub-rule 29 to apply to sub-rule 48, it leaves the question of refresher fees where it stood before. He says that sub-rule 48 gives the maxima which may be allowed as refresher fees, and sub-rule 29 provides at the end that in a party and party taxation special fees shall not be allowed. I have already dealt with that question. The special fee there mentioned is an unusual or extraordinary fee, and is not a larger fee than would otherwise be given for the attainment of justice. Sub-rule 29 empowers the taxing-master to go beyond the maximum stated in sub-rule 48, for the purpose, not of enabling him in a party and party taxation to allow refreshers which would be unusual or extraordinary, but only such as would be "necessary or proper for the attainment of justice or for defending the rights of a party." Having regard to the counsel employed, it is for the master to consider what is a reasonable fee. In *In re Ermen*, Farwell, J., and in *Stewart* v. *Weber & Co.*, Kennedy, J., decided the question in the same way as I have done. The latter case is indeed on all fours with the present case, and I might have followed it without adding anything; but, having regard to the importance of the question, I have thought it best to give my own reasons. I allow the objection, and send back the matter to the taxing-master to exercise his discretion as to what are reasonable fees to be allowed to the plaintiff's counsel as refreshers.

Solicitors, *Ranger & Co.; Charles Everett.*

Chan. Div.
Swinfen Eady, J. } Feb. 4.

In re WIMBORNE (BARON) AND THE VENDOR AND PURCHASER ACT, 1874. (a.)

Settled land—Settlement by will—Power to jointure and raise portions—Re-settlement—Life estate assigned—Compound settlement—Sale by tenant for life under original settlement—Power of trustees of original settlement to give discharge for purchase-money—Settled Land Acts, 1882 (45 & 46 *Vict. c.* 38), *s.* 50, *and* 1890 (53 & 54 *Vict. c.* 69), *s.* 4.

Where, in consequence of re-settlement, lands are subject to a compound settlement, but the original settlement is still subsisting, a tenant for life who has parted with his beneficial interest and whose life estate under the original settlement has not been restored, can exercise his statutory power of sale under the original settlement, and the trustees thereof can give a valid discharge for the purchase-money.

In re Cornwallis-West and Munro's Contract, 51 *W. R.* 602, [1903] 2 *Ch.* 150, *distinguished.*

This was a summons by a purchaser for the determination of a question arising under the following circumstances:

Under the will of Sir Josiah Guest, who died in 1852, certain freeholds, and amongst them the Fife-

(a.) Reported by R. HILL, Esq., Barrister-at-Law.

head estate, in the county of Dorset, which had been purchased out of residuary personalty, according to directions in the will, stood limited to the use of the testator's eldest son, now Lord Wimborne, for life, with remainder to the use of his first and other sons in tail male; and the will gave to Lord Wimborne powers of jointuring and of raising portions for his younger children.

A re-settlement of the Fifehead estate (*inter alia*) was made by two deeds respectively dated the 17th and 19th of January, 1895, and executed by Lord Wimborne and his eldest son, the Hon. Ivor Guest. By this re-settlement the Fifehead estate was assured, discharged from the estate tail of the son, but subject to the said jointure and portions charges, to such uses as Lord Wimborne and Mr. Guest should appoint, and in default of and until such appointment to certain uses to secure a rent-charge of £1,500 to Mr. Guest, and subject thereto to the use of Lord Wimborne during his life in restoration and confirmation of the estate for life limited to him by the said will, and from and after his death to certain uses for raising money to pay estate duties, and subject thereto to the use of Mr. Guest for life with remainders over in strict settlement.

By a deed of the 20th of July, 1895, Mr. Guest released his rent-charge of £1,500, and Lord Wimborne, as to his life estate, granted the Fifehead estate to the use of Mr. Guest, his heirs and assigns.

By a deed dated the 20th of March, 1899, Lord Wimborne and Mr. Guest, in exercise of the power contained in the deed of the 19th of January, 1895, appointed the Fifehead estate to such uses as would be subsisting under the re-settlement if Lord Wimborne were then dead.

Lord Wimborne subsequently entered into a contract, with the concurrence of the Hon. Ivor Guest, for the sale of the Fifehead estate to the present purchaser, and gave notice of the sale to the present trustees of Sir Josiah Guest's will, to whom it was proposed that the purchase-money should be paid.

The purchaser objected that the trustees, even if they were trustees of the will for the purposes of the Settled Land Acts, could not give a valid discharge for the purchase-money, since they were not trustees of the compound settlement, consisting of the will, the re-settlement, and the other indentures above mentioned; and he took out this summons to determine the question.

Vernon Smith, K.C., and *G. J. Duncan*, for the applicant, relied on *In re Cornwallis-West and Munro's Contract*, 51 W. R. 602, [1903] 2 Ch. 150, and also cited *In re Du Cane and Nettlefold's Contract*, 46 W. R. 523, [1898] 2 Ch. 96, and *In re Mundy and Roper's Contract*, 47 W. R. 226, [1899] 1 Ch. 275.

J. G. Wood, for the respondent.

SWINFEN EADY, J.—The facts in this case are not in dispute. By the will of the original testator, Sir Josiah Guest, certain lands stood limited, in the events which have happened, to the use of the testator's eldest son, now Lord Wimborne, for life, with remainder to his first and other sons in tail, and there was power to Lord Wimborne to jointure and raise portions for his younger children.

Lord Wimborne and his eldest son have since disentailed and re-settled the property and by two deeds dated respectively in 1895 and 1899 Lord Wimborne has parted with his life estate in favour of his son. The result of the re-settlement is that the lands still stand limited to persons in succession, and there are a jointure and portions which still remain to be raised.

The lands comprised in this contract were not part of the original estate of the testator, but were acquired out of his residuary estate and stood limited to the same uses as the land devised by his will, with one small exception not material to be mentioned.

The question is: Can the trustees of the original settlement created by the will give a good receipt for the purchase-money, or is it essential for trustees to be appointed of the compound settlement consisting of the will and re-settlement and other instruments.

Now it seems to me clear from the decisions in *In re Mundy and Roper's Contract* and *In re Du Cane and Nettlefold's Contract* that there may be subsisting side by side an original and a compound settlement, and the mere fact that a tenant for life has parted with the whole of the beneficial interest does not prevent his exercising his statutory powers as tenant for life under the Settled Land Acts.

It is quite clear that the original settlement created by the will is still subsisting by reason of the jointure and portions charges, and by the decision of the Court of Appeal the existence of those charges makes the land settled land as limited to persons in succession. If that were all, it seems to me clear from the two cases referred to that the trustees can give a valid discharge and Lord Wimborne can exercise the powers of sale of a tenant for life.

But then it is said that this is contrary to the decision of Farwell, J., in *In re Cornwallis-West and Munro's Contract*, and I think the contention is put in this way, that where there is a compound settlement no persons can give a valid discharge but trustees of that settlement, although there may be trustees of the original settlement.

Now I do not think that that contention is supported by the case last named, because in the present case Lord Wimborne has entirely parted with his life estate and it has not been restored as in *In re Cornwallis-West and Munro's Contract*. Farwell, J., said: "It is sufficient for me to say that in my opinion the old life estate in this case has been restored—that is to say, that the life estate created by the will of Mrs. Whitby is still the life estate that is now in existence. . . . Having once arrived at this opinion, it seems to me clear that in the present case 'the settlement' within the meaning of the Settled Land Acts, 1882 to 1890—the only settlement, in short, under which the vendor is able to exercise his statutory power of sale—must be the compound settlement." He based his conclusion on the fact that the old life estate had been restored, and it will be sufficient, in order to distinguish that case, to say that that feature does not exist in the present settlement. Counsel for the respondent suggested that the judge's real meaning was that where a tenant for life purported to sell under a re-settlement, his life estate having been restored, it was necessary, in order to make a title in that way, that trustees of the compound settlement should be appointed, and that he did not intend to decide that a title could not also be made under the original settlement. But, however that may be, it is immaterial for the present purpose, because Lord Wimborne has parted with his life estate but his statutory powers of a tenant for life still remain exerciseable.

Therefore I say that Lord Wimborne can still sell, and that the trustees of the original settlement created by the will can give a valid discharge for the purchase-money.

A question, however, has arisen as to whether they are trustees of the will for the purposes of the Settled Land Acts in respect of the Fifehead estate, and so it may be better to re-appoint them as such—the summons being amended by intituling it in the

matter of the Settled Land Acts as well as of the Vendor and Purchaser Act.

Solicitors, *Thrupp, Chidell, & Sharp; Bircham & Co.*

IN BANKRUPTCY.

K. B. Div. (Buckley, J.) — Feb. 29.

In re ROWE.
Ex parte DERENBURG & CO. (*a.*)

Bankruptcy—Proof—Withdrawal—Substitution of fresh proof—Payment by stranger—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *Schedule II.*, *r.* 22—*Bankruptcy Rules*, 1886, *rr.* 225-229.

A creditor who has tendered a proof is entitled to withdraw it without leave of the court, so long as it has not been adjudicated upon by the trustee, and to substitute a fresh proof in its place. A creditor who has received a voluntary payment from a stranger in consideration of the fact that the creditor has sustained a loss by the acts of the bankrupt, is not obliged to give credit for the amount so received when proving his debt in the bankruptcy.

Appeal by creditors from the rejection of their proof by the trustee in bankruptcy.

The creditors, Messrs. Derenburg & Co., were stockbrokers, who had had large dealings with the bankrupt Rowe, and in January, 1903, at the date of the receiving order, they had lent to Rowe the sum of £20,368 upon the security of share certificates which were subsequently discovered to have been forged by him.

Rowe had been a partner in the firm of Bewick & Moreing, and that firm, though in no way liable for his criminal acts, sent Derenburg & Co. a cheque for £6 500 on the 3rd of June, 1903, accompanied by a letter in the following terms: "Although you admit that we are not liable, we have pleasure in sending you £6,500. This we understand will cover all the losses you have sustained except those for which you hold an insurance policy."

On the 3rd of July Derenburg & Co. presented a proof for £13,868 against Rowe's estate, giving credit for the £6,500 they had received from Bewick & Moreing. Some correspondence with the trustee ensued with reference to this proof, and it appeared from the file that it was not formally admitted until the 1st of December. Meanwhile, Derenburg & Co. were advised that Bewick & Moreing would find a difficulty in proving for the £6,500, but that they themselves were entitled to prove for the full amount of their debt without giving credit for that sum. They therefore on the 6th of November sent in a fresh proof for £20,368, and asked that it should be substituted for the earlier proof for £13,868.

On the 7th of November the trustee wrote refusing to consider their fresh proof, and he ultimately rejected it.

On the 1st of January, 1904, the trustee filed the earlier proof with a note upon it that he had admitted it in full upon the 1st of December, 1903.

The later proof was rejected on two grounds—firstly that the creditors were not entitled to withdraw the first proof and substitute another without leave of the court; secondly, that they were bound to give credit for the £6,500.

Derenburg & Co. appealed.

Reed, K.C., and *Bannerman*, for the appellants.—The trustee was wrong on both grounds of rejection. A creditor who has lodged a proof is entitled to withdraw it so long as it has not been adjudicated upon, and to substitute a fresh proof: *In re Rhoades, Ex parte Rhoades*. 47 W. R. 561, [1899] 1 K. B. 905; *In re Mateo Clarke, Ex parte Buenos Ayres and Pacific Railway Co.*, 49 W. R. 528, [1901] 1 K. B. 655. As to the second ground, the creditors are not obliged to give credit for a payment made by a stranger. A debtor cannot plead payment by a stranger unless made at his request and on his behalf, and the trustee in his bankruptcy is in no better position: *Kemp* v. *Balls*, 18 Ex. 607, 3 W. R. Dig. 146; *James* v. *Isaacs*, 12 C. B. 791; *Lucas* v. *Wilkinson*, 5 W. R. 197, 1 H. & N. 420. To justify a plea of payment by a stranger the payment must be for and on account of the debt, and must be subsequently ratified by the debtor: *Belshaw* v. *Bush*, 11 C. B. 191. Here there was a mere voluntary payment, not on account of the debt, nor ratified by the debtor.

Muir Mackenzie, for the trustee.—As to the first point, the trustee not having rejected the proof within the twenty-eight days limited for that purpose by rule 228 must be deemed to have admitted it, and the creditor should not be allowed to withdraw it without leave. A creditor has no inherent right to amend his proof. The court can always exercise its discretion to prevent his doing so: *In re Safety Explosives (Limited)*, [1904] 1 Ch. 226; *Ex parte Vaughan, In re Dodds*, 39 W. R. 125, 25 Q. B. D. 529; *Ex parte Seaton, In re Deerhurst* (*No.* 2), 8 Morr. 258. As to the second point, if this payment was made on account of the loss expected to arise from the nature of the debt, it was a payment on account of the debt. The amount was in fact ascertained by reference to the amount of the debt. The case resembles *Ex parte Holland, In re Rogers*, 8 Morr. 243.

Reed, K.C., replied.

BUCKLEY, J.—In this case the first point taken by the trustee is that the first proof not having been rejected within the twenty-eight days limited by rule 228, it must be deemed to have been admitted, and could not be withdrawn without the leave of the court. Rule 229, however, seems to me to contemplate some notice of admission being given to the creditor, and I think that the creditors in this case, not having received any notice, were entitled to take the view that their first proof had not been adjudicated upon, as was the fact, and to withdraw it and present a fresh proof.

As to the second point, I do not think that this was the case of a stranger offering part of a debt; the payment in question was not tendered or accepted as part of the debt, it was made in consideration of the fact that the creditors had sustained loss by the acts of a person for whom Bewick & Moreing considered themselves to some extent morally responsible.

It was a voluntary payment made not on account of the debt, but in consideration of the debt turning out a loss in consequence of the debtor's estate being unable to meet it. The proof must therefore be admitted for the full amount of the debt.

Appeal allowed.

Solicitor for the appellants, *Cecil F. Dunn.*

Solicitors for the trustee, *Morley & Shirreff.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). Dec. 18.

FITZSIMON v. MOSTYN. (a.)

Landlord and tenant—Lease—Renewal of lease—"At the costs of the lessee"—Costs of arbitration to assess fine payable on renewal.

A lease contained a covenant by the lessor that he would at any time during the term "upon the request and at the costs of the lessee," and on payment of a fine calculated upon the number of years of the term which had expired and the full improved annual value of the premises at the time of the renewal (such value to be determined by the lessor's surveyor or at the option of the lessee by the award of two referees or their umpire), renew the term. The lessee required the lessor to renew the term, and gave notice of his desire to have the full improved annual value of the premises determined by the award of two referees or their umpire.

Held, that the costs of the reference and award must be paid by the lessee.

Decision of the Court of Appeal (51 *W. R.* 257, [1903] 1 *K. B.* 349) *affirmed.*

Appeal from a decision of the Court of Appeal (Vaughan Williams, Stirling, and Mathew, L.JJ.), reversing a decision of Wright, J., on a special case stated by an umpire under section 7 (*b*) of the Arbitration Act, 1889.

The facts are given at length in the court below. Shortly they are as follows:

The appellant was the assignee of two leases of land at Llandudno granted by the respondent's predecessors in title. The leases contained a covenant "that the lessors, their heirs or assigns, will at any time during the said term, upon the request, and at the costs of the lessee his executors and administrators or assigns, and on payment by him or them of a fine calculated according to the table hereunder written upon the number of years of the said term which have expired, and the full improved annual value of the premises at the time of such renewal (such value to be determined by the said surveyor, or at the option of the lessee, by the award of two referees or their umpire), renew. or cause to be renewed, the said term for a further term . . . at the like rent and subject to the like covenants and conditions as are herein reserved and contained, including this present covenant for renewal."

The appellant, in 1900, applied to Lord Mostyn for a renewal of the terms. Differences having arisen as to the amount of fines payable on renewal, the appellant gave notice to the respondent of his desire to have the full improved annual value of the premises determined by arbitration. Arbitrators and an umpire were appointed, and the question was raised before the umpire whether he had any power to deal with the costs of the reference and award.

The Court of Appeal held that the costs of renewal included the costs of the reference and award.

Haldane, K.C., and *Marshall, K.C.* (*E. P. Hewitt* with them), for the appellant.

Montague Lush, K.C., and *J. C. W. Madden*, for the respondent, were not heard.

Earl of HALSBURY, L.C.—In this case I am satisfied that the judgment of the Court of Appeal is entirely right; but I must add that I am not quite satisfied with some of the observations which were made by the learned judges, because it appears to me that we must construe these words as they stand. I do not know that we have anything to do with the reasonableness or unreasonableness of the landlord or the tenant; the question is upon what terms is the tenant to have his lease renewed. He is entitled by the language of the covenant to have his lease renewed on certain terms. At the commencement of everything the stipulation is that it is to be "at the costs of the lessee"; and the whole question here is, what is to be included in that word "costs"? I should have thought that Stirling, L.J.'s, observation decided the whole question—namely, those things that are necessarily incurred by reason of the renewal. The landlord is to be at no cost. Whether the landlord was unreasonable or not, seems to me to be immaterial; no such question arises here, and I would rather deprecate the discussion of it, because everybody admits here that there is nothing to be imputed to either side.

The reason why I make my protest is that I do not think, where there are plain words used in an instrument of this sort, you can give a different interpretation according to the state of the facts to which they are applied. If these were costs at all—other questions might of course arise where it was suggested that they were not included within the costs at all—but if these were costs at all, and therefore the words apply to them, it appears to me that we have nothing to do with the merits of the two parties, whether they were reasonable or unreasonable towards each other; the only question is, what is the true construction of these words? I think the Court of Appeal have arrived at the true construction of these words according to their plain and ordinary meaning; and therefore I think the judgment of the Court of Appeal was right, and I move your lordships that this appeal be dismissed.

Lord SHAND.—I am entirely of the same opinion. I think the question is one simply of construction—namely, what is the meaning of the clause contained in this lease in regard to the expenses of renewal? I also think that Stirling, L.J., has put it in a sentence when he says, "What is to be renewed is the term, and it seems to me the fair and ordinary meaning of the language is that the lessee is to bear all the costs which are necessarily and properly incurred by the lessee for the purposes of the renewal." In the course of the renewal one of the parties—the lessee—was entitled to say whether the value should be fixed by the surveyor or by arbitration. If he had taken the surveyor, there might have been less costs incurred; but if an arbitration became necessary in consequence of questions between the parties, I think the expenses of that arbitration are costs which have been incurred for the purposes of the renewal.

For my own part, I should add that if a case arose in which the conduct of the lessor clearly caused much greater cost than was necessary for the renewal of the lease, it may be that, to the extent of such greater and unnecessary cost under the construction of the contract, the lessee would not be liable for such costs. But nothing of the kind has arisen here.

We have here simply costs which the parties contemplated would be incurred when they entered into this agreement, and I am satisfied that the learned judges were right in holding that these costs must fall upon the tenant.

Lord DAVEY.—I agree, and I have nothing to add.

Lord ROBERTSON.—If the appellant's argument is good about the costs of arbitration, it must be good also about the surveyor's fee where the value is fixed

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

in that way; for the one mode is alternative to the other and at the option of the lessee. The operation to be performed by the surveyor or by the referees is fixing the rent that is to be put into the lease. I cannot bring myself to see how this is not part of the process of renewing the term.

Lord LINDLEY.—I also am of the same opinion. It appears to me that the attempt to construe this as a covenant to renew at the expense of the lessee and to cut down these expenses to what are called the ordinary expenses of renewal, and then to construe the rest of the clause as a distinct covenant to pay the fine, is not in accordance with the words used. The bargain evidently is, if the lessee wants renewal he is to ask for it; he is to pay for it, and to pay whatever is necessary in order to obtain it. I think it is too clear for argument.

Appeal dismissed.

Solicitors for the appellant, *Belfrage & Co.*, for *Chamberlain & Johnson*, Llandudno.

Solicitors for the respondent, *Hulberts, Hussey, & Metcalfe.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — March 12.

THE KING *v.* PINCKNEY. (*a.*)

Practice—Habeas corpus—*Person to whom directed out of jurisdiction—Power to issue writ.*

The Court has no jurisdiction to issue a writ of habeas corpus *directed to a person who is at the time out of the jurisdiction.*

Ex parte Wyatt, 5 *Dowl.* 389, *explained and distinguished.*

Appeal from an order of the Divisional Court (Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) affirming an order of Walton, J., at chambers.

On the 29th of July, 1903, Walton, J., made an order, upon the application of Philip John Pinckney, for a writ of *habeas corpus* to issue, directed to the applicant's wife, to bring the child of the marriage, between three and four years of age, before the judge at chambers. Mrs. Pinckney and the child were at this date and remained ever since abroad, out of the jurisdiction.

On the 5th of August, 1903, Walton, J., ordered the above-mentioned writ of *habeas corpus* to be quashed, and that instead thereof a fresh writ of *habeas corpus* should issue directed to Mrs. Pinckney to bring the child before the judge at chambers, and he directed that the writ should lie in the office until Mrs. Pinckney came within the jurisdiction. Upon appeal the Divisional Court affirmed this order.

Mrs. Pinckney appealed.

Montague Lush, K.C., and *A. S. Poyser*, for Mrs. Pinckney.—The applicant for a writ of *habeas corpus* must show that the person to whom it is directed is at the time within the jurisdiction. The foundation of the writ is the right of the sovereign to be informed why someone is being restrained of his liberty within the realm: *Richard Bourn's case*, Cro. Jac. 543. It is not a question between subject and subject. Formerly writs of *habeas corpus* could issue out of England into any colony or dominion of the Crown, but by 25 & 26 Vict. c. 20 this was put an end to, section 1 of which provided that no writ of *habeas corpus* should issue out of England into any colony or foreign dominion of the Crown where her Majesty had a lawfully-established court of justice having authority to grant and issue the writ, and to ensure the execution thereof. Wilmot, C.J.'s, Opinions and Judgments, at p. 83, show the principles upon which a writ of *habeas corpus* is granted, and both there and in *Rex* v. *Cowle*, 2 Burr. 834, at p. 856, the writ is likened in some respects to a writ of *mandamus*. The Court of King's Bench never allowed a prerogative writ of *mandamus* to issue unless the prosecutor showed that it would be effective. It was therefore never issued when the person to whom it was directed was out of the jurisdiction. It is admitted that a writ of *habeas corpus* cannot be served out of the jurisdiction. It cannot in such a case be made immediately effective, and therefore the court has no jurisdiction to issue it. The fundamental principle of the writ is that it must be made immediately effective. Rule 232 of the Crown Office Rules requires that every writ of *habeas corpus* must be made returnable immediately. The writ in the present case is not being used to inform the sovereign that some one is being wrongfully detained within the realm. The writ cannot be made use of for the purpose of punishing a person for having wrongfully parted with the custody of a child: *Barnardo* v. *Ford*, *Gossage's case*, 41 W. R. 333, [1892] A. C. 326. There was, therefore, no jurisdiction to issue the writ.

They also referred to *Hobhouse's case*, 3 B. & A. 420.

Colefax, for the prosecutor.—It is clear that the question of domicil has nothing to do with the jurisdiction of the court to issue a writ of *habeas corpus*, though it may have some bearing upon the subsequent question as to the proper custody of the child. Nor is the fact that the child is being detained out of the jurisdiction material: *Barnardo* v. *Ford*. Must, then, the person detaining the child be within the jurisdiction? It is submitted not. In *Ex parte Wyatt*, 5 Dowl. 389, a writ of *habeas corpus* was issued directed to a person who was then in France and who had the custody of a child, and it was served in France through the French courts. [COLLINS, M.R.—In that case the point was not taken, and somehow or other a writ of *habeas corpus* was obtained and served in France. An application was then made for a rule absolute in the first instance for an attachment for contempt in not obeying the writ, but it was refused by Patteson, J., and as it turned out that the respondent to the writ was at that time a prisoner for debt in the Marshalsea of the court, the learned judge offered to grant a new writ of *habeas corpus*, and this was accepted, and a new writ was granted. The case therefore came to nothing.] The point that there was no jurisdiction to issue the writ because Mrs. Pinckney was out of the jurisdiction was not taken before Walton, J.

COLLINS, M.R.—It seems to me that this writ of *habeas corpus* has been issued under a misapprehension. Some difficulty seems to have arisen in connection with the first writ, and the learned judge quashed it and ordered another writ to issue. Upon the evidence it is clear that Mrs. Pinckney was out of the jurisdiction at the time, and in these circumstances it has not been very strenuously contended on behalf of the prosecutor that there is jurisdiction to issue a writ of *habeas corpus* directed to a person out of the jurisdiction. It was suggested by the learned counsel that the point was not taken at chambers. But, even if that were so, it would not give the court jurisdic-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

tion to issue the writ if otherwise the court has no jurisdiction. In my opinion there is no jurisdiction to issue a writ of *habeas corpus* directed to a person who at the time is out of the jurisdiction.

The Divisional Court seemed to think that there was no objection to the writ lying in the office until Mrs. Pinckney came within the jurisdiction, as is sometimes done in the case of writs of attachment. I think that there was no jurisdiction to issue the writ at all. It would be contrary to the whole spirit of the legislation on the subject if any interval were allowed to elapse between the issue of the writ and its execution. As rule 232 of the Crown Office Rules says, the writ must be made returnable immediately. The appeal must therefore be allowed.

MATHEW, L.J.—I am of the same opinion. I agree entirely with the first part of the order of Walton, J. —namely, that part where he quashed the first writ of *habeas corpus*. The learned judge no doubt quashed it because he thought that he ought not to have issued it. With regard to the second order, in my opinion the learned judge had no jurisdiction to issue the writ. A writ of *habeas corpus* must be served immediately. I have never heard of a writ of *habeas corpus* being ordered to lie in the office after being issued. I should be sorry to throw any doubt upon the right of the subject to have the writ served at once.

COZENS-HARDY, L.J.—I agree.

COLLINS, M.R.—I ought to add that I think that the case of *Ex parte Wyatt* has been sufficiently distinguished during the argument.

Appeal allowed.

Solicitors for the appellant, *Futvoye & Baker.*

Solicitors for the prosecutor, *Harries, Wilkinson, & Ratkes.*

From Chan. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) } Jan. 25; Feb. 8.

In re GEIPEL'S PATENT. (*a.*)

Patent—Disconformity—Order for revocation—Terms—Form of order—Discretion of judge—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 20—*Costs.*

Where a judge has exercised his discretion under section 19 *of the Patents, Designs, and Trade-Marks Act,* 1883, *by making an order to revoke letters patent unless the specification be amended by disclaiming part thereof, the Court of Appeal will not interfere to vary the terms he may have imposed in making such order.*

Appeal and cross-appeal from a decision of Buckley, J., reported *ante*, p. 63, [1903] 2 Ch. 715.

The patent in question, No. 7,860 of 1893, was for certain improvements in steam traps or appliances for the automatic removal from pipes, cylinders, &c., of water accumulating therein through the condensation of steam.

The learned judge had held, on a petition for revocation, that certain modes of using the invention, which were distinguished in the complete specification as fig. 2 and fig. 6, were bad—the first for non-utility, and the second for disconformity with the provisional specification, as being based on the principle of controlled expansion instead of differential expansion, as relied on in the provisional specification; and, in exercise of the discretion conferred by section 19 of the Patents, Designs, and Trade-Marks Act, 1883, he made an order, dated the 27th of June, 1903, for revocation of the letters patent, unless within three months or such further time as the court might allow the patentee should obtain leave to amend by disclaiming figs. 2 and 6. The order went on: "If the said specification be amended, no injunction shall be asked for in any action brought for infringement of the said letters patents, in respect of any steam traps made prior to the 27th of June, 1903, unless the patentee establishes to the satisfaction of the court that his original specification was framed in good faith and with reasonable skill and knowledge."

Against this latter part of the order the petitioners appealed, asking that it might be set aside and the following substituted: "If the said specification be amended, no action shall be brought *or maintained* for infringement of the said letters patent in respect of any steam traps *or part of steam traps* made prior to the 27th of June, 1903"—thus omitting the concluding words, besides adding those here printed in italics.

The patentee also appealed from the judgment so far as it related to the amendment by disclaimer of fig. 6, and asked that the order might be varied so as to apply only to amendment of fig. 2.

Bousfield, K.C., and *A. J. Walter*, for the patentee.

T. Terrell, K.C., Astbury, K.C., and *J. H. Gray*, for the petitioners.

The following cases were cited: *Deeley* v. *Perkes*, [1896] A. C. 496, 13 R. P. C. 581; *In re Pitt's Patent*, [1900] 1 Ch. 508, 17 R. P. C. 214; *In re Allison's Patent*, 17 R. P. C. 298, 513; *In re Hearson's Patent*, 1 R. P. C. 213; and (by the Court) *Woolfe* v. *Automatic Picture Gallery (Limited)*, 51 W. R. 121, [1903] 1 Ch. 18.

THE COURT declined to interfere with the discretion exercised by Buckley, J., as to the form of the order made by him, and dismissed the petitioners' appeal with costs, reserving judgment on the appeal of the patentee.

Feb. 8.—STIRLING, L.J., delivered the judgment of the court, allowing the cross-appeal of the patentee with costs. His lordship said there was no disconformity in fig. 6, both the provisional and the complete specification being based on the principle of differential expansion, which was also in his opinion practically the principle of fig. 6—the terms differential expansion and controlled expansion not being mutually exclusive. The language of Cotton and Lindley, L.JJ., in *Woodward* v. *Sansum*, 4 R. P. C. 166, 175, 177, showed how far variations from the provisional specification were allowable in the complete specification.

It was ordered that £125 should be added to the costs of the patentee's cross-appeal in repayment of costs paid by him to the petitioners in the court below.

Solicitors, *Faithfull & Owen; Frank Evelyn Jones*, for *W. T. Hill*, Manchester.

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) And K. B. Div. (Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) — Dec. 9; Feb. 3.

SMITH (*Appellant*) *v.* LEIGH UNION ASSESSMENT COMMITTEE (*Respondents*). (*a.*)

Poor law—Rating—Appeal to quarter sessions—Right of assessment committee to appear as respondents—Consent of guardians—Notice to guardians—Sufficiency of notice—Union Assessment Committee Amendment Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 2—*Divided Parishes and Poor Law Amendment Act,* 1882 (45 & 46 *Vict. c.* 58), *s.* 12.

The consent of the guardians of a union, which is required by section 2 *of the Union Assessment Committee Amendment Act,* 1864, *before the assessment committee can appear as respondents to a rating appeal, is not such a consent in writing of a majority of the guardians of a union required under the Poor Law Acts as is mentioned in section* 12 *of the Divided Parishes and Poor Law Amendment Act,* 1882, *and it is not necessary that fourteen days' notice should be given to each guardian of the meeting at which the consent to such appearance is to be given.*

Special case stated by the court of quarter sessions for the County Palatine of Lancaster upon an appeal heard and determined by the quarter sessions on the 27th of April, 1903, against a certain assessment to the poor rate.

When the appeal was called on for hearing, counsel claimed to appear and be heard on behalf of the assessment committee of the Leigh Union appearing in the name of the guardians of the union. The overseers of the township of Leigh (which is situated in the Leigh Union) did not appear either in person or by counsel.

Counsel appeared on behalf of the appellant, and called upon counsel who appeared on behalf of the assessment committee to prove that the said committee had duly obtained the consent of the guardians to their appearance as respondents to the appeal.

It was proved or admitted that the notice of appeal had been served upon the assessment committee on the 11th of March, 1903; that the next meeting of the guardians was held on the 25th of March; and that the clerk of the committee, on the 20th of March, sent to each of the guardians a notice dated Friday, the 20th of March, that at the next meeting the consent of the board to the appearance of the assessment committee as respondents in appeals to quarter sessions would be proposed.

On the 25th of March the next meeting of the guardians was held, and it was resolved: "That the board hereby consents to the assessment committee appearing as respondents in appeals to quarter sessions against the assessment of the property" of the appellant.

It was contended by counsel for the assessment committee that the consent of the guardians thus given was a sufficient compliance with section 2 of the Union Assessment Committee Amendment Act, 1864, which enacts that the assessment committee may, with the consent of the guardians after notice shall have been sent to every guardian, appear as respondents to such appeals, but in the name of the guardians of such union; and that such consent need not be in writing.

It was contended by counsel on behalf of the appellant that the assessment committee and the guardians had not complied with the provisions of section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, which enacts as follows: "Where under the Poor Law Amendment Act, 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union, or the managers of a school district, is required, it shall be a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians or managers, of which meeting, and of the business to be transacted thereat, not less than fourteen days' notice shall be given to each guardian or manager."

It was contended by counsel for the appellant that not less than fourteen days' notice should have been given to each guardian of the meeting at which consent to the appearance of the assessment committee as respondents was given, and that as only four clear days' notice was given of such meeting, including Saturday and Sunday, such notice was insufficient and such notice was invalid, and that the assessment committee had no right to appear and be heard on the appeal.

It was contended by counsel for the assessment committee that section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, did not apply—(1) because it referred only to consents in writing, and section 2 of the Union Assessment Committee Amendment Act, 1864, did not require a consent in writing; (2) because the Act of 1864 was not one of the Acts amending the Poor Law Amendment Act, 1834; and (3) because section 12 of the Act of 1882 provided merely that a resolution passed at a meeting of which not less than fourteen days' notice had been given should be a sufficient compliance with the requirements of earlier Acts, but did not enact that a resolution passed without such notice should in no case be valid, and the words "fourteen days shall be sufficient" did not impose a minimum.

The quarter sessions held that the objection raised on behalf of the appellant must be sustained, and refused to hear counsel for the assessment committee on the merits of the appeal, but stated this case for the opinion of the High Court on the question whether the assessment committee were entitled to be heard.

Evidence was given on behalf of the appellant to show that he had duly served notice of appeal on the overseers of the parish and on the assessment committee, and had given notice of objection to the valuation list and had failed to obtain relief before the assessment committee.

The quarter sessions allowed the appeal with costs against the overseers, and reduced the appellant's assessment from £140 gross and £119 rateable value to £60 gross and £51 rateable value.

The question for the opinion of the court was whether the quarter sessions were right in refusing to hear counsel for the assessment committee.

Section 2 of the Union Assessment Committee Amendment Act, 1864, is as follows: "The assessment committee of such union may, with the consent of the guardians of such union after notice shall have been sent to every guardian, appear as respondents to such appeal, but in the name of the guardians of such union, in like manner and with the same incidents and subject to the same liabilities and entitled to the same remedies and rights as in the case of persons other than the overseers to whom notice of appeal may be given."

Ryde, for the assessment committee.

Boyle, K.C., and *W. W. Mackenzie*, for the appellant.

(*a.*) Reported by F. G. RÜCKER and E. G. STILLWELL, Esqrs., Barristers-at-Law.

Lord ALVERSTONE, L.C.J.—It by no means follows that because a point is taken very late in the history of the poor law rating appeals it may not be a perfectly good point; therefore Mr. Mackenzie must not think I am at all deciding this case except upon the arguments that we have heard. But there are two lines of statutes in connection with these matters which I think are perfectly clear and definite. Prior to the Union Assessment Committee Act of 1862 and the Union Assessment Committee Amendment Act of 1864, the parties to the poor law appeals were the direct parties, the appellant and the overseers, and it was only after the Union Assessment Committee Amendment Act, 1864, came into force that, in order to give the assessment committee, who were responsible for the rating and who approved the valuation lists, a right to appear, this legislation enacted that they should be entitled to defend appeals or even to bring appeals. Accordingly, section 2 says that the assessment committee of such union may, with the consent of the guardians of the union after notice has been sent to every guardian, appear as respondents to the appeal, but in the name of the guardians of the union, in like manner and with the same incidents and subject to the same liabilities and entitled to the same remedies and rights as in the case of persons other than the overseers to whom notice of appeal may be given. Mr. Mackenzie is perfectly right in saying that that power to appear as respondents to an appeal is an important matter. It involves the guardians, or rather it involves the assessment committee in the name of the guardians, in the possible liability to costs, and therefore it is not a step that ought to be taken without a formal consent of the guardians. I quite agree, although there is no statement about it, that the consent of the guardians, not the consent of the assessment committee itself, must be given by resolution at a meeting, and, if the point taken in this appeal had been that no notice had been given to the guardians at all, and possibly that there was no consent of the guardians to the assessment committee appearing in their names as respondents, the objection would have been a very fatal one, and an objection which has to my knowledge prevailed in a great many cases. But that was not the point taken in this appeal. Notice having been given to all the guardians—and for this purpose it must be assumed the guardians have assented to the assessment committee appearing as respondents in pursuance of section 2—the counsel for the appellant at the sessions objected, not that the conditions of section 2 of the Union Assessment Committee Amendment Act, 1864, had not been complied with, but that the notices given were not good notices, because they did not comply with section 12 of the Divided Parishes and Poor Law Amendment Act, 1882. Whatever may have been argued at the sessions, it is obviously suggested that this section required a fourteen days' notice, and Mr. Mackenzie has very properly contended that, in order to see whether that is so, one must look and see whether this Act of 1882 was intended to amend the practice which had existed and was known to exist under the Union Assessment Committee Acts of 1862 and 1864. The words are: "Where under the Poor Law Amendment Act, 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union or the managers of a school district is required" for this purpose; that is an entirely different thing to the written resolution either of the meeting of the assessment committee or of the meeting of the board of guardians, which is merely an ordinary majority. There were certain provisions in earlier statutes than the Act of 1834, some of which still remain, but one is enough for our purpose—namely, the one referred to in section 23 of the Act of 1834—that before guardians could consent to spend capital money either in erecting a workhouse or in hiring a workhouse, not the consent in writing of the guardians was to be obtained, but the consent in writing of the majority of the guardians of any union—that is to say, a majority of the whole body. I need scarcely point out that is an entirely different thing to the majority of those present at the meeting properly summoned. That would be the ordinary proceedings of both guardians and assessment committee. I am therefore clearly of opinion that the objection taken that notice under section 2 of the Union Assessment Committee Amendment Act, 1864, must be notice under section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, and therefore fourteen days' notice, is a bad point and one to which effect ought not to have been given. It is important that this should be pointed out, because what happened in this case is that, inasmuch as the practice is at these sessions, as in many other sessions in various other parts of the country (I do not know whether the practice has become universal since I was familiar with it), that the respondent begins, only the respondent to the appeal has been heard in this case, so the court had to proceed with regard to the value without hearing the assessment committee, who are responsible for having raised respondents to whatever figure they were put up to. Therefore the preliminary objection was a bad one, and the case must go back to the sessions to hear the appeal.

LAWRANCE and KENNEDY, JJ., agreed.

Case remitted to quarter sessions.

The appellant appealed to the Court of Appeal.

Feb. 3.—*A. T. Lawrence, K.C., Boyle, K.C.*, and *W. W. Mackenzie*, for the appellant.

Ryde, for the assessment committee.

COLLINS, M.R.—In this case we have to deal with a somewhat puzzling question on certain sections of the Poor Law Acts. But in my opinion the judgment of the Divisional Court is right, and the appeal fails. On an appeal by a ratepayer against an assessment to a poor rate the assessment committee of the union appeared as respondents. The question is whether they were empowered so to appear. If they had a right to appear, they acquired that right under section 2 of the Union Assessment Committee Amendment Act, 1864. It was contended by the appellant that the assessment committee had not fulfilled the conditions of that section, which gives the assessment committee the right to appear "with the consent of the guardians of such union after notice shall have been sent to every guardian." It was contended that they had not obtained the necessary consent of the guardians. They had in fact obtained consent, but not, it was contended, proper consent. To make that contention good, the appellant referred to section 12 of the Divided Parishes Act, 1882, which, he said, governed the right of the assessment committee to say they had obtained the consent. That section is as follows: "Where under the Poor Law Amendment Act, 1834, or any of the Acts amending the same, the consent in writing of a majority of the guardians of a union, or the managers of a school district, is required, it shall be a sufficient compliance with such requirement if a resolution giving consent is passed at a meeting of the guardians or managers, of which meeting and of the business to be transacted thereat not less than fourteen days' notice shall be given to each guardian or manager." That section, in its express terms, points to cases in which the consent in writing of the majority of the guardians

of a union is necessary. But section 2 of the Act of 1864 does not say that the consent there mentioned need be in writing. That creates an initial difficulty in the way of the appellant. He has to make out that consent given at a meeting called on fourteen days' notice is a condition precedent, and that consent given at a meeting called on five days' notice, as happened in this case, is not sufficient. He therefore contends that the consent required by section 2 is a consent in writing. He is obliged to contend this in order to introduce section 12 of the Act of 1882 into the discussion at all. Section 12, as I have said, deals with cases in which the consent in writing of a majority of the guardians is necessary, and it substitutes a new machinery for the existing machinery applicable to such cases. The appellant refers to the statutory provisions by which guardians cannot act as guardians otherwise than at a meeting, and by which their proceedings at meetings are regulated, and to the practice under which everything that is done at meetings of guardians is recorded in writing, and on that ground he argues that the consent required by section 2 of the Act of 1864 must be taken to mean consent in writing. I am of opinion that that is a strained contention, and that it does not accord with the simplicity of the legislation on the subject. Section 23 of the Poor Law Act, 1834, gives power to the commissioners, with the consent in writing of the majority of the guardians of any union, to build or hire a workhouse. That was a special enactment, and the necessity for a consent in writing in that particular case was imposed as a special condition. There were also in the same Act other cases mentioned where a consent in writing was required, and the machinery for obtaining such consent varied. Co-existing with these provisions were other provisions in which consent was required for various purposes, but in which the consent was not expressly required to be in writing, but in which, the appellant contends, it must, in accordance with the poor law regulations, always necessarily be recorded in writing. Many of the sections expressly providing for written consent were from time to time repealed, and in 1882 the Legislature thought fit by section 12 of the Divided Parishes Act to substitute one uniform machinery applicable to all such cases, by providing that written consent should always be obtained, where it was required, at a meeting of which fourteen days' notice should be given. But that only points to specific enactments requiring consent in writing, and does not apply to cases where consent is as a mere matter of machinery recorded in writing. In my opinion, the appellant fails to show that section 2 of the Act of 1864 imposes as a condition precedent the necessity of obtaining written consent, and, therefore, section 12 of the Act of 1882 has no application to this case. I think the appeal must be dismissed.

ROMER and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitor for the appellant, *F. Kinch*, for *A. H. Hayward*, Leigh.

Solicitors for the assessment committee, *Robbins, Billing, & Co.*, for *Marsh, Son, & Calvert*, Leigh.

From K. B. Div.
(Lord Alverstone, L.C.J., Collins, M.R., and Romer, L.J.) } Jan. 20.

JACKSON v. MUMFORD. (a.)

Insurance—Marine—Policy on machinery of torpedo-boat destroyer—"Trials."

A policy of marine insurance upon the machinery of a torpedo-boat destroyer, which was being built for the Admiralty, was expressed to cover the following perils: "Fire in shops and on board on stocks trials and all marine risks to completion and acceptance by the Admiralty," and also "of the seas men-of-war fire . . . and of all other perils losses and misfortunes." Attached to the policy was a clause which contained the following words: "With leave to go on trial trips." During a trial the connecting-rod of the starboard engine broke, causing great damage.

Held, that "trials" did not denote a period during which the assured were to be insured against fire, but specified a particular peril insured against—viz., peril of trials; and that the damage which had occurred was covered by the policy.

Judgment of Kennedy, J. (51 *W. R.* 91), *affirmed.*

Appeal from the judgment of Kennedy, J., on the trial of an action without a jury (51 W. R. 91).

The action was brought on a policy of marine insurance upon the machinery of a torpedo-boat destroyer called *The Bullfinch*.

The plaintiff was the receiver and manager of Earle's Shipbuilding Co. (Limited), who were, at the time when the policy was effected, building *The Bullfinch* for the Admiralty.

The defendant, who was a member of Lloyd's, subscribed the policy to the extent of £100.

The perils insured against by the policy, which was a time policy, were—"fire in shops and on board on stocks trials and all marine risks to completion and acceptance by the Admiralty"; and also "of the seas men-of-war fire . . . and of all other perils losses and misfortunes."

At the foot of the policy was attached the following clause: "This insurance also specially to cover loss of or damage to hull or machinery through the negligence of master mariners engineers or pilots or through explosions bursting of boilers breakage of shafts or through any latent defect in the machinery boilers or hull. . . . With leave to go on trial trips."

During the currency of the policy, whilst *The Bullfinch* was on a trial, the connecting-rod of the starboard high-pressure engine broke. The jams of the connecting-rod split and then broke horizontally. The result was that the piston-rod flew up against the cover of the cylinder, and there was a large escape of steam under high pressure. Eight men were killed and four injured.

The plaintiff claimed to be entitled to recover under one or other of the three following heads of the perils insured against—(1) trials; (2) breakage of shafts: (3) latent defect in the machinery. The defence was that the loss was not a loss by the perils insured against within the meaning of the policy. The defendant's case with regard to the first head was that the word "trials" in the policy denoted a period during which the assured was insured against fire.

Kennedy, J., gave judgment for the plaintiff, on the ground that the word "trials" denoted a particular peril insured against—viz., peril of trials, and that the plaintiff had suffered a loss from such

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

peril. He was of opinion that the plaintiff failed to make out his case under either of the other heads.

J. A. Hamilton, K.C., and *F. W. Hollams*, for the defendant.

Scrutton, K.C., and *Ernest Pollock*, for the plaintiff.

Lord ALVERSTONE, LC.J.—I have come to the conclusion that the judgment of Kennedy, J., on that point with regard to which the defendant has appealed is right. This policy is in the form of an ordinary Lloyd's policy with certain additions. The first addition is the insertion before the ordinary list of perils insured against of the following words: "fire in shops and on board on stocks trials and all marine risks to completion and acceptance by the Admiralty." I do not think this policy is open to the suggested construction that the word "trials" merely refers to a time during which the fire risk is to apply. If that is the meaning, the words do not read grammatically. Such a construction requires the insertion of the word "on" or the words "and on." There is also a further argument against the suggested construction. The policy starts with naming fire as one of the perils insured against, and then lower down in the policy is added this clause, "with leave to go on trial trips." This makes it unnecessary to include the risk of fire on trial trips by any special words. I have come to the conclusion that the word "trials" was put in to indicate one of the perils insured against. The clause indicates the risk of other perils besides fire. It covers all marine risks to completion and acceptance by the Admiralty. I think it is important to notice that the liability of the underwriters was to come to an end when the Admiralty took possession of the vessel. Taking into consideration the fact that the vessel was a torpedo boat destroyer, which the parties must have known would be put to very severe tests by trials, I think it is clear that the intention was that these trials should be the subject-matter of insurance. I am therefore of opinion that the policy covered a risk of break-down of the machinery occurring during a trial. As there appears to be no foundation for any suggestion that the damage was the result of inherent vice such as would necessarily result in a breakdown some time or other, I agree with Kennedy, J., that the plaintiff is entitled to recover.

COLLINS, M.R.—I am of the same opinion. I think damage or mischief caused by trials is one of the risks insured against. *Primâ facie*, therefore, the damage which occurred falls within the policy. It is argued that the damage was not caused by the trial, but by the inherent vice of the machinery itself. There is, however, no foundation for that. The machinery was only insured for an interval, which interval included a period of trials. I think that one of the risks insured against was the risk during a trial of such a thing happening as in fact occurred here.

ROMER, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Cattarns & Co.*

Solicitors for the defendant, *Waltons, Johnson, Bubb, & Whatton.*

High Court of Justice.

Chan. Div. Kekewich, J. — Jan. 13.

In re CROXON (OTHERWISE CROXTON) (DECEASED). CROXON *v.* FERRERS. (*a.*)

Will—Name and arms clause—Direction to "lawfully assume" arms—Meaning of—Condition subsequent—Impossibility of performance.

A person cannot "lawfully assume" a coat of arms by mere user, or otherwise than by obtaining a grant of the arms in one or other of the ways recognized by the custom and usages of society with regard to arms—viz., by an Act of Parliament, a grant from the College of Heralds, or a Royal License.

As to the meaning of "assume" standing alone, quære.

A testator directed that every person becoming entitled under his will to his settled real estates should in certain events "lawfully assume" a coat of arms used by the testator (but being in fact the arms of a certain ancient family with which the testator could not be proved to be connected), and in default should (in effect) forfeit his estate. Upon evidence being given as to the impossibility of obtaining a grant of the arms from the Heralds' College to the plaintiff, who was devisee of the settled estates,

Held, that the direction in the will was void as a condition subsequent which was impossible of performance, and that the plaintiff's estate was not forfeited.

Adjourned summons.

By his will dated the 29th of June, 1898, B. J. Croxon (otherwise Croxton) devised certain real estate of which he was seised in fee to his second son, the plaintiff, for his life, with remainder to the defendant for life, with divers remainders over, and in his will was contained the following clause: "I direct that every person who shall become entitled under this my will to the hereditaments hereinbefore devised, and who shall not then bear my surname of Croxton and my coat of arms—to wit, on a ground sable a lion rampant argent debruised by a bend componee, or and gules, shall within twelve months after so becoming entitled lawfully assume such name and arms"; and the clause concluded with a provision that any person failing to comply with such direction should forthwith forfeit his estate.

The testator died on the 15th of October, 1902, and his will was duly proved.

The only material facts in evidence were as follows:

The surname of the testator and that of his father before him had been Croxon, and in birth, baptismal, and marriage certificates the testator's name had been registered in that form.

Some thirty years prior to his death the testator, conceiving that he was related to a Cheshire family of the name of Croxton, adopted the latter name for all ordinary purposes, and continued during the rest of his life to be known by it, although it was not known that he had ever done any legal operative act for the purpose of assuming it.

The name Croxton had also been adopted by some of the testator's relations at about the same date, and the plaintiff had also been commonly known by the name of Croxton. The testator had also adopted and used the coat of arms described in his will, and had had the same engraved upon certain oak furniture which was by the will bequeathed as heirlooms to

(*a.*) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

accompany the settled real estate. The arms in question are in Ormerod's History of Cheshire, stated to have been formerly borne by members of the Cheshire family of Croxton.

By deed-poll dated the 7th of September, 1903, and enrolled in the central office, the plaintiff had assumed the name of Croxton. The plaintiff had made exhaustive inquiries as to the claim by the testator to relationship with the Croxton family, but had failed to trace any connection between them or to find any ground for the claim. Upon application to the College of Heralds for a grant of the arms, the plaintiff received a report of the Kings of Arms duly signed by Garter, Clarencieux, and Norroy to the effect (*inter alia*) that the arms described in the will could not be granted or exemplified to any person who could not prove male descent from one of the male persons who had an undoubted right to such arms (being in effect the male persons of the family of Croxton).

The plaintiff being unable to trace his pedigree, and therefore unable to obtain a grant of the arms from the college, took out this summons to determine (amongst other things) the question whether the clause above-mentioned in the will of the testator was valid and binding upon the plaintiff, and if so, what would constitute a sufficient compliance on the plaintiff's part with such clause.

Austen Cartmell, for the plaintiff.—This is a condition subsequent, and void for impossibility. The clause must mean that the arms are to be assumed by one or other of the ways recognized by the community and hallowed by custom, if not enforced by strict law. The law on the subject is meagre, but there have always been certain recognized methods, one of which must be intended here. Formerly offences against the law of arms had been cognizable by the Earl Marshal, and the heralds on their visitations had required strict proof by the claimants to arms of the right to bear them. Because these tribunals had become effete, there was no reason for saying that the hallowed and ancient means of assuming arms was not still the only proper and lawful means.

He cited *Blount's case*, (1737) 1 Atk. 295; *Stubs* v. *Stubs*, 1 H. & C. 257; Enc. Brit. (8th ed.), "Heraldry"; *Austen* v. *Collins*, 54 L. T. 903, 34 W. R. Dig. 91.

M. Romer, for the defendant, the remainderman.—"Lawfully" means "without violating any law" or "in manner not forbidden by law": see Century and Imperial Dictionaries. A person who takes arms without a grant or license violates no law, because there is no court in the realm which can prevent him. Even in old times when the Court of Chivalry existed, it had no means of enforcing its decrees by process; it was merely a court of honour, and if persons obeyed its findings with alacrity, it was not because they could be absolutely compelled to do so. Nowadays even that tribunal has disappeared, and there is no court exercising any jurisdiction in the matter of arms. The plaintiff, then, could "lawfully assume" the arms by merely taking and using them; this, however, he has not done within the year fixed by the will.

He cited *Bevan* v. *Mahon-Hagan*, 31 L. R. Ir. 342.

KEKEWICH, J.—The argument has taken us into many interesting questions, but I propose to restrict myself to the only question I have really to decide, although I am far from saying that what has been said is beside the mark. I am much indebted to counsel for assisting me in forming a conclusion upon the point. The difficulty arose upon a particular document, and the use by the testator of the words "lawfully assume." Striking out the word "lawfully," there would still be a difficult question—perhaps more difficult than the one I have to decide. There is some authority—in the shape of *dicta*—for saying that you cannot "assume arms" except by obtaining a proper grant of arms from the Heralds' College, by Royal Warrant, or by Act of Parliament. There are also *dicta* against that view—also the etymological meaning of the word "assume." If I was to decide that question I should want to look more closely into the cases, and also at precedents, to find out the real meaning attached in them to the use of the word "assume" in a name and arms clause. But the testator here has used the word "lawfully" as well, and I must take it for granted that by using the word "lawfully" he meant something more than a mere "assumption," whatever that term may mean. I do not impute to the testator a knowledge of the *dicta* I have mentioned, or an intention that his son should obtain a grant of arms from the Heralds' College. But, upon binding rules of construction, I must read the words used as, if not necessarily a qualification of the word "assume," yet importing something more than mere assumption. Unless one adopts that view the word "lawfully" is mere surplusage, and upon the ordinary rules of construction I have no right to regard the word as surplusage unless there is some very obvious reason for doing so. Now, in the will the testator certainly does recognize the fact of himself bearing this coat of arms which he had assumed without grant, and he speaks of "my" coat of arms. [His lordship read the clause in question.] If the son had in fact been bearing the coat of arms, no doubt he would have been outside the condition and untouched by it; but the testator does contemplate the contingency of the devisee not bearing the name and arms, and in that case he is to "lawfully assume" it. It does not follow, because a person actually bearing the arms, although without a grant, would be outside this condition, that therefore a person can "lawfully assume" the arms without a grant. To bring himself within the condition a person must be within the first part—*i.e.*, as "not bearing" the arms—and also within the second part as "lawfully assuming." Then as to the word "lawfully": according to the dictionary, that word means "anything which is not forbidden by law," so that in that sense a man may "lawfully assume" the arms of a stranger, because he is not acting unlawfully, since no court at present in existence could restrain it unless he deceived somebody by the use of the arms. To my mind, however, the word "lawfully" has something other than a merely negative connotation; I think the testator must have meant that something should be done to give a legal colour—a legal title to the arms when assumed. Unless you give that meaning, I fail to see how you can give any additional meaning to the word "assume" by the insertion of the word "lawfully." It is true that an Act of Parliament might be passed to enable this gentleman to bear this coat of arms, but that is not a matter within his own cognizance at all: he has no control over Parliament, and I think he would probably petition Parliament in vain. With regard to the Royal License it comes to the same thing, because it is clear that nothing would be granted by the Crown without the exemplification of the arms with the consent of the Heralds' College. The result is that he cannot, in my opinion, "lawfully assume" these arms. It follows, therefore—this being a condition subsequent and impossible of performance—that the condition is void and not binding on the plaintiff, and there will be a declaration accordingly.

Solicitors for all parties, *Patersons, Snow, Bloxam, & Kinder*, for *Longueville & Co.*, Oswestry.

Chan. Div.
Byrne, J. } Feb. 11.

In re DUNN.
BRINKLOW *v.* SINGLETON. (*a.*)

Administrator pendente lite—*Receiver—Indemnity—Costs of defending action—Charges of personal misconduct—Defence of the action no benefit to the estate.*

Although an adminstrator pendente lite *and a receiver is entitled to an indemnity from the estate for his costs in an action brought against him as such administrator or receiver in respect of the estate, where he is defending the estate, yet he is not entitled to his costs incurred in defending a personal action in which he is charged with fraud and personal misconduct where his defence cannot result in any benefit to the estate.*

S. was appointed administrator pendente lite, *and subsequently receiver of an estate in an administration action. He had an action brought against him charging him with misconduct as such administrator and as such receiver. He applied as such receiver for leave to defend, but leave was not granted. The action was dismissed with costs, which, however, he did not obtain owing to the want of means of the plaintiff. Upon the administration action coming on for further consideration S. asked for indemnity from the estate for those costs.*

Held, that as the action was brought against him personally, and as his defence could not have benefited the estate, S. was not entitled to such indemnity.

Further consideration.

On this cause coming on for further consideration, a question arose as to the claim of one of the defendants, who had been receiver and manager of the estate, to be indemnified out of the estate for certain costs incurred by him in defending an action brought against him by one of the beneficiaries. The testator in the cause, A. D. Dunn, died in April, 1897, and an action having been commenced in the Probate Division, the defendant, C. J. Singleton, was appointed administrator *pendente lite.* In July, 1897, an originating summons was taken out for administration of the estate by a creditor, and in the same month an administration order was made directing the usual accounts and inquiries. In April, 1898, probate of the testator's will was granted to the executors named therein, and in May, 1898, the defendant Singleton was appointed receiver and manager of the estate, which included certain businesses which were ordered to be carried on by Singleton until sale or being wound up. Singleton acted as such receiver and manager until July, 1902, when his accounts (which included, an already ascertained balance from his accounts as administrator *pendente lite*) were passed, his remuneration and costs were paid him, and he was discharged, and further proceedings in the present action against him were stayed. In August, 1902, the final certificate was made, and the estate was found insufficient.

In December, 1902, a beneficiary under the testator's will brought an action (*Addison* v. *Singleton*) against Singleton as administrator *pendente lite* and as receiver of the estate, charging him with having conspired with another person to bring about unnecessary litigation, and with mismanagement of the estate in these capacities, and claiming damages. This action was dismissed with costs, but the plaintiff being without sufficient means, Singleton was unable to obtain his costs in that action.

The defendant Singleton had previously taken out a summons in the present action for leave to defend the action brought against him, but no order had been made except that he might attend the further consideration of the present action at his own risk as to costs.

The cause having now come on for further consideration, the defendant Singleton claimed to be indemnified by the estate for his costs incurred in defending the above action.

Cann, for plaintiff.

Rowden, K.C., and *P. S. Stokes*, for the applicant.—The estate is still in the hands of the court, and it will not be parted with until the costs of the receiver in relation to it are fully paid. Receivers being officers of the court are, like trustees, entitled to be indemnified by the estate against the costs of defending an action brought against them for their conduct as such receivers: *Bristowe* v. *Newham*, 2 Ph. 190; *Courand* v. *Hanmer*, 9 Beav. 3; *D'Oechsner* v. *Scott*, 24 Beav. 239; and the observations of Jessel, M.R., in *Walters* v. *Woodbridge*, 26 W. R. 469, 7 Ch. D. 504, support this view. They are also entitled to all other costs and expenses incurred by them in connection with their duties: *Morrison* v. *Morrison*, 7 De G. M. & G. 214; *Batten* v. *Wedgwood Coal and Iron Co.*, 33 W. R. 303, 28 Ch. D. 317; *Strapp* v. *Bull & Co.*, 43 W. R. 641, [1895] 2 Ch. 1; *Levy* v. *Davis*, (1900) W. N. 174.

Levett, K.C., and *W. A. Peck*, for the executors.—A receiver is only entitled to be indemnified his costs either when defending the trust estate or when acting under the orders of the court (*Hosegood* v. *Pedler*, 66 L. J. Q. B. 18; *Walters* v. *Woodbridge*), and not when defending a personal action, as in the present case.

P. Wheeler appeared for a creditor.

BYRNE, J.—I will not go through the charges made in the action of *Addison* v. *Singleton*. I can only say that the action has been dismissed with costs, and I do not take a single word of it as having any foundation in fact. It appears to have been brought by the plaintiff as legal personal representative of her deceased husband, and she asked for £6,000 damages, which, if it had been recovered, would have gone in aid of the estate. She could not have retained the money if it had been recovered. In fact she purported to act as executrix. Now it is said on behalf of Mr. Singleton that under the well-known rule that a receiver, or an officer of the court such as an administrator *pendente lite*, is entitled to full indemnity from the estate for his acts done in that capacity, Mr. Singleton ought to be indemnified against the costs to which he had been put in the action of *Addison* v. *Singleton*, the plaintiff in that action being impecunious. I do not want to state exactly the nature and extent of the indemnity to which the receivers, officers of the court, and trustees are entitled. It has been treated in the argument—and I think reasonably so—that the indemnity given by the court to trustees is similiar to that given to its officers and receivers. Of the various authorities that have been referred to, the most useful in the present case is *Walter* v. *Woodbridge*. In that case an action had been brought against a trustee upon the ground that a compromise was improper, and was entered into by the personal fraud of the trustee. The action was dismissed with costs, which the trustee could not obtain, and he asked to be indemnified out of the estate. There was a remarkable similarity between the circumstances in that case and those in the case before me in respect of the application made for leave to defend. Lord Romilly there said: "A trustee may be allowed to institute or defend a suit at the cost of the estate where the suit has reference to the estate. Where, for instance, a claim is made upon the estate, the

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

court allows the trustee his costs of resisting such claim, though his personal conduct is not called in question, but the court will not allow a trustee his costs of defending a suit solely for the purpose of repelling charges of personal conduct. I regret that the court cannot assist the trustee in cases where the plaintiff or next friend is a man of straw, and I wish that there was some rule of the court by which plaintiffs and next friends under circumstances like these might be required to give indemnity for costs." And he held that he had no power to grant the application. Upon appeal the Court of Appeal considered the action against the trustee as really one impeaching the compromise, and that the suit was defended by the trustee, not on his own behalf, but as trustee. He was accordingly held entitled to be indemnified. In the course of the judgment of Jessel, M.R., occurs the passage which was relied on on behalf of Mr. Singleton: "The principle that a trustee shall not make any profit from his office is rigidly enforced by the court, and the principle that while he acts in the due discharge of his duty he is to be indemnified against all loss ought to be enforced with equal strictness." James and Thesiger, L.JJ., were of the same opinion. I gather from these judgments that the principle acted upon by the court was that a trustee or receiver is not entitled to be indemnified against the costs of an action that may be brought charging fraud against him personally, and that he is not entitled unless part of his defence is as trustee or receiver in respect of the estate, and where he is defending the estate. I do not understand the court to have differed from Lord Romilly if his view of the facts of the case had been the correct one—namely, that the action ought to be treated as a separate action brought against the trustee for personal fraud or misconduct. Now, when I consider the nature of the action in the present case, I cannot help seeing that it was one the defence of which could not have resulted in any benefit to the estate. It is true that the charges brought against Mr. Singleton were for acts done while he was administrator *pendente lite*, and receiver, but they are charges of personal fraud, and however successful he might have been, and in fact was, in his defence of the action, that could result, and has resulted, in no benefit to the estate. I am not laying down any general rule because circumstances are various, but I do not at present see how any action, the defence of which could not be for the benefit of the estate, could be allowed to be defended at the expense of the estate. The case of *Courand* v. *Hanmer* appears to me to be an analogous case to one of opposition having been made to a receiver by parties entitled to appear on passing his accounts and seeking to disallow items in them. I think that it was natural that the receiver's costs should be allowed out of the estate as against the incumbrancer who took this security knowing that it would be subject to the proper costs to be incurred in an incumbrancer's suit, the receiver being appointed as much for their benefit as for that of the mortgagor. That, therefore, is not, I think, an authority for Mr. Singleton in the present case. The decision in *Bristowe* v. *Needham* is only that by not applying to the court for leave the receiver was not to be deprived of the indemnity to which, if he had applied for leave and obtained it, he would have been entitled in the case of an action which has resulted in a successful defence, and one which, as far as I know, was for the benefit of the estate. I regret that Mr. Singleton should suffer by the impecuniosity of the plaintiff in the action brought against him, but the line must be drawn somewhere, and a receiver cannot be entitled to be indemnified out of the estate for the costs of an action brought against him of a purely personal description, having no relation to the estate except that the acts complained of were done by him while acting as an officer of the court; and I must refuse his application with costs.

Solicitors, *S. J. Attenborough; Pownall & Co.; Crawford & Chester; A. F. V. Wild; J. B. Roberts & Wrightson.*

Chan. Div. } Farwell, J. } Dec. 1.

In re SKINNER.
COOPER *v.* SKINNER. (*a.*)

Practice—Administration—Trustee—Neglect to account—Originating summons—Costs of taking and vouching account.

Where, owing to the gross neglect and indefensible refusal of trustees to render proper accounts, a summons has been taken out for an account and administration, the trustees can be made liable to bear the costs, including the costs of taking and vouching the accounts.

William E. Skinner by his will dated the 2nd of August, 1898, appointed his two sons, William H. Skinner and Edward Skinner, and Albert Neve, a solicitor, executors and trustees of his will. The will contained a power for Neve to charge for all business transacted by him in executing the trusts of the will.

The testator died on the 31st of March, 1899. The will and codicil were proved by the three executors on the 29th of June.

On the 24th of June, 1901, the testator's daughter, Mrs. Cooper, took out a summons asking for an account of the testator's estate under ord. 55, r. 3 (*c*), and that if and so far as might be necessary the testator's real and personal estate might be administered by the court.

The three trustees were made defendants.

A full administration order was made; and the question whether the costs up to and including the hearing ought to be paid by the defendants Neve and Edward Skinner was reserved.

The account was taken in chambers, and the master made his certificate dated the 16th of June, 1903.

The case came on for further consideration.

The defendant W. H. Skinner died and his executors were added as defendants.

It was admitted that there would be no residue of the testator's estate after paying debts and legacies.

Upjohn, K.C., and *Cababé*, for the plaintiffs, referred to *Heugh* v. *Scard*, 24 W. R. 51, 33 L. T. 659; *Easton* v. *Landor*, 62 L. J. Ch. 164, 41 W. R. Dig. 258.

Methold, for W. H. Skinner's executors.

Holman Gregory, for Neve, referred to *Hewett* v. *Foster*, 7 Beav. 348.

FARWELL, J., in giving judgment, said: In this case the testator died as long ago as the 31st of March, 1899. This proceeding for an account, and if and so far as necessary for the administration of the estate, was commenced by summons on the 24th of June, 1901. During all that time, in spite of repeated applications by the plaintiff for a proper account, no accounts had been rendered by the defendants to any of the beneficiaries except one cash account which no one suggests was proper or sufficient.

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

The plaintiff is entitled to a legacy of £2,000, and to a share in the residue of the testator's estate. The will was proved by the three executors and trustees named therein, two of whom were the testator's sons, and the third was the defendant Neve, a solicitor who prepared the will, which contained a power for a solicitor-trustee to charge for his services. One of the sons seems to have been ill, and to have been excluded by the other two executors from acting in the administration of the estate.

The gist of the complaint against the defendants E. Skinner and Neve is that they would not, nor did not, render any proper accounts, though repeatedly requested to do so by the plaintiff and W. H. Skinner, their co-executor.

Now it is clear that in the case of a small estate like this it is very hard that the plaintiff should be obliged to have recourse to proceedings of this nature in order to get an account. I am always very unwilling to make trustees pay costs; but, on the other hand, beneficiaries have a right to expect the performance of their duty by executors, and not the less when one of them has power to make professional charges. In my opinion the conduct of these two defendants amounts to a gross neglect to account.

In *Heugh* v. *Scard* Sir George Jessel laid down the rule thus: "It is a matter of some importance that executors and trustees should understand my rule on the subject of costs. The question of costs being discretionary, it is impossible to lay down a rule binding on any other branch of the court. But it is nevertheless well that executors and trustees should understand what I think to be the proper rule. In certain cases of mere neglect or refusal to furnish accounts, when the neglect is very gross, or the refusal wholly indefensible, I reserve to myself the right of making the executor or trustee pay the costs of litigation caused by his neglect or refusal."

Now the present case does appear to me to be one where the neglect was very gross and the refusal wholly indefensible. The judge before whom the matter originally came reserved the costs down to and including the hearing to be dealt with on further consideration, and on that reservation I now have no hesitation in saying that they ought to be paid by the defendants Edward Skinner and Neve. Then comes the question of the costs of taking the account. I think that the view expressed by Lord Langdale in *Hewett* v. *Foster*, as explained by the Court of Appeal in *Easton* v. *Landor*, was a correct statement of the law applicable at the date of the case before him. Under the old practice, inasmuch as everyone interested in the estate had a right to have the accounts taken in court, the order for an account in an administration action went as a matter of course, and the costs of taking it came as a general rule out of the estate. But that is no longer the case now. Since the 24th of October, 1883, there is no longer any such general right to have an account taken, and it is by no means a matter of course that the costs of taking the account are paid out of the estate. The result is that I have to decide which of the two parties shall bear the costs of taking and vouching the accounts. I have come to the conclusion in the circumstances that I ought to make these two defendants pay them.

The remaining costs must be reserved. Some question may arise on the construction of the will, and I do not think I ought to order these two defendants to bear the whole of the costs. The houses remaining unrealized must be sold, and the plaintiff must conduct the sale.

Solicitors, *G. W. Dampney*; *Charles H. W. Osborn*; *S. J. Spreat.*

Chan. Div. } Jan. 20, 26.
Buckley, J. }

ATTORNEY-GENERAL v. ASHTON GAS CO. (a.)

Company—Gas company—Statutory maximum dividend—Payment free of income tax—Ashton Gas Act, 1877 (40 & 41 *Vict. c. clxxxvi.*), *ss.* 16, 17—*Income Tax Act,* 1842 (5 & 6 *Vict. c.* 35), *ss.* 54, 60, *Schedule A, Rule No. III.* (3).

A gas company, which is precluded by statute from paying dividend in excess of a statutory maximum rate, cannot pay a dividend at that rate free of income tax.

This was an action brought by the Attorney-General, at the relation of the Corporation of Ashton-under-Lyne, and by the corporation, against the Ashton Gas Co. to obtain a declaration that the profits divisible in any year among the shareholders of the company ought to be calculated as inclusive, and not as exclusive, of the amount payable for that year in respect of income tax on the profits proposed to be divided, and for an injunction.

The defendant company was incorporated by the Ashton Gas Act, 1847 (10 & 11 Vict. c. cci.), for the purpose of supplying gas to the town of Ashton-under-Lyne and the neighbourhood. It is now regulated by the provisions of that Act as amended by the Ashton Gas Act, 1877.

By section 16 of the Ashton Gas Act, 1877, it is enacted that, except as in that Act provided, "the profits of the company to be divided among the shareholders in any year shall not exceed" the rate of £10 per cent. per annum (referred to in the Act as "the standard rate of dividend") on the ordinary share capital or stock of the company authorized by Parliament and paid up.

By section 17 the standard price for gas supplied by the company is to be 3s. 8d. per 1,000 cubic feet, provided that the company may increase or diminish such standard price subject to a decrease or increase in the standard rate of dividend, to be calculated thus: For every penny charged in excess or diminution of such standard price in any year the standard rate of dividend for such year to be reduced or increased by 5s. in the £100 per annum.

Ever since 1847 the profits divisible for any year among the shareholders of the company have been calculated as exclusive of the amount payable for that year in respect of income tax on the annual profits and gains.

For many years past the company had made large profits, out of which it has in each year paid to its shareholders the maximum dividend payable under the sliding scale established by section 17. By paying these dividends free of income tax the company has, according to the corporation, who are large consumers of gas, in effect paid larger dividends than were lawful.

Danckwerts, K.C., and *R. J. Parker*, for the plaintiffs, referred to *Mason* v. *Ashton Gas Co.*, 54 L. T. 708; *Last* v. *London Assurance Corporation*, 34 W. R. 233, 10 A. C. 438; *Gilbertson* v. *Ferguson*, 7 Q. B. D. 562, 30 W. R. Dig. 97; and *Partington* v. *Attorney-General*, 4 E. & I. App. 100, 122.

H. Terrell, K.C., and *W. M. Cann*, for the defendants, referred to *Mersey Docks* v. *Lucas*, 32 W. R. 34, 8 A. C. 891, and *London County Council* v. *Attorney-General*, 49 W. R. 686, [1901] A. C. 26.

Cur. adv. vult.

BUCKLEY, J.—By sections 16 and 17 of their special Act of 1877 the defendant company are pre-

(a.) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

cluded from paying dividend in excess of a certain rate fixed by a sliding scale dependent upon the price charged for gas. Their practice has been, and is, to pay dividend at the maximum rate thus fixed, but free of income tax. The whole question in the case is whether this was a payment in excess of that allowed by the Act. The point is the simplest possible, and, but for the fact that some provisions of the Income Tax Acts have to be considered, and that these Acts are not always easy of construction, I should have thought it incapable of the amount of argument which it has received. The obvious solution seems to be that when the company pays, say, 10 per cent. free of income tax, it gives the shareholder 10 per cent. and relieves him from liability to make any payment to the Revenue or allowance to the company out of it. In other words, he receives 10 per cent. and an indemnity against a liability to pay part of it to the Revenue, or allow a deduction by the company of such part as the company has paid to the Revenue for income tax. He thus gets more than a 10 per cent. dividend. Further, if he be a person of limited income entitled to remission or abatement of income tax, he will in fact receive 10 per cent. and the income tax, or so much of the income tax as he reclaims from the Revenue authorities. The argument addressed to me has been that, inasmuch as under the machinery of the Income Tax Acts the corporation is assessed under Schedule A, and pays income tax upon all its profits, the corporation has nothing out of which it can pay the corporator dividend beyond the balance which remains after the corporation has paid the income tax payable by the corporation; and that out of this fund it is entitled to give the shareholder not exceeding, say, 10 per cent. This argument, I think, rests upon a fallacy. The profits are not arrived at after deducting income tax. The income tax is a part of the profits—viz., such part as the Revenue is entitled to take out of the profits. A sum which is an expense which must be borne whether profits are earned or not must, no doubt, be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves. I refer to Lord Blackburn's judgment in *Last* v. *London Assurance Corporation*. Under the Income Tax Acts all income has to pay the tax, but not to pay it twice over. If it has already been paid under Schedule A, it is not payable again under Schedule D. But that does not prove that the person who receives a distributive share of the fund does not bear income tax in respect of his ownership of shares in the company. The Act provides that he shall. The relevant machinery is that under section 40 of the Income Tax Act, 1842; the company is chargeable, and its officer has to do the necessary acts and make the necessary returns on its behalf. By section 54 he is to prepare a statement of the profits, and the estimate is to be made on the amount of the profits before any dividend shall have been made thereof to the member, and the member is to allow out of such dividend a proportionate deduction in respect of the duty so charged. The words which here command attention are that the member is to allow the duty out of the dividend. This particular company is governed by section 60, Schedule A, No. III. (3) of the Act of 1842. That section goes on to repeat or reproduce, but not very accurately, some part of the matter which had already been dealt with by section 54, and the words as to the allowance of the proportionate deduction of the duty are not identical with the words of section 54. For the words in section 54, "all such other persons and corporations or companies," section 60 substitutes the words "all such persons, corporations, companies, and societies," and for the words "out of such dividends" substitutes the words "out of such produce or value." An argument has been based upon this, the object of which is to show that the persons who are to make the allowance under section 60 are not the members of the corporation, but the corporation itself, and that the words are intended to provide that the corporation shall make the allowance to its treasurer. This may be so, but I do not think it is. It is true that the draughtsman has used a collection of nouns substantive which reproduce those used in the earlier part of the clause with reference to the corporation whose profits are being considered and not the collection of nouns substantive previously used as describing the members to whom distributive shares are to be paid. But, as matter of construction, I think the person to allow under section 60 is the same person as he who is to allow under section 54—viz., the member. But the question is not, I think, vital, for, even if the suggested construction of section 60 be right, the liability of the members to make the allowance would still, as it seems to me, be enforced by section 54. I refer also to section 102 of the Act of 1842 and section 40 of the Act of 1853. When this company declared and paid a dividend of 10 per cent., the member would be bound to allow the corporation to deduct the income tax upon his dividend, and he would receive a net sum of less than 10 per cent. When the corporation declared and paid a dividend of 10 per cent. free of income tax, the member received a sum larger by the amount of the income tax, which is not then to be deducted. The whole question is—Are the profits thus divided among the shareholders in excess of 10 per cent. on the capital? I think they are. It is exactly as if the company declared a dividend of 10 per cent. and the amount of the income tax, so that when the statutory deduction of the income tax is made the shareholder shall have a clear 10 per cent. In my judgment the plaintiffs are right.

Solicitors, *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *F. W. Bromley*, Ashton-under-Lyne; *Burgess, Cosens, & Co.*, for *Arthur Buckley*, Manchester.

K. B. Div.
(Kennedy and Darling, JJ.) Nov. 17.

HOBBS v. MOREY. (a.)

Election law—Corporation—Nomination of disqualified person—Right of defeated candidate to claim seat—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 56, *sub-section* 2.

A candidate who has received a minority of the votes in an election under the Municipal Corporations Act, 1882, *is not entitled to claim the seat when the successful candidate is disqualified for being elected, unless the disqualification was either apparent or such disqualification has been brought to the notice of the electors.*

Special case stated under the Municipal Corporations Act.

The case set out the following facts:

At an election held on the 19th of June, 1903, to fill a casual vacancy in the office of councillor for the North Ward of the Borough of Newport, in the county of the Isle of Wight, the respondent and the petitioner were the only candidates.

The respondent was returned by a majority of

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

votes over the petitioner. The respondent was at the time of his nomination as a candidate for the said office, and at the time the said election was held, a partner in the firm of Henry Morey & Son, a firm which at the time of the nomination and at the time of the election was a party to a contract for the supply of goods to the council of the said borough. The respondent at the time of the nomination and the election was disqualified by section 12, sub-section 1 (c), of the Municipal Corporations Act, 1882, for being elected and for being a councillor of the said borough by reason of his interest as a partner of the said firm in the said contract. On the 11th of June, 1903, notice in writing was given to the mayor of the above objection, but the mayor held that he could not adjudicate on the objection so raised and determined the nomination to be valid in form.

After the close of the poll on the 19th of June, 1903, and before the returning officer declared the result of the election, the petitioner objected in writing to the declaration of the respondent as councillor for the said ward, and claimed to be declared himself elected to the office.

On the 8th of July, 1903, the petitioner presented a petition against the return of the respondent, praying that it might be declared that he was duly elected to the office.

On the 25th of July, 1903, the respondent gave notice to the petitioner that he did not propose to contest the allegation in the petition that he was disqualified by reason of his interest, but that he did intend to contest the petitioner's right to claim the seat.

The questions for the opinion of the court were, therefore: (1) Was the election of the respondent to the office of councillor for the said ward invalid? (2) Is the petitioner to be deemed elected to the office of councillor for the said ward?

R. Cunningham Glen, for the petitioner.—Section 56, sub-section 2, of the Municipal Corporations Act, 1882, provides that when there is only one valid nomination, that nomination is to be deemed the person elected, and as the respondent is admittedly disqualified the petitioner is entitled to the seat.

He cited *Drinkwater* v. *Deakin*, L. R. 9 C. P. 626.

Corrie Grant, for the respondent.—To entitle the petitioner to the seat he must show either that the disqualification was evident, as in the case of a woman or a felon becoming candidate, or that notice was given to the electors of the disqualification, and that votes given to that candidate would be thrown away. Neither of these conditions is fulfilled in the present case.

He cited *Hope* v. *Lady Sandhurst*, 37 W. R. 548, 23 Q. B. D. 579; *Pritchard* v. *Mayor of Bangor*, 37 W. R. 103, 13 App. Cas. 246; *Harford* v. *Lynsky*, 47 W. R. 653, [1899] 1 Q. B. 852.

KENNEDY, J.—In this case the question before us is as to the right of the petitioner to the seat. The respondent admits, as I understand, that he is disqualified by reason of section 12, sub-section 1 (e), of the Act, and that he could not be elected or sit as a councillor. The petitioner claims, however, that, there being only two candidates for the seat, he is entitled to be declared elected. It is said that the disqualification which prevents the respondent from being elected prevents him also from being nominated, and the argument is that, there being only one valid nomination, section 56, sub-section 2, operates, and the person nominated (that is, the petitioner) is to be deemed to be elected.

That is, in other words, to say that the petitioner, who obtained the minority of the votes at the election, is to be declared elected, and the majority of votes—those given for the respondent—are to be altogether thrown away. I cannot assent to that view. It appears clear to me, both on the statute and on the authorities which have been referred to, that the expression "valid nomination" in section 56 has the meaning which was given to it by Lord Watson in *Pritchard* v. *Mayor of Bangor*. He then said: "If no objection is made or if objections are stated and repelled by the mayor, then the nomination becomes a valid nomination. I do not mean to suggest that it is final and conclusive upon questions of disqualification or other similar objections which may be taken to it, but I think it was intended to be conclusive to this effect, that the nomination paper so sustained as valid should form the basis of the election, and that the nominee in the paper should be treated as a person for whom votes could be given before the returning officer." The expression "valid nomination" therefore includes the case of a person who is disqualified in fact, but whose disqualification is not apparent on the nomination paper, and whose nomination has been sustained. That being so, the election must proceed, and the question—as has been pointed out in some of the cases—becomes, not a question between the two candidates, but between the successful candidate and the electorate. The election of such an unqualified person can be objected to only in one way—namely, by election petition to the court. The court, on the hearing of the petition, cannot, I think, declare that a candidate who has the minority of votes is elected, unless it has first decided that the votes given to the candidate who is returned at the head of the poll are votes thrown away. There are, I agree, cases in which the court has power so to decide. Alike in Parliamentary and in municipal elections, if a person is a candidate who is manifestly disqualified, then in such a case the votes given for him may be treated as having been thrown away, since they were perversely and wilfully given to a candidate whom the electors knew to be disqualified. In regard to the nomination itself, as Wright, J., says in *Harford* v. *Linskey*, "If the nomination paper is on the face of it a mere abuse of the right of nomination or an obvious unreality, as, for instance, if it purported to nominate a woman or a deceased sovereign, there can be no doubt that it ought to be rejected, and no petition could be maintained in respect of its rejection. If the election proceeds, then, in such a case, for instance, as *Lady Sandhurst's Case*, where the disqualification of the candidate was apparent, and the fact that she was a woman must have been known to everyone who voted for her, the votes given for her might be treated as nullities. But where the disqualification does not appear on the nomination paper and the election proceeds, then, unless on a scrutiny a sufficient number of votes given for the candidate can be struck off to give the petitioner a majority, I think he cannot successfully claim the seat, and the votes given to his opponent cannot be disregarded. That seems to me to be the true view, and in accordance with both authority and principle, and as here the disqualification was not apparent, and the petition does not allege that the voters knew of the respondent's disqualification (the only notices being notices to the mayor and opposing candidate), and the petitioner had only a minority of votes, I do not think he can successfully claim the seat. All we can do, therefore, on this petition is to declare the election of the respondent void.

DARLING, J.—I am of the same opinion. It seems to me the question is really concluded by the judg-

ment of Lord Watson in *Pritchard* v. *Mayor, &c., of Bangor*. We therefore answer the first question of this petition in the affirmative, and the second in the negative.

Judgment accordingly.

Solicitors for the petitioner, *Sole, Turner, & Knight.*

Solicitors for the respondent, *Ley, Lake, & Co.*, for *R. B. Pittis*, Isle of Wight.

K. B. Div. (Wright, J.) Nov. 10.

MAYOR, &c., OF WESTMINSTER *v.* JOHNSON.
THE SAME *v.* FULLER. (*a.*)

Inland Revenue—Land tax—Public underground lavatories provided and maintained by sanitary authority —Land Tax Act, 1797 (38 *Geo.* 3, *c.* 5), *s.* 4—*Public Health* (*London*) *Act,* 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 44, 45.

Public underground lavatories provided and maintained by a sanitary authority under the powers conferred upon them by the Public Health (*London*) *Act,* 1891, *are not rateable in respect of land tax, as the sanitary authority does not acquire such rights of ownership in the lavatories as to render them liable to be charged, but only such an interest as is necessary to enable them to fulfil their public duties in respect of the lavatories.*

Trial of actions before Wright, J., without a jury.

These were two actions brought for declarations that certain underground conveniences were exempt from land tax. The actions were tried together upon the following agreed statements of fact:

MAYOR, &c., OF WESTMINSTER *v.* JOHNSON.

Pursuant to the London Government Act, 1899, and the Borough of Westminster Order in Council dated the 15th of May, 1900, the Metropolitan Borough of Westminster was duly constituted. The borough includes the parish of St. James, Westminster, which was formerly the district of the vestry of St. James, Westminster, created by the Metropolis Management Act, 1855.

By charter dated the 29th day of October, 1900, there was granted and confirmed to the borough the title of city, and that the council should be styled the mayor, aldermen, and councillors of the city of Westminster. The appointed day as from which the Act and Order in Council took effect was the 9th of November, 1900.

The council of the city, pursuant to and in execution of and in accordance with the provisions of the Public Health (London) Act, 1891, ss. 44 and 45, maintain in the city a number of public lavatories and public sanitary conveniences for the use and benefit of the public. The lavatories and conveniences, with one exception, are (though this is not admitted by the defendant to be material) each a source of expense to the council and a burden upon the city rates, and taking the whole of them together they are collectively a source of expense to the city and a burden upon the city rates. The lavatories and conveniences are all managed together as one enterprize and by one department of the city administration. Among the lavatories and conveniences are those hereinafter more particularly described which were constructed by the Vestry of St. James, Westminster, as hereinafter more particularly mentioned.

Upon the completion of the improvements authorized by the Metropolitan Street Improvements Act, 1877 (40 & 41 Vict. c. ccxxxv.), the streets and paved portions of land (including the island) which formed Piccadilly-circus, and also the streets in and about the circus affected by or made under the Act, were handed over to and taken charge of by the Vestry of St. James, Westminster, in pursuance of section 18 of the said Act. The whole of the streets and paved portions (including the island) were within the parish of St. James, Westminster, and were partly under the Act and partly prior thereto dedicated to the public use.

During the years 1890-1 the vestry in pursuance of the statutory powers conferred by the Metropolis Local Management Act, 1855, constructed a public convenience in Piccadilly-circus which was under their statutory power conferred by the Metropolis Local Management Act, 1855, and the Public Health (London) Act, 1891, considerably altered and enlarged by the vestry during the year 1894. This is one of the conveniences hereinbefore mentioned.

The convenience consists substantially of an underground opening with brick walls eighteen inches thick, faced with enamel tiles and a floor of mosaic upon concrete, completely protected from the weather by a roof with pavement lights forming the floor of an island in the roadway substantially of the same area as the convenience. The convenience is lighted by electricity and gas. Its construction as enlarged cost about £5,090.

The convenience contained twenty water-closets, twenty-one urinals, and fourteen lavatories. The accommodation was for both sexes, but separate for each sex. It was constructed wholly underground, mainly under the island, but partly under the carriage-way, and had a skylight projecting above the pavement of the island. It was entered by means of two separate staircases, each opening on to the pavement of the island.

The city council placed two men and two women in charge for the purpose of keeping order and keeping the place clean and taking charge of the lavatories, urinals, and closets. A charge of 1d. was made for the use of the closets and 2d. for the use of the lavatories, including in the latter case, water, soap, towel, and brushes. The charge was made under section 45 of the Public Health (London) Act, 1891, for the purpose of aiding in meeting the expenditure on public conveniences and lavatories in the city, and was so applied, and with the object of placing some check on a too indiscriminate public user. The convenience was open for 7 a.m. to 1 a.m., at other times it was locked up. This convenience produced an income in excess of the expenses, but it was the only one which did. The city officials managed this and other conveniences. The charges were in no case made with a view to profit, but it was not admitted by the defendant that this was material. The convenience was assessed in the valuation list made in pursuance of the Valuation (Metropolis) Act, 1869, and in force at the time of the assessment hereinafter mentioned, at £250 gross, and in the valuation list now in force is assessed at £200 gross.

The site of this convenience was in a situation formerly occupied partly by houses and partly by the street. The land tax in respect of No. 6, Piccadilly, had been redeemed prior to the Act. The land tax on the other houses had not been redeemed. From the date the Metropolitan Board of Works took possession, under the Act, of the houses no land tax whatever had been paid. The board paid the Crown the value of the freehold (which was Crown property) of the land covered by the houses, but no conveyance had been made by the Crown either to the board or their successors, the county council, or to anyone else. The

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

whole of the space occupied by the convenience and its walls and foundations was "made ground," consisting of brick and other rubbish produced and placed there in the course of carrying out the improvements by the Act authorized and making the streets, island, &c., now there, the levels of the land having been considerably altered by the board's improvements.

In December, 1900, the city was assessed to the land tax in respect of the said convenience in the sum of £250 for the year ending the 25th of March, 1901. No previous assessment to such tax had ever been made in respect of the convenience but the houses which were formerly built upon the site had always been assessed.

The question which the parties agreed to be the question to be decided between them in this action was whether land tax could be assessed in respect of the convenience.

MAYOR, &c., OF WESTMINSTER v. FULLER.

In this case the lavatories and conveniences were those hereinafter more particularly described which were constructed by the Vestry of St. James, Westminster, under the Public Health (London) Act, 1891.

Among the conveniences were two conveniences, one in Great Marlborough-street, Regent-street, and another in Broad-street.

Each of the conveniences consists substantially of an underground opening with brick walls 18in. thick and the floor of Terazzo on concrete, completely protected from the weather by a roof with pavement lights forming the floor of an island in the roadway substantially of the same area as the conveniences. The conveniences were lighted by electricity and gas.

The Great Marlborough-street convenience, which cost about £1,700 to construct, contained six water-closets, six urinals, and four lavatories. The accommodation was for both sexes, but separate for each sex. It was constructed wholely underground, partly under the carriage-way of the street and partly under an island therein, and had a small skylight level with the pavement of the island. It was entered by means of two separate staircases, each opening on the pavement of the island. The convenience was constructed in "made ground," forming part of either the street or the foundation of the street.

The Broad-street convenience, the construction of which cost about £2,050, contained nine water-closets, nine urinals, and four lavatories. The accommodation was for both sexes, but separate for each sex. It was constructed wholly underground, partly under the carriage-way of the street and partly under an island therein, and had a small skylight level with the pavement of the island. It was entered by means of two separate staircases, each opening on to the pavement the island.

This convenience was constructed on the site of a convenience which was formerly there, but was situated wholly above ground.

The present convenience, and its walls and foundations, was wholly constructed in "made ground" forming part of either the street or the foundation thereof.

The city council placed two men and two women in charge of each of the conveniences for the purpose of keeping order and keeping the place clean and taking charge of the lavatories, urinals, and closets, and like charges were made as in *Mayor, &c., of Westminster* v. *Johnson*. Neither of these conveniences produced any income sufficient to meet the expenses thereof, and both were a burden on the city rates. The charges were not in either case made with a view to profit, but it was not admitted by the defendant that this was material.

In the case of two of the properties (20 and 21, Great Marlborough-street) opposite the Great Marlborough-street convenience the land tax had been redeemed. The land tax on the properties 23, 24, 36, and 37, Great Marlborough-street had not been redeemed. They were, and always have been, assessed to land tax.

In the case of six properties (46 and 52, Broad-street) which were opposite the Broad-street convenience the land tax had been redeemed. The land tax on the properties 5, 6, 7, 8, 9, Broad-street had not been redeemed. They were and always have been assessed to land tax. At the date of the redemption of land tax in this and the preceding paragraph mentioned the sites of streets surrounding the conveniences were streets substantially as at present.

Neither of the above two conveniences were entered in or assessed in the valuation list under the Valuation (Metropolis) Act, 1869, in force at the time the assessment hereinafter mentioned was made, nor have they ever been entered or assessed in any such list. They were not rated to any rate in the metropolis.

In December, 1900, the City was assessed to the land tax for the year ending the 25th of March, 1901, in respect of the Great Marlborough-street convenience in the sum of £80, and in respect of the Broad-street convenience in the sum of £80. No previous assessment to such tax had ever been made in respect of either of the conveniences.

The question which the parties agreed to be the question to be decided between them in this action also was whether the land tax can be assessed in respect of the conveniences.

The Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 4, provides that: "All and every manors, messuages, lands, and tenements . . . and all hereditaments of what nature or kind soever they be . . . and all and every person and persons, bodies politic and corporate, guilds, mysteries, fraternities, and brotherhoods, whether corporate or not corporate, having or holding any such manors, messuages, lands, tenements or hereditaments or other the premises in respect thereof shall be charged" with land tax.

The Public Health (London) Act, 1891, provides as follows:

Section 44, sub-section 1: "Every sanitary authority may provide and maintain public lavatories and ashpits and public sanitary conveniences other than privies, in situations where they deem the same to be required, and may supply such lavatories and sanitary conveniences with water, and may defray the expense of providing such lavatories, ashpits, and sanitary conveniences, and of any damage occasioned to any person by the erection or construction thereof, and the expense of keeping the same in good order, as if they were expenses of sewerage."

Sub-section 2: "For the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building, or the curtilage of a building, shall be vested in the sanitary authority."

Section 45, sub-section 1: "Where a sanitary authority provide and maintain any public lavatories, ashpits, or sanitary conveniences, such authority may—(*b*) Let the same for any term not exceeding three years at such rent and subject to such conditions as they may think fit; (*c*) charge such fees for the use of any lavatories or water-closets provided by them as they may think proper."

Danckwerts, K.C. (*Mayer* with him), for the plaintiffs.—These underground conveniences are exempt from land tax, as the plaintiffs do not have and hold them within the meaning of section 4 of the Land

Tax Act, 1797. Although the subsoil is by virtue of section 44, sub-section 2, of the Public Health (London) Act, 1891, vested in the plaintiffs, they do not possess the fee simple in the soil; they only possess that kind of right which is necessary in order to enable them to exercise a control of the subsoil, the fee simple remaining in the owner. This class of tenement, therefore, is not such as is liable to land tax: *Rolls* v. *Vestry of St. George, Southwark*, 28 W. R. 867, 14 Ch. D. 785. In *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434, 45 W. R. Dig. 92, Lord Herschell says: "It seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use. And Lord Russell of Killowen, L.C.J., in *Bradford* v. *Eastbourne Corporation*, [1896] 2 Q. B. 205, 44 W. R. Dig. 93, says: "It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter."

He also referred to *Finchley Electric Light Co.* v. *Finchley Urban Council*, 51 W. R. 375, [1903] 1 Ch. 437.

Macmorran, K.C. (*S. A. T. Rowlatt* with him), for the defendants.—It is true that the vesting of the subsoil under the Public Health (London) Act. 1891, is only a vesting for the purpose of the Act, but the corporation are the owners of these conveniences, and as such are liable to land tax in respect of them. The plaintiffs have exclusive possession of the conveniences, opening and closing them at such times as they wish, and charging such sums for the use thereof as they think fit, and in the case of trespass have a right of action; they have therefore all the ordinary rights of ownership of an hereditament such as to render them liable to pay land tax: *Metropolitan Railway Co.* v. *Fowler*, 42 W. R. 270, [1893] A. C. 416.

Danckwerts, K.C., in reply, cited *Hinde* v. *Charlton*, 15 W. R. 226, L. R. 2 C. P. 104.

WRIGHT, J.—The Land Tax Act of 1797 provides, in substance, as far as is material for present purposes, that tenements or hereditaments had or held by persons should be liable to be assessed to the land tax. and the real question is whether the corporation of Westminster have or hold these conveniences as hereditaments within the meaning of that enactment. It seems to me tolerably plain that the enactments in the Land Tax Act, where it speaks of having or holding tenements or hereditaments, is using that language with reference to ordinary unqualified rights of property, and the question is whether a restricted qualified property which the sanitary authority has in places like this can properly be brought within the words of the Land Tax Act. The nature of the right which they have is, I think, best described in the language of Lord Herschell and Lord Halsbury in the case of *Tunbridge Wells Corporation* v. *Baird*. Taking Lord Herschell's words, he says: "It seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use." Here, of course, the vesting under the Public Health (London) Act, 1891, is a little different from that, because it is a vesting for the purpose of constructing and maintaining these conveniences; but the principle is the same. Then in the case of *Bradford* v. *Mayor of Eastbourne* Lord Russell of Killowen used similar language: "It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter." *Primâ facie* it seems to me that the corporation when they appropriate a piece of land under one of their streets for a purpose of this kind do not acquire under the Public Health Act of 1891, or under any other statute by which they are authorized to do these works, anything equivalent to a general property. They acquire only such an interest as is necessary for the purpose of discharging their public duty. Then comes the question, which is one of some difficulty, when they actually construct a permanent building of this kind on or under the street, whether or not that ought to be regarded as a tenement or hereditament had or held by them. It seems to me no distinction can be drawn merely because a structure is more or less permanent; the construction of the structure is permitted to the authority simply for the purpose of and in discharge of their sanitary duties, and I cannot think these ought to be regarded as any more than what I may call a personal property of theirs merely because it is permanent or of a certain thickness or peculiar in construction. The principle is that they are allowed to put it down only for limited purposes and they are not owners in the ordinary sense. In the case of *Metropolitan Railway* v. *Fowler* the facts were entirely different, as has been pointed out. There there was the permanent appropriation of the soil for the purposes of the railway and I do not think there is anything in the language by the noble lords who gave judgment in that case which would in any way warrant me in holding that they would take the same view in respect to the entirely limited ownership of the sanitary authority, in that which is merely the soil of the streets. Mr. Danckwerts has pointed out, I think, the whole of these conveniences, or certainly the greater part of them are in made ground—that is to say, in soil, which is put there by the council merely in exercise of its duties or its powers in making up the level of the street—and therefore it seems to me it is reasonable to consider whatever occupies a part of that which is put there merely for the purpose of a street ought to be regarded and held on a similar title to the street itself, with this addition, no doubt, for it is also held here under the title of the Public Health Act, 1891, as a public convenience. It certainly is not immaterial, to my mind, to consider that there seems to be no precedent whatever for assessing streets or conveniences of this kind or anything of this nature to the land tax. I must therefore hold that the plaintiffs are not liable to be assessed to the land tax in respect of any of these conveniences.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Caprons, Hitchins, Brabant, & Hitchins.*

Solicitors for the defendants, *Miller, Vardon, & Miller.*

House of Lords.

From C. A. (England). Nov. 12.

MOREL BROS., COBBETT & SON v. WESTMORLAND (EARL). (a.)

Married woman—Authority of wife to pledge husband's credit—Necessaries—Husband and wife sued jointly—Presumption of agency — Alternative liability of husband—Election—Rules of Supreme Court, ord. 14, *r.* 5.

The relationship of husband and wife gives rise to no presumption of joint liability for goods supplied to the domestic establishment on the order of the wife. Should husband and wife be sued jointly for goods supplied to the wife, and judgment obtained against her, then, in the absence of joint liability, there is no alternative remedy against the husband, nor does ord. 14, *r.* 5, *alter this.*

When it is established that a sufficient allowance has been paid by the husband to his wife, and she has been directed not to go beyond it, the presumption of the agency of the wife for the usual domestic purposes of the joint establishment and other necessaries will be rebutted.

Decision of the Court of Appeal (51 *W. R.* 290, [1903] 1 *K. B.* 64) *affirmed.*

Appeal from an order of the Court of Appeal (Collins, M.R., Romer and Mathew, L.JJ.).

The plaintiffs, who were wine merchants and provision dealers, brought the action against Lord and Lady Westmorland jointly for £455, balance of an account for provisions and wines supplied between May, 1897, and September, 1901. Of these goods, £196 worth were supplied before the end of July, 1899, and the remaining £235 after that date.

On an application under order 14 leave was given to sign final judgment against Lady Westmorland. Judgment was signed accordingly, but not satisfied.

Lord Westmorland, in his defence, alleged that he never authorized any person to order, purchase, or take delivery of any of the goods in question, or to pledge his credit in respect thereof; and, in his amended defence, that if any order was given on his behalf, such order was given by the countess, and that, by suing and recovering judgment against her, the plaintiffs had elected to look to her alone as the contracting party, and were not entitled to recover from him.

All the goods were in fact ordered by the countess, and her name was entered in the books of the plaintiffs. The name of the earl was never entered in the plaintiffs' books. The greater part of the goods were supplied by the plaintiffs to Apethorpe Hall, Northamptonshire, where the defendants resided. Accounts were sent in periodically by the plaintiffs to the countess, in which the goods were uniformly debited to her.

There was no affirmative evidence of authority given to the countess to pledge the joint credit of the earl and of herself, or that she had in fact pledged their joint credit. Phillimore, J., declined to withdraw the case from the jury. On behalf of Lord Westmorland evidence was given that in June, 1899, his net annual income was £2,500, while the countess had an annual income of £400 in her own right, and that it was agreed that out of his net income the earl should pay into a separate account the sum of £2,000 annually, upon which either the earl or countess might draw for payment of household expenses only, and the countess was told that this was the utmost sum which could be allowed. The annual sum of £2,000 was regularly paid as agreed. The following questions were left to the jury: First, Is defendant liable for goods supplied before July, 1899?—Answer: Yes. Secondly, As to goods supplied to Apethorpe since July, 1899: (*a*) Were they necessaries suitable for the station of the defendant?—Answer: Yes. (*b*) Did the defendant give his wife a sufficient allowance for household expenses?—Answer: On income named, Yes. (*c*) Did he prohibit his wife from incurring any household expenditure except out of his allowance?—Answer: Yes. (*d*) Did the wife, when ordering goods from the plaintiffs, act as agent for the defendant and herself, or for the defendant only, or for herself only?—Answer: For defendant and herself jointly. (*e*) To whom did the plaintiffs give credit?—Answer: To the earl in the name of the countess. Thirdly, Is defendant liable for goods sent after July, 1899, to other places than Apethorpe?—Answer: No. On further consideration Phillimore, J., gave judgment for the plaintiffs against Lord Westmorland for £411 and costs. This was reversed by the Court of Appeal, who entered judgment for Lord Westmorland.

Shearman, K.C., and *Hills*, for the appellants.

Debenham v. *Mellon*, 29 W. R. 141, 6 App. Cas. 24; *Kendall* v. *Hamilton*, 28 W. R. 97, 4 App. Cas. 504; and *Scarf* v. *Jardine*, 30 W. R. 893, 7 App. Cas. 345, were cited or referred to.

Gore-Brown, K.C., and *Bonner*, for the respondent, were not heard.

Earl of HALSBURY, L.C.—The plaintiffs might have sued either the agent or the principal. I prefer keeping to those terms, because it gets rid of the confusion which arises from the peculiar relation of these parties to each other. The result was that the plaintiffs obtained judgment against the agent. They cannot get judgment against the principal also. It is an alternative remedy; it cannot be made available against the two.

I think the authorities upon which the judgment is founded—one of the principal authorities being a decision of this House—render it absolutely impossible to go back upon the course of decision upon this subject. I am myself satisfied that the question was rightly decided both in this House and in the Court of Appeal.

With reference to the rule upon which reliance has been placed (ord. 14, r. 5), I think it is accurately stated in the Yearly Practice of the Supreme Court, edited by Mr. Muir Mackenzie, Mr. Chitty, and others, that "the rule does not apply to the case of alternative liability. Therefore, if the claim is against two defendants as alternatively liable, and judgment is signed against one, this rule does not enable the plaintiff to proceed against the other; and the doctrine of election established by *Scarf* v. *Jardine* applies." I concur with that, and move your lordships that this appeal be dismissed with costs.

Lord SHAND concurred.

Lord DAVEY.—With regard to the part of the claim which is subsequent to July, 1899, it appears from the evidence of the solicitor that an arrangement was made by which a sum was placed at the disposal of the countess by the earl out of his own money for the purpose of her continuing to manage the household and defray the household expenses. The learned Master of the Rolls in the court below has discussed the effect of that arrangement, which I agree with him meant that the countess was not to pledge the credit of the earl, but to pay the expenses

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

of the household out of the annual sum which was placed at her disposal in a separate banking account for that purpose. The Master of the Rolls has illustrated the conclusions to which he came by the authorities bearing upon the subject. I do not desire to add anything to what he has said; I simply express my concurrence with his view as to the effect of that arrangement with regard to that part of the claim of the appellants. With regard to the earlier claim, for the period prior to July, 1899, I agree with what has been said. I am disposed to think that, if the proof had established a joint liability, the plaintiff would not have been prejudiced by signing judgment under order 14, against one of the joint debtors. I think he might then go on and show that the other debtor was also a joint debtor. But if the proof which he tendered at the trial shows not a joint debt by the two, but an alternative claim against one or the other, then I think that by signing judgment against one he has, on the principle of *Scarf* v. *Jardine*, elected to take his remedy against that one, and cannot afterwards sue the other, who is not jointly but alternatively liable. And I agree that the concluding words of ord. 14, r. 5, do not enable the plaintiff to pursue his remedy against the other defendant who has got leave to defend, if the proof should show that the claim against the two was not joint but alternative. I think, therefore, that the appeal must be dismissed.

Lord ROBERTSON.—It is enough to support this judgment that there was no evidence at all of joint liability.

The period before July, 1899, is bare of any evidence which would yield the legal inference of joint liability. The true theory of the case—namely, that the earl was principal during the earlier period, is not available to the appellants now that they have taken judgment in this suit against the lady who *ex hypothesi* was agent.

The period after July, 1899, is made much clearer, in a positive sense, for I hold the arrangement made to have deprived the lady of all power to pledge her husband's credit. The earl substituted this fund, which he placed at the lady's disposal, for any authority, express or implied, to pledge his credit at all, joint or several. This being the fact, the well-established law of *Debenham* v. *Mellon* protects the respondent.

Appeal dismissed.

Solicitors, *A. L. Rayner; Royds & Rawstone.*

Court of Appeal.

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) — Feb. 11.

SAUNDERSON *v.* COLLINS. (*a.*)

Bailment—Bailor and bailee—Carriage lent to bailee—Negligence of bailee's servant—Scope of employment—Liability of bailee for damage caused to carriage by his servant.

The plaintiff, a coachbuilder, lent the defendant a dog-cart for use while he repaired the defendant's trap. The defendant's coachman, without his master's knowledge or permission, took out the dog-cart one night for a drive on his own account and damaged the dog-cart by negligently driving it into a tramcar.

Held, that the plaintiff could not recover damages from the defendant for the damage done to the dog-cart.

Decision of the Divisional Court (Lord Alverstone, L.C.J., and Wills and Channell, JJ.) (51 *W. R.* 558) *reversed.*

Coupé Carriage Co. *v.* Maddick, [1891] 2 *Q. B.* 413, 40 *W. R. Dig.* 11, *discussed.*

Appeal by the defendant from a decision of the Divisional Court (Lord Alverstone, L.C.J., and Wills and Channell, JJ.), reversing the decision of the county court judge at the trial of the action at Newcastle-upon-Tyne.

The facts leading up to the appeal were shortly these:

The plaintiff Saunderson was a coachbuilder, and he brought the action in the county court to recover £22 18s. 6d. for damages done to a dog-cart which he had lent to the defendant Collins to use during the time that he was repairing another dog-cart, which was the property of the defendant. The evidence before the county court judge was to the effect that Mr. Collins had a servant named Langdon, who acted as his coachman, and that on the evening of the 20th of June, 1902, which was the day of the Coronation celebration in Newcastle, Langdon surreptitiously and without the knowledge or permission of his master, took out the dog-cart and with four friends went for a drive round the town. Some of them became drunk, and in the course of the drive Langdon drove into a tramcar and the dog-cart was damaged.

The county court judge found that there was no negligence on the part of the defendant, and that the act of Langdon was a tortious act as regarded his master; the dog-cart was left in the coachhouse as usual that evening and the key was placed in the drawer in the hall of the defendant's house and it was taken from its place and the coachhouse unlocked after Mr. Collins had retired for the night. He held that if the case of the *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413, 40 W. R. Dig. 11, could not be distinguished, he was bound by that decision to give judgment for the plaintiff; but he distinguished it from the present case on the ground that the defendant's servant in wrongfully taking the trap out of his master's coachhouse and damaging it was doing a tortious act in respect of which both the plaintiff and the defendant had a right of action against Langdon. He therefore entered judgment for the defendant.

The Divisional Court reversed that judgment; holding that the decision in the *Coupé Co.* v. *Maddick* covered this case, and that judgment should have been entered at the trial for the plaintiff.

The defendant appealed.

Manisty, K.C., and *Meynell*, for the defendant.—A master is not liable for the tortious act of his servant committed outside the scope of his employment and done in his own and not in his master's interest. The present case, for the reason stated by the learned county court judge, is distinguishable from the *Coupé Co.* v. *Maddick*, and therefore the Divisional Court was wrong in holding that that case was binding upon the county court judge and was binding on them. If it is not distinguishable, then we say that the law was not rightly laid down in the *Coupé case* with regard to the liability of a bailee.

Mitchell v. *Crassweller*, 13 C. B. 237; *Storey* v. *Ashton*, 17 W. R. 727, L. R. 4 Q. B. 476; and *Mears* v. *London and South-Western Railway Co.*, 11 C. B. N. S. 850, 10 W. R. C. L. Dig. 17, were referred to.

Robert Wallace, K.C., and *Mundahl*, for the plaintiff.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

—The distinction which the learned county court judge drew between the facts in this case and those of the *Coupé Co.* v. *Maddick* was rightly held by the judges in the Divisional Court to be one without substance. The defendant was liable as bailee for any damage the cart received while it was lent to him. The position of a bailee is made very clear, and the cases dealing with the subject are collected in judgments given in *The Winkfield*, 50 W. R. 246, [1902] P. 42. There was a lack of care here which rendered the defendant as bailee liable, for there was some obligation with regard to the acts of the servant in whose control or custody the thing bailed was placed by the defendant. If the plaintiff had sued the coachman, then the decision in *Mears* v. *London and South-Western Railway Co.* would have been an authority in his favour, but it is not necessary to consider that case here, because the *Coupé Co's case* decides that the bailor has a good cause of action against the master. To limit the master's liability to the acts of a servant within the scope of his employment would in effect eliminate entirely the contract of bailment. It was admitted here that Langdon was the defendant's coachman, and the defendant as bailee is liable for any damage caused by his coachman to the bailor's dog-cart, which the bailee gave into his coachman's care and keeping while it remained on the premises.

COLLINS, M.R.—This case no doubt at first presents some difficulty, but when the well-settled principles that govern the law of bailment are applied to the admitted facts, it becomes tolerably clear what our decision should be. The facts show that this was a bailment for mutual considerations, and it is perfectly well settled law what are the obligations of the bailee under such circumstances. First, a bailee must take reasonable care—that is, ordinary care, not extraordinary care—of the thing bailed. It is clear that the defendant's coachman, without his master's order, took out the cart purely and solely for his own use and for a frolic of his own, with the result that the cart was seriously damaged in a collision which was brought about by the coachman's negligence between the dog-cart and a tramcar. Under these circumstances the dog-cart was returned to the plaintiff in a damaged condition, and as Mr. Collins declined to be answerable and to make good the damage, the coachbuilder brought this action. The county court judge held in favour of the defendant. The plaintiff appealed to the Divisional Court, who reversed the decision of the county court judge on the ground that the decision in *Coupé Co.* v. *Maddick* was an authority directly in point, and therefore binding on the court. Before us it has been argued for the plaintiff that the acts of the servant of a bailee were the acts of the bailee, his master, who was therefore liable for the consequences of those acts. For the defendant it was contended, that as bailee he was not liable to make good injury to the thing bailed if the injury or damage was caused by the act of a person not his servant, and that the coachman here when acting outside the scope of his employment was for the time being not a servant of the defendant. It was admitted that if a burglar broke into the coachhouse of the bailee and stole the dog-cart, there being no evidence of the bailee having been guilty of negligence in leaving the door of the coachhouse open or otherwise, no liability would be placed on the bailee. The reason why the bailee in that case would not be liable is that the act of the burglar was not his act. In the present case it was not a burglar who took the cart, but the result was the same, as the act was done by a person for the acts of whom the master was not at the time responsible. The act of the coachman was an act done outside the master's control. It was not an act done under the mandate of the master. The servant had done that which broke his connection with his master, and the master was not liable for that act which was done outside the scope of the servant's employment and without the master's order. On these findings there was no breach of the defendant's duty as bailee of the dog-cart, and he is, in my opinion, entitled to judgment.

With regard to the decision of the Divisional Court that they were bound by the decision in *Coupé Co.* v. *Maddick*, I desire to express no opinion as to whether that case was or was not well decided. I leave that question open, because in my judgment that case is clearly distinguishable from the one we are now considering. In the *Coupé Co.'s case* the act was done by the servant admittedly within the scope of his employment. He had received orders from his master to drive a horse to a certain place, and it was held that the master was liable for the act of his servant while so driving the horse, although not driving by the proper route to the place to which he should have gone. But in so far as he was driving the horse he was acting on the mandate of his master, which is the essential circumstance which is entirely missing in the present case. I am not so sure whether the distinction I have drawn between the two cases is a sound distinction in law, but as I have said, I have not now to determine whether or not the decision of Cave and Charles, JJ., in the *Coupé Co.'s case* is one that, had it come before us, we should have affirmed, but it is certainly a sound distinction on the facts, and it is a distinction that, in my opinion, goes to the root of the decision in this case.

Therefore I am unable to agree with the decision of the Divisional Court, and consequently this appeal must be allowed.

ROMER, L.J.—I entirely agree, and were it not that the case is one of some interest from a legal point, I should not desire to add anything to what has already been said by the Master of the Rolls. Here on the facts it was admitted that no special contract was made with regard to the obligation of the defendant in respect of the dog-cart, and therefore the question which we have to decide is what were the obligations which are to be implied in the circumstances of the case. In my opinion there is no implied contract by the defendant to insure the chattels bailed. The case is one of ordinary bailment for mutual benefit simply, and the duty of the defendant in that case is well settled. The bailee is bound to take reasonable care of the chattel bailed, but he is not liable for loss of or injury to the chattel bailed, unless such loss is caused by his negligence or by the negligence of his servants acting for him. Here the county court judge found that the cart was injured through the negligence of the defendant's servant, but at a time when the servant was not acting as the defendant's servant. Therefore his wrongful act was not one that made his master liable. The defendant himself had not failed in his duty as bailee of the cart, and therefore the plaintiff cannot succeed in getting damages from him in an action based on a contract of bailment.

With regard to what has been said as to the decision in the *Coupé Co.'s case*, in my opinion that decision can only be supported by taking the view on the facts that the servant was acting within the scope of his employment. If and so far as that case determines that a bailee is liable for the acts of his servant in relation to the thing bailed when acting outside the scope of his employment, I must say that, speaking for myself, I do not think that decision could be supported; but, as the Master of the Rolls

has pointed out, we are not called upon to decide that point now.

MATHEW, L.J.—I am of the same opinion. On the facts found the servant here was guilty of an act of conversion. The parties to the contract of bailment did not contemplate that there would be an act of conversion, whether by a burglar or by anyone else. It follows, therefore, that the defendant is not liable for the conversion by his servant, there being no evidence here of any breach of duty on the defendant's part to take reasonable care of the cart so long as it remained in his keeping.

Appeal allowed with costs.

Solicitors for the defendant, *E. A. Fuller*, for *Dickinson, Miller, & Dickinson*, Newcastle-upon-Tyne.

Solicitors for the plaintiff, *Cree & Son*, for *Hugh Burns*, Newcastle-upon-Tyne.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Jan. 13.

NEAGLE *v.* NIXON'S NAVIGATION CO. (LIMITED).
EDWARDS *v.* GUEST, KEEN, & NETTLEFOLDS (LIMITED). (*a.*)

Master and servant—Employers' liability—Accident—Compensation—Medical examination of workman—Refusal to submit to examination by medical referee—Stay of proceedings—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (11).

Where a workman receiving weekly payments under the Workmen's Compensation Act, 1897, *has, on being required by his employer, submitted himself to examination by a medical man provided and paid by the employer, in accordance with clause* 11 *of the first schedule to the Act, it is optional with the workman whether he should submit himself to further examination by one of the medical referees appointed under the Act. His refusal to submit himself to such further examination is no ground for staying proceedings in an arbitration commenced by him under the Act.*

Appeals from decisions under the Workmen's Compensation Act, 1897.

The first appeal was from an order of the judge of the Merthyr Tydvil County Court staying certain proceedings which had been commenced under the Act.

The applicant for compensation was a workman employed by the respondent company at their colliery, who was accidentally injured by a fall of coal in the course of his employment. The accident happened on the 19th of March, 1903, and notice of the accident was served on the employers in due course. Without any proceedings for arbitration being taken under the Act, and without any memorandum of agreement being filed, the employers made weekly payments of compensation to the workman for six weeks, at the end of which time they required him to submit himself to medical examination.

On the 1st of May the workman submitted himself for examination by Dr. Downing, a medical practitioner provided and paid by the employers, in pursuance of clause 11 of the first schedule to the Workmen's Compensation Act.

On the 7th of May the employers wrote to the workman informing him that Dr. Downing reported that he was now quite recovered and able to resume work, and enclosing Dr. Downing's certificate. At the same time they gave him notice that, if he was dissatisfied with the certificate, he might, under clause 11 of the first schedule to the Act, submit himself for examination to one of the medical practitioners appointed by the Secretary of State for the purposes of the Act, and that, if he failed to do so, the weekly payments would be suspended.

The workman refused to submit himself for examination by one of the medical practitioners appointed by the Secretary of State, and thereupon the employers discontinued the weekly payments as from the 1st of May.

On the 11th of July the workman commenced proceedings under the Act by filing a request for arbitration as to the amount of compensation payable to him.

The respondents thereupon gave the applicant notice of motion to stay proceedings, on the ground that, by clause 11 of the first schedule to the Act his right to receive any weekly payment was suspended until he had been examined by one of the medical referees.

Clause 11 is as follows: "Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the second schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place."

The respondents purported to give their notice of motion under rule 50 (1) of the Workmen's Compensation Rules, 1898, which is as follows: "In any case in which an arbitration is proceeding, or an award has been made or a memorandum recorded or a certificate given, and the employer or any person by whom the employer is entitled to be indemnified alleges that the workman who claims or has been awarded compensation refuses to submit himself for examination in accordance with paragraph 3 or paragraph 11 of the first schedule to the Act, or obstructs such examination, such employer or other person may apply to the judge or arbitrator to stay proceedings in the arbitration or to suspend the weekly payments awarded until such examination has taken place."

The county court judge, following the case of *Davidson* v. *Summerlee and Mossend Iron and Steel Co. (Limited)*, 40 Scottish Law Reporter 764, was of opinion that the applicant's right to compensation was suspended so long as he declined to submit himself to official examination. He accordingly granted a stay of proceedings.

The applicant appealed.

S. T. Evans, K.C., Rhys Williams, and *Sankey*, for the applicant.—According to the true construction of clause 11 of the first schedule to the Workmen's Compensation Act, a workman receiving weekly payments is bound, if required by the employer, to submit him-

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

self to be examined by a doctor paid by the employer, or, if he objects to that, then to be examined by one of the medical referees. But when he has been examined by a doctor, paid by the employer, he is not bound to be further examined by a medical referee. Examination by a medical referee is a matter which is entirely at the option of the workman. The words at the end of the clause, "if the workman refuses to submit himself to such examination," do not refer to examination by a medical referee, but mean a refusal by the workman to submit himself to any examination under the clause. The Act itself and the Workmen's Compensation Rules, 1898, show an intention to draw a distinction between a compulsory examination and a voluntary examination. In the case of a compulsory examination the fees and other expenses are paid by the employer, in the case of a voluntary examination the expenses, other than fees paid by the Treasury, are primarily payable by the workman himself: see clauses 3 and 11 of the first schedule, clause 13 of the second schedule, and rules 25 and 33 (4) and (5); see also the rules as to medical referees. The case of *Niddrie and Benhar Coal Co. (Limited)* v. *McKay*, 40 Scottish Law Reporter 798, is in the applicant's favour; as is also the dissenting judgment of Lord Young in *Davidson* v. *Summerlee and Mossend Iron and Steel Co. (Limited)*. The county court judge was wrong in ordering a stay of proceedings.

Haldane, K.C., *Ruegg, K.C.*, and *A. Parsons*, for the employers.—The natural construction of clause 11 is to make the words "such examination" refer to the examination last before mentioned, viz., examination by a medical referee. The county court judge was right in adopting the language used by the Lord Justice Clerk in *Davidson* v. *Summerlee and Mossend Iron and Steel Co. (Limited)*.

The second appeal was from an order of the judge of the Pontypool County Court. The facts were similar to the facts of the first case, but the county court judge refused to stay proceedings.

The employers appealed.

Haldane, K.C., *Ruegg, K.C.*, and *A. Parsons*, for the employers.

Asquith, K.C., and *Sankey*, for the applicant.

COLLINS, M.R.—The question we have to determine lies in a small compass and can be dealt with by a short judgment. A workman was accidentally injured in the course of his employment. By mutual agreement the employers paid him a weekly sum as compensation, and the payment of this weekly sum continued for some time. The employers then, believing that the workman had recovered, required him to submit himself to medical examination by a medical man appointed by them, in accordance with clause 11 of the first schedule to the Workmen's Compensation Act, 1897. He did this, and the medical man made a report to the employers that the workman was practically well. The employers gave the workmen notice of the effect of the report, and discontinued the weekly payments. The workman then instituted proceedings to have compensation assessed by arbitration under the Act, and thereupon the employers moved in the county court, under rule 50 of the Workmen's Compensation Rules, 1898, for a stay of proceedings in the arbitration until the workman had submitted himself to examination by one of the medical referees appointed under the Act. The question is whether it is a condition precedent to the right of the workman to have compensation assessed under the Act that he should submit himself to examination not only by a medical man paid by and acting on behalf of the employers, but also by one of the official medical referees.

This question turns on the construction of clause 11 of the first schedule. I will, in the first place, refer to clause 3, which is as follows: "Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation and any proceeding under this Act in relation to compensation shall be suspended until such examination takes place." That clause refers to the case where an injured workman has not yet received any weekly payment of compensation. Then we come to clause 11, which presupposes that the workman is in receipt of weekly payments, it may be by mere agreement, or in pursuance of a filed memorandum, or under an award. It provides as follows: "Any workman receiving weekly payments under this Act shall, if so required by the employer . . . from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer." That is a compulsory enactment. As it stands, it imposes an obligation on the workman, if so required, to submit himself to examination by a medical man acting for the employer. But then comes a qualification to that obligation. The clause proceeds: "But if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, . . . and the certificate of that medical practitioner as to the condition of the workman shall be given to the employer and workman, and shall be conclusive evidence of that condition." Then we come to what I may call the sanction of the enactment: "If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place."

It was contended on the part of the employers before the county court judge that the words "such examination" ought to be referred to the last antecedent examination—viz., that by the official medical referee—and that, therefore, if the workman after being examined by the employer's medical man refused to submit himself to be examined by the medical referee, then what I have called the sanction took effect and the workman's right to receive any weekly payment was suspended. The county court judge adopted that view, and it is now challenged by the applicant. In my opinion the applicant is clearly right, and there does not seem to me to be any real difficulty in the question. The sanction of the enactment seems to be addressed to a person who has refused something which somebody else had a right to demand of him. The only right referred to in the clause which anyone is entitled to insist on as against the workman is the right to require him to submit himself for examination by a medical man provided and paid for by the employer. Submission to such an examination is the obligation to which the sanction applies. But then a *locus pœnitentiæ* is offered to the workman, an alternative is substituted for the sanction. If he does not like to be examined by the employer's medical man, or if after being examined by him he does not like his report, he is given this *locus pœnitentiæ*, he may go and be examined by one of the medical referees; but, if he chooses to do this, then the decision of the medical referee is to be binding on both parties. The effect of that is, that if the workman adopts the alterna-

tive course instead of submitting himself to be examined by the employer's medical man, he takes the risk of getting a report which will be binding upon him; but it is not compulsory on him to adopt that alternative course. In the present case the workman chose to submit himself to be examined by his employer's medical man. In my opinion, to hold that an examination by a medical referee is an examination the refusal of which would let in the penalty of having all weekly payments suspended, on the ground that "such," being a relative word, must refer to the last antecedent, would be to pay attention to a technical rule of construction rather than give the enactment its natural meaning. But it is not at all necessary to do this. The rule that a relative word refers to the last antecedent is only a guide to construction, and it is not true to say that a relative word need always be referred to the last antecedent. In the construction of this clause "such examination" must refer to an examination which some one had a right to call on the workman to undergo, and therefore it does not refer to an examination by a medical referee. In my opinion that is sufficient to decide these cases. Other parts of the Act and various rules of the Workmen's Compensation Rules have been referred to, and properly referred to, for the purpose of supporting the view which I hold to be the right view; but I do not think it necessary to go into them. The question has been dealt with in two Scotch cases. I agree with the dissenting judgment of Lord Young in *Davidson* v. *Summerlee* and *Mossend Iron and Steel Co. (Limited)*, and with the judgment of Lord M'Laren in *Niddrie and Benhar Coal Co. (Limited)* v. *McKay*. The first appeal must be allowed, and the second appeal dismissed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

First appeal allowed; second appeal dismissed.

Solicitors for the applicant in the first case, *Riddell & Co.*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

Solicitors for the applicant in the second case, *Metcalfe & Sharpe*, for *T. S. Edwards*, Newport, Mon.

Solicitor for the employers in both cases, *H. P. Becher*, for *Simons & Powell*, Pontypridd.

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Dec. 16.

McCABE *v.* JOPLING AND PALMER'S TRAVELLING CRADLE (LIMITED). (*a.*)

Master and servant—Employers' liability—Accident—Compensation—Undertaker—Sub-contractor—Repair of buildings—Sub-contract for supply of scaffolding—Indemnity—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 4.

J., having contracted to paint the outside of a building more than thirty feet in height, entered into a sub-contract with P., whereby P. undertook the supply, fixing, and subsequent removal of certain cradles to be used as scaffolding in the work of painting. A workman in the employment of P. was accidentally killed while engaged in the work of removing the cradles. The dependants of the deceased workman took proceedings under the Workmen's Compensation Act, 1897, *against both J. and P.*

Held, that the applicants were entitled to an award of compensation against J., and that J. was entitled to be indemnified by P.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal from an award of Judge Lumley Smith, K.C., of the City of London Court, in an arbitration under the Workmen's Compensation Act, 1897.

The applicants for compensation were the dependants of Andrew McCabe, a workman who met with his death through an accident arising out of and in the course of his employment.

The respondent Jopling, who was a builder, entered into a contract to paint the outside of two houses, which were more than thirty feet in height, for £159, and for the purpose of carrying out the contract he entered into a sub-contract with the other respondents, Palmer's Travelling Cradle (Limited) (hereinafter called Palmer's Co.), for the supply, fixing, and subsequent removal of four travelling cradles for the sum of £23.

The following is a description of the cradles and of the manner in which they were fixed: On the roofs of the houses were fixed timber structures consisting of jibs 6ft. long lashed with a ledger 22ft. long, and fastened with wire ropes to the building and also to weights of 56lb. Between the jibs was fixed a horizontal wire rope; from this wire rope the cradles, which were about 6ft. long and big enough to hold two men, were suspended. The cradles could be moved laterally by means of guy-ropes and vertically by pulleys and other ropes by the painters using the cradles.

The cradles were fixed and removed by men in the employment of Palmer's Co. The actual work of painting was done by men in the employment of Jopling. The painting work had been completed about a month before the cradles were removed. McCabe was in the employ of Palmer's Co. and took part in the work of removing the cradles. While engaged in lowering one of them from the roof to the street below for the purpose of removing it he fell to the ground and was killed. At the time of the accident there were five men engaged in removing the structures, ropes, and cradles.

The applicants took proceedings under the Workmen's Compensation Act against both Jopling and Palmer's Co. The judge of the City of London Court found that the houses were being repaired by means of a scaffolding, that the removal of the scaffolding was a substantial part of the process of repairing them, that this part had been undertaken by Palmer's Co., and that they were "undertakers" within the meaning of the Act. He made an award of compensation against Jopling as undertaker under section 4 of the Workmen's Compensation Act, and held that Jopling was entitled to be indemnified by Palmer's Co. under the proviso to that section.

Palmer's Co. appealed.

S. T. Evans and *Minton-Senhouse*, for Palmer's Co.—Jopling is not entitled to be indemnified by the company. The undertaking was the painting of a building, which, no doubt, is a work of "repair" within the meaning of section 7 of the Act. The undertaker of that work, within the meaning of that section, was Jopling. The company sub-contracted to supply cradles for the work of painting. But a sub-contractor is only liable to indemnify the undertaker under section 4 of the Act if the sub-contractor would himself have been liable apart from the section—that is to say, if he has undertaken a substantial part of the repair: *Cooper and Crane* v. *Wright*, 51 W. R. 12, [1902] A. C. 302. Supplying cradles for painting a house is not performing part of the work of painting: see *Percival* v. *Garner*, [1900] 2 Q. B. 406. Palmer's Co. did not undertake or carry out any part of the painting of these houses. At any rate they did not undertake or carry out a

substantial part of it. In *Frid* v. *Fenton*, 16 Times L. R. 267, it was held that the construction of a building within the meaning of section 7 was not completed until the scaffolding had been removed. But there the same person who did the work of construction erected and removed the scaffolding.

They also cited *Wagstaff* v. *Perks*, 51 W. R. 210; and *Mason* v. *A. R. Dean* (*Limited*), 48 W. R. 353, [1900] 1 Q. B. 770.

Ruegg, K.C., and *Douglas M. Hogg*, for Jopling.—The work done by Palmer's Co—viz., the supply and erection and subsequent removal of the cradles, was a part, and a substantial part, of the work of painting the houses. The cradles constituted the scaffolding which brought the case within the Act. If Jopling himself had put up a scaffolding and removed it, it is clear that the removal of it would have been part of the work of repair: *Frid* v. *Fenton*. The fact that this was done by a sub-contractor cannot make any difference. The judge has found that this work was a substantial part of the work of repair, and there is ample evidence to support that finding.

Stuart Bevan, for the applicants.

COLLINS, M.R.—It cannot be disputed since the decision in *Cooper and Crane* v. *Wright* that a sub-contractor may be an "undertaker" within the meaning of the Workmen's Compensation Act, 1897. If a sub-contractor is an undertaker, and the contractor who originally undertook the work is compelled to pay compensation under the Act to a workman in the employment of the sub-contractor, it is clear that under section 4 the contractor has a right of indemnity over against the sub-contractor. It was contended that, having regard to the nature of the particular work which Palmer's Co. contracted to do, they were not undertakers. The work which Jopling contracted to do was the painting of two houses. This court has decided that the painting of a building comes within the word "repair" in section 7 of the Act: *Dredge* v. *Conway, Jones, & Co.*, 49 W. R. 518, [1901] 2 K. B. 42. Sub-section 2 of section 7 defines undertakers as meaning in the case of a building "the persons undertaking the construction, repair, or demolition." Jopling therefore was an undertaker, and for the purpose of carrying out the work of repair he made a contract with Palmer's Co., whereby the latter for £23 undertook to provide, fix, and remove cradles to be used in the work of painting. The cradles were hung from the roof by means of poles fixed to the roof, and they could be moved laterally, and could be lowered and raised by means of ropes and pulleys. They were a substantial structure, and were a "scaffolding" within the Act. The painting work having been finished, the cradles remained where they were for some time. Then Palmer's Co., in accordance with their sub-contract, proceeded to remove them, and in the process of removing them the deceased man was killed.

The argument on the part on Palmer's Co. was that the process of removing the cradles and poles was no part of the process of repairing—that is to say, the process of painting—the houses, and that therefore Palmer's Co. were not "undertakers" within the Act, and therefore they were not liable to indemnify Jopling under section 4. It is clear that the deceased man was killed by an accident arising out of and in the course of his employment, and that therefore Jopling had no defence to the claim to compensation under section 4. It would be strange if it could be successfully maintained by the sub-contractor that a workman who was entitled to compensation under the Act from the contractor upon the footing that he was injured by an accident arising out of and in the course of his employment of repairing a building was nevertheless not employed at the time of the accident in the repair of the building at all. Since the decision in the House of Lords *Cooper and Crane* v. *Wright*, it is clear that if the work comes within the Act the liability of the contractor and of the sub-contractor arises. Having regard to modern methods of carrying out work, it is, in my opinion, impossible to say that, where a person contributes to the carrying out of a work of repair as Palmer's Co. did here, that is not part of the work of repair. The work of repair in this case was carried out by means of a scaffolding, and could not have been carried out without it, and this court held in *Frid* v. *Fenton* that in such a case the work of construction or repair was not finished until the scaffolding was removed. The scaffolding, having been fixed there, had to be removed before the work of repair was complete. Can it be said that the fact that Palmer's Co, were sub-contractors prevents the removal of the scaffolding from being part of the work of repair? So far as this is a question of fact, the learned judge in the court below has decided it against Palmer's Co. It is said that it is a question of law, and it is contended that, as the work did not itself involve any part of the actual process of painting, it could not be part of the process of repair. It is, in my opinion, impossible to say that this work of Palmer's Co. was not part of the process of repair when it was something essential to the process of repair, and would, if it had been done by Jopling himself, undoubtedly have been part of that process. It might as well be said that a workman who was employed in keeping steady a ladder upon which a painter was engaged at work was not employed in the process of repair. Putting up, fixing, and removing these cradles formed as much part of the repair of these houses as the actual painting itself.

I desire to add an observation with regard to the argument which has been used to the effect that the work undertaken by the sub-contractor must be a substantial part of the work of construction, repair, or demolition. The word "substantial" does not occur in the Act, and Lord Davey in *Cooper and Crane* v. *Wright* points out that "it is quite immaterial for that purpose what the extent or nature of his employer's contract may be, provided the work on which the injured workman is employed is within the Act." The introduction of the word "substantial" into some of the judgments may have been caused by the last clause of section 4. It may be that "substantial" was used in contradistinction to "ancillary or incidental to." But that distinction has really no place in the discussion here, because the judge has found that the part of the work which was done by Palmer's Co. was a substantial part of the process of repair. I desire to say this in order to guard against the idea that work essential to repair is not part of the repair because it is not a substantial part of it. I think the appeal must be dismissed.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for Palmer's Co., *Wynne-Baxter & Keeble.*

Solicitors for Jopling, *Cooper & Bake.*

Solicitors for the applicants, *Sole, Turner & Knight.*

High Court of Justice.

Chan. Div. } Nov. 24, 25, 30; Dec. 7.
Kekewich, J. }

NORTH AMERICAN LAND AND TIMBER CO. (LIMITED) v. WATKINS. (a.)

Limitations, Statute of—Principal and agent—Fiduciary relation.

A company remitted money to its agent in America to be used in the purchase of lands. The agent bought land and sold it to the company at a profit without disclosing his interest in the transaction.

Held, that an express trust was created, and that the Statute of Limitations was no bar to an action for an account in order to recover the balance of the moneys remitted to him and not applied for the particular purpose.

Burdick *v.* Garrick, 18 *W. R* 387, *L. R.* 2 *Ch. App.* 233; Soar *v.* Ashwell, 42 *W. R.* 165, [1893] 2 *Q. B.* 390, *followed.*

The plaintiff company was an English company registered on the 7th of September, 1882, and formed for the purpose *inter alia* of purchasing, developing, selling, and otherwise dealing with timber and other lands in the United States of America.

The defendant was the promoter of the said company and prepared the first prospectus.

By an oral agreement between the plaintiff company and the defendant the defendant undertook to defray all the preliminary and legal expenses in America, including the conveyance of the land, in return for an allotment of one fully paid-up share for every 100 shares allotted to others.

The plaintiff company appointed the defendant to be its manager and agent in America, and he continued to act in that capacity from the date of its formation down to the 30th of July, 1897.

The defendant proceeded to America on the 14th of September, 1882, and the plaintiff company, on the 8th of March, 1883, sent a power of attorney to the defendant to act as their agent in the purchase and sale of lands and timber.

From time to time during the year 1883 the plaintiff company remitted to him large sums of money, amounting to over £78,000, to be employed by him in payment for the lands so purchased by him as their agent.

The plaintiffs alleged that during the years 1883 and 1884 the defendant as their agent purchased for them with the money remitted to him large tracts of land from the State of Louisiana and the Government of the United States amounting to 878,566 acres.

The defendant represented to the plaintiff company that he had paid therefor 388,113 dollars out of the moneys remitted to him, whereas he had actually paid for the said land only 239,547 dollars, converting to his own use the balance of the plaintiffs' money amounting to 148,566 dollars.

The plaintiff company did not find out that the defendant had made a secret profit of 148,566 dollars out of the business while acting as their agent, until April, 1901.

The plaintiffs claimed to recover from the defendant as moneys had and received by him to their use, and for moneys received by the defendant as trustee for them and retained by him or converted to his own use, or as and by way of secret profits 148,566 dollars, and also an account of all moneys received by the defendant as their trustee or agent in the years 1883 and 1884, and an inquiry as to what balance remained in the defendant's hands after giving him credit for all sums properly expended by him in the purchase of the said lands on behalf of the plaintiff company.

The defendant, by his defence, alleged that the plaintiff company was originally formed with the object of purchasing timber lands in East Texas and West Louisiana, but that when he went to America in September, 1882, he found that the best portions of such timber lands had been already acquired by other parties, and that consequently his position as agent for the plaintiffs was thereby put an end to. The defendant alleged that subsequently he acquired with his own moneys and on his own behalf about 1,200,000 acres of prairie land in Southern Louisiana, and that in March, 1883, the plaintiffs, after having been informed of such purchase, agreed to purchase a portion of such land at a uniform price of 35 cents. per acre. The defendant alleged that at the date of the said purchase he was not the agent or manager of the plaintiffs, and that he stood in no fiduciary relation to them.

The defendant said that he was only appointed the agent of the plaintiff company by the power of attorney dated the 8th of March, 1883, that the lands purchased before that date were purchased by him on his own behalf and out of his own money, and not as agent for the plaintiffs, and that he was entitled to make a profit out of any such transaction, and was not accountable to the plaintiffs in respect thereof. But that as regards any land purchased since the date when he became agent for the plaintiffs, there was no difference in the price paid by the plaintiffs and that at which the land was originally purchased from the vendors. He denied that he made a secret profit, and said that in July, 1884, the plaintiffs were fully informed of the true facts of the case, and that a portion of the lands transferred to the plaintiffs had been bought from the defendant and the prices which he paid for them. In addition to all other defences the defendant relied on the Statute of Limitations as a bar to plaintiffs' claim.

Upjohn, K.C., F. Gore-Browne, K.C., and *Newton Crane*, for the plaintiffs.—Upon the correspondence and evidence it is established that the defendant was the agent of the plaintiff company in the purchase of these lands.

Warrington, K.C, and *Martelli*, for the defendant.—The plaintiffs have not established that defendant was their agent to buy this land, he was acting as promoter, and was in that sense in a fiduciary relationship, and therefore could not sell his own property to the company without clearly disclosing the fact of his interest, and if he did not disclose the fact the company could have rescinded the contract, but they could not have made him account for his profits: *In re Cape Breton Co.*, 33 W. R. 788, L. R. 29 Ch. D. 795. The Statute of Limitations is a complete bar to this action. The matter was thoroughly discussed in the case of *Friend* v. *Young*, 46 W. R. 139, [1897] 2 Ch. 421, where Stirling, J., held that the existence of the fiduciary relation of principal and agent did not prevent the defence of the Statute of Limitations being set up. The present case does not come within *Burdick* v. *Garrick*, 18 W. R. 387, L. R. 5 Ch. App. 233, which was a very special case, depending on the special nature of the power of attorney under which moneys were to be received and invested, and by which a distinct trust was created. In order to apply *Burdick* v. *Garrick* it is necessary to find some fiduciary relation, something qualifying the position of principal and agent.

They also referred to *Watson* v. *Woodman*, 24 W. R.

(a.) Reported by A. C. THOMAS, Esq., Barrister-at-Law.

47, L. R. 20 Eq. 721; *In re Greaves*, 30 W. R. 55, L. R. 18 Ch. D. 551; *In re Tucker*, [1894] 3 Ch. 429; and Buckley on Companies, pp. 661, 662.

Upjohn, K.C., in reply.—The cases draw a broad distinction between one who is a mere agent, who is more in the position of a banker than of any one else, and one who as agent receives money of his principal on a special trust. The present case comes exactly within the decision in *Sheldon* v. *Weldman*, 1 Ch. Cas. 26, where it was held that the fact that the moneys were delivered by the principal to the agent to be applied in a particular manner constituted a trust so as to take the case out of the Statute of Limitations. The leading modern case is *Burdick* v. *Garrick*, L. R. 5 Ch. App. 233, which has been referred to as being a special case, but all that is special about it is that the attorneys were constituted agents to receive money and to apply it in a special manner. Lord Hatherley said (p. 240): "In the present case we have an agent who is entrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner in the purchase of land or stock; and which moneys the factor or agent is bound to keep totally distinct or separate from his own money; and in no way whatever to deal with or make use of them. How a person who is entrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see." This case was followed in *Gray* v. *Bateman*, 21 W. R. 137, and Kay, J., made some important observations on it in *Banner* v. *Berridge*, 29 W. R. 844, 18 Ch. Div. 254. Other cases which show that the Statutes of Limitations do not apply to an action like the present are *In re Bell, Lake* v. *Bell*, 35 W. R. 212, 34 Ch. Div. 462; *In re Sharpe*, 40 W. R. 241, [1892] 1 Ch. 154; and *Soar* v. *Ashwell*, 42 W. R. 165, [1893] 2 Q. B. 390, where the doctrine was very fully considered by Lord Esher, M.R., and Bowen, L.J., whose remarks are exactly in point in the present case. These cases clearly establish that if a person is acting as agent for another, and he receives from his principal a sum of money to be applied for a particular purpose, that money is not his property, but he is a trustee of it, with a duty to keep it separate from his own money, and to apply it in accordance with the principal's instructions. The principle of the decision in *Friend* v. *Young*, which is relied upon by the other side, is that although a factor occupies a fiduciary position, still by virtue of the express enactment of the Mercantile Law Amendment Act he can plead the Statute of Limitations. *Watson* v. *Woodman*, 24 W. R. 47, L. R. 20 Eq. 721, and *In re Hindmarsh*, 8 W. R. 203, 1 Dr. & Sm. 129, are distinguishable from *Burdick* v. *Garrick*, in that in those cases a solicitor received money on behalf of his client, but there were no directions given as to how he was to deal with it, therefore there could not be a distinct trust—it was a mere receipt for the benefit of his principal. In this case the Statute of Limitations does not apply, and the plaintiffs are entitled to succeed.

Warrington, K.C., in reply upon the fresh cases cited.—The distinction between those cases and *Friend* v. *Young* and *Watson* v. *Woodman* is this. If the purpose for which the money is entrusted to or received by the agent is one which involves the expenditure of the whole of it, then he is a trustee; but if, on the other hand, the purpose is one which does not exhaust the whole of it, and he is merely to remit the balance, or the whole of it, as the case may be, to the principal, then the case is within *Friend* v. *Young*, and the balance could be recovered by the common law action for money had and received, to which the Statute of Limitations would apply. The present case comes within the principle of *Friend* v. *Young* and *Watson* v. *Woodman*, and not within the principle of *Burdick* v. *Garrick*.

Dec. 7.—KEKEWICH, J., read the following judgment: The order of the 8th of May, 1903, on its face limits the questions to be decided at the trial, and having regard to the abandonment by the defendant's counsel of most of the points raised by the defence, it really limits those questions to two—viz., first, whether the defendant was the agent of the plaintiffs for the investment of their money in the purchase of prairie lands; and, secondly, whether the plaintiffs' title to an account is barred by the Statute of Limitations. I have no doubt that the agency has been proved. There is no occasion to dwell upon what took place before the incorporation of the company or on the part taken by the defendant in the settlement of the prospectuses. Suffice it to say that the defendant himself suggested investment in prairie instead of in timber lands, and having urged the company to remit him funds for the purposes of such investment, accepted the remittances, when made, for those purposes. It is impossible for him now to say that he was not the agent of the company for the employment of the money remitted to him for the purposes which he had recommended, and in connection with which he accepted the money remitted. It would be a useless expenditure of time and labour to refer again to the correspondence which was necessarily read at considerable length in the opening of the case, or to endeavour to cull out particular passages supporting the conclusion at which I have arrived. The defendant's letters are the letters of an agent reporting to his principal. But I must pause to notice one defence arising on the correspondence which was persisted in until the end of the trial. It is said that the letters themselves disclose the fact that the defendant had acquired the lands which were purchased by the plaintiffs, and that they must have known from those letters that they were acquiring those lands from him as vendor. There are many expressions in many of the letters consistent with the relation of vendor and purchaser, and if the plaintiffs had known, or indeed had otherwise reason to believe that he was acting as principal, they would have been bound to read his letters from that point of view. But an agent cannot be allowed to convert himself into a principal by a possible construction of his language. He must tell the truth plainly, and give his principal the opportunity of determining whether he is still willing to treat with the agent on that footing. Nothing of that kind was done, and the plaintiffs were well justified in reading the defendant's letters as merely written with reference to the relation originally existing between them.

The question arising on the Statute of Limitations is only more difficult because of some authorities which at first sight conflict with others laying down general rules for the guidance of the court in such cases as this. Nothing can be more precise than the language of Lord Hatherley, L.C., and Giffard, L.J., in *Burdick* v. *Garrick*, L. R. 5 Ch. App. 233, and that language must be held to govern this case unless it can be shown that it all depended on the terms of the deed by which the agency was constituted. There is nothing in the judgments to indicate that this was the intention of the learned judges who decided *Burdick* v. *Garrick*, and who expressed their views of the law in general terms; but in *Watson* v. *Woodman*, L. R. 20 Eq., at p. 731, Hall, V.C., distinctly said that in his opinion *Burdick* v. *Garrick* depended on the special nature of

the deed under which moneys were to be received and invested and in *Friend* v. *Young*, [1897] 2 Ch., at p. 432, Stirling, J., quoted that opinion without comment but without disapproval. In *Watson* v. *Woodman*, in the passage already referred to, Hall, V.C., proceeded to quote *In re Hindmarsh*, 1 Dr. & Sm. 129, as an authority that the relation of trustee and *cestui que trust* does not ordinarily exist between solicitor and client, although the solicitor may have received moneys from or for the client, and inasmuch as the case before him was capable of being treated as one of that character, and as not depending on any special trust, I think that he must be taken to mean that *Burdick* v. *Garrick*, where there was a special trust, did not for that reason extend to it. The decision of Stirling, J., in *Friend* v. *Young*, [1897] 2 Ch., may also, I think, be properly understood as referring, not to agency in general, but to the particular relation existing in the case under his consideration—namely, that of merchant and factor. He does not thus limit his decision in words, but he takes some pains to review the legislation respecting merchant and factor as regards the application to it of the Statute of Limitations, and he concludes his judgment on that point by saying that the existence of a fiduciary relation did not prevent the defence of the statute being set up in the case before him. He certainly refers to *Burdick* v. *Garrick* and *Watson* v. *Woodman*, which were not concerned with the relation of merchant and factor, and as already mentioned, he quotes Hall, V.C.'s, criticism of the former case without disapproval, but I venture to think that he would have said more about *Burdick* v. *Garrick* but for the obvious distinction between that case and the one before him, which distinction is explained in the preceding part of his judgment. Of the other authorities cited there is only one which I think it necessary to notice, *Soar* v. *Ashwell*, [1893] 2 Q. B. 390. On this case Stirling, J., in *Friend* v. *Young*, remarked that the "plaintiff's claim was of such a nature as could only be asserted in a Court of Equity," and that this was "pointed out by the Master of the Rolls in the commencement of his judgment." The Master of the Rolls certainly did this, and there are other passages in his judgment which show that he was throughout determining how a Court of Equity would treat that claim; but I cannot think that the Master of the Rolls could have intended to mean more than that the case was one of trustee and *cestui que trust* to be decided according to the principles guiding the court which ordinarily takes cognizance of that relation. In the concluding sentence of his judgment he says that he is clearly convinced by the evidence that the defendant became, on receipt of the money, a trustee of it. I conceive the point of Stirling, J.'s, remark to be that he himself in *Friend* v. *Young* was not dealing with a case of that character, but with one quite different, involving fiduciary relation, but not that of trustee and *cestui que trust*, and which might therefore properly be the subject of a common law action. On the point that the case of *Soar* v. *Ashwell* was one of trustee and *cestui que trust*, and therefore outside the Statute of Limitations, the judgment of Bowen, L.J., is perfectly clear. Like the Master of the Rolls, he relies on *Burdick* v. *Garrick*, but before referring to that case he says (at p. 397): "It has been established beyond doubt by authority binding on this court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express and not merely a constructive trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property which he never has held otherwise than upon this confidence . . . and this confidence or trust imposes on him the liability of an express or direct trustee." These authorities, altogether consistent with others to which I have not thought it worth while here to refer, lead inevitably to the conclusion that in this case an express trust was constituted as between the plaintiffs and the defendant, and that as regards the moneys remitted by the former to the latter for investment the plea of the Statute of Limitations cannot prevail. The plaintiffs are therefore entitled to an account but the precise language in which that account must be directed requires consideration. It may usefully be preceded by a declaration and of course the declaratian and the account must be made to fit one another. The defendant must pay the costs up to and including the trial. The subsequent costs will be reserved.

Solicitors, *Minchin & Co.*; *W. Webb.*

Chan. Div.
Farwell, J. } Jan. 11, 12.

In re KECK'S SETTLED ESTATES. (a.)

Settled land—Tenant for life—Capital money—Improvements—Order of the court—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22, 25, 26, *sub-section* 2 (*iii.*).

A scheme for improvements had been approved by the trustees for the purposes of the Settled Land Acts; the scheme had been carried out by the tenant for life, and capital money was in the hands of the trustees.

Held, that under section 22, *sub-section* (2) (*iii.*) *of the Act of* 1882, *the court should exercise its discretion as to whether the scheme was a provident one before authorizing repayment by the trustees to the tenant for life.*

Adjourned summons.

This was an application by the tenant for life of settled estates asking that the trustees might be directed or authorized to pay to the applicant out of capital money in their hands certain sums in repayment of money paid by him in carrying out an improvement scheme for the development of the estate for building.

The scheme had been approved by the trustees, and the capital money was in their hands and not in court. The tenant for life in remainder objected to the scheme on the ground that it was improvident.

Upjohn, K.C., and *Hewitt*, for the tenant for life, contended that the money being in the hands of the trustees, and the trustees having approved the scheme, the court could only authorize the payment.

Danckwerts, K.C., and *G. Henderson*, for the tenant for life in remainder, contended that the court had discretion, and could refuse to make the order after hearing evidence as to the merits of the scheme.

Jenkins, K.C., and *H. S. Preston*, for the trustees.

FARWELL, J., in giving judgment, said that the question raised by the case was whether it was enough for the tenant for life to come to the court and say "Here is a scheme approved by the trustees, proof that the money has been spent by the tenant for life on the scheme; make an order authorizing repayment by the trustees," on the ground that the court had no power of discretion and no need to be satisfied

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

of the merits of the scheme. While not alleging *mala fides*, the tenant for life in remainder wanted to go into evidence to prove that the scheme was improvident, and that the general drift of the tenant for life's management of the estate was too hasty. If his contention was well founded, he claimed that the affidavits which had been put in were not sufficient, and that the witnesses must go in the box.

The Act of 1882 had given tenants for life larger powers than they had previously possessed. On the other hand, the Act imposed certain restrictions. The tenant for life was not allowed to sell the mansion-house or heirlooms without the order of the court. He had also to have due regard to the interests of all parties, and was in the position of a trustee for the remaindermen. When settled land was sold, what was to be done with the purchase-money? Section 21 provided for that, and one of the modes of application was "in payment for any improvement authorized by this Act," and under section 25 one of the improvements authorized by the Act was the improvement embodied in the present scheme. By section 22 the investment or other application by the trustees of capital money arising under the Act was to be made according to the direction of the tenant for life, but in the case of payment for an improvement authorized by the Act the tenant for life must obtain the approval of the trustees of the settlement or of the court to a scheme for the execution of the improvement. Section 26 provided as follows: "(1) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon. (2) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on (i.) a certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance hereof; or on (ii.) a like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the commissioners, or by the court, which certificate shall be conclusive as aforesaid; or on (iii.) an order of the court directing or authorizing the trustees to so apply a specified portion of the capital money. (3) Where the capital money to be expended is in court, then, after a scheme is approved by the court, the court may, if it thinks fit, on a report or certificate of the commissioners, or of a competent engineer or able practical surveyor approved by the court, or on such other evidence as the court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement."

In this case the money was in the hands of the trustees, and the scheme has been approved by them, so that sub-section 3 had no application. Sub-clauses (i.) and (ii.) of sub-section 2 dealt with matters of fact, and if the trustees complied with one or other of them they got a discharge. But sub-clause (iii.) raised the question which had been argued in the present case. I cannot think that it meant that there should be a mere formal application to the court nor can I resist the conclusion that it had been thought advisable that, though the trustees might have approved of a scheme, it should be competent for some one to bring the matter before the court, and that the court should then exercise its discretion.

What Byrne, J., had said in *Duke of Norfolk* v. *Herries*, 48 W. R. 328, [1900] 1 Ch., at p. 467, threw some light on the question: "The scheme of the Act is to give wide powers for the tenant for life, and to give power of consent to trustees, upon the footing that they will act fairly in the exercise of their respective powers, and that neither trustees nor the court will sanction schemes which are improvident, or which will unduly fetter any discretion which ought to be exercised at a later date, and there is always this safeguard, that tenants for life and trustees joining in improvident schemes, or not acting with due regard to the interests of the remaindermen, are running the risk of the possible establishment of a personal liability against themselves."

The conclusion at which I arrive is that I must be satisfied as to the merits of the scheme, and must have evidence in order to exercise a discretion in the matter.

HIS LORDSHIP, after hearing evidence, decided that the scheme was not an improvident one, but had due regard to the interests of all parties, and he accordingly authorized the payments asked for in the summons.

Solicitors, *Stow, Preston, & Lyttelton*, for *Berridge & Sons*, Leicester; *R. S. Taylor, Son, & Humbert.*

Chan. Div. } Jan. 14, 15, 16, 18, 23.
Buckley, J. }

BRINCKMAN v. MATLEY. (a.)

Foreshore—Public right of bathing—Dedication—Lawful access to the foreshore—Private ownership of foreshore.

Although the public have the right of passage over the sea, including that part of it which is above the foreshore, and have primâ facie *the right of fishery therein, yet when the foreshore is uncovered by the sea the public have not a general common law right to go upon it or to cross it for all purposes, and in particular have not the right to do so for the purpose of bathing therefrom in the sea. Nor does the fact of a person having lawful access to the foreshore give him the right of using it or crossing it for the purpose of bathing in the sea. The public cannot acquire by dedication from the owner of the foreshore the right to wander at will over it and down to the brink of the sea.*

In this case the question arose as to the right of the public to bathe from the foreshore, and in particular to a part of the foreshore in the Isle of Thanet, owned by the Marquis of Conyngham (who was under age), and his trustees, Sir Theodore Henry Brinckman and the Hon. Arthur William de Moleyns.

The part of the foreshore in question lay between ordinary high water-mark and ordinary low water-mark of the sea at a bay or curvature of the coast called Joss Bay, near Broadstairs, and was held by the marquis and his trustees, who were plaintiffs in the action, with the Manor of Minster. These plaintiffs were until recently the owners of a much larger extent of the foreshore, but had sold that which lies between Hackemdown Point (near the

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

North Foreland) and Margate on the one side, and that which lies between Broadstairs and Ramsgate on the other, remaining owners of all that which lies between Hackemdown Point and Broadstairs. In this point of the foreshore lies Joss Bay.

The title of the marquis to this foreshore was derived under a grant by King James in the ninth year of his reign, whereby he granted the Manor of Minster and all lands theretofore overflown with the water of the sea which had been gained from the sea and reduced to dry ground, and lands there overflown with the water of the sea which should thereafter be gained and reduced to dry ground abutting on the manor, and lands subject to the inundation of the sea between the flowing and ebbing of the sea. There were entries in the court rolls of the manor from 1756 onwards in respect of fines for the groundage of vessels on the foreshore, of payments for permission to gather seaweed and sand, and for trespass to gather flints, and for taking up wreckage on the foreshore.

In 1889 the owners obtained injunctions restraining persons from digging shingle from the foreshore.

Joss Bay is approached from the land down a cutting made through the cliffs called Joss Gap. In Joss Gap, between the sides of the cutting, there had stood for many years either a bar between two posts or a single post in the middle of the roadway which could be let down at will so as to allow carts to pass. This post and the bar which succeeded it was locked. Persons on foot, however, could go through by passing either under the bar or between the posts and the cliff, and thus reach the foreshore. For many years down to about fifteen years before the action there were some four or five fishing-boats in the bay, which were owned by fishermen who lived near, and who drew up their boats there. Some carts were taken through the gap by persons to collect seaweed, the accumulation of which was a nuisance, without being interfered with, but not under any claim of right.

The defendant, Frank Robert Matley, was the head master of an elementary school in Poplar, and in July, 1903, he brought 200 boys belonging to the school down to a camp on the cliffs adjoining Joss Bay, with the permission of Mr. Harmsworth, the owner of the land, who also owned Joss Gap, holding as tenant upon the court rolls of a customary freehold of the manor at a quit rent.

Upon the steward of the manor finding that these boys were bathing in Joss Bay, he pointed out to the defendant that they were not entitled to do so as a matter of right.

The defendant, however, claimed that they had the right, and thereupon this action was brought claiming a declaration as to the right to the foreshore, and an injunction to restrain the defendant, his servants, agents, and workmen, from bathing from the foreshore in question, or any part thereof, and from wrongfully entering upon the foreshore for the purpose.

In addition to the marquis and his trustees, A. W. Turner, who had obtained liberty by a deed made in February, 1903, to place bathing machines and tents upon the foreshore, was a plaintiff.

In his defence the defendant alleged that Mr. Harmsworth and persons authorized by him were entitled, by forty years' user, to a right of way from Joss Farm to the foreshore, and a right on the foreshore to bathe in the sea; also, that there was an immemorial custom for the inhabitants of the parish of St. Peter, in which the land was situate, to go on the foreshore for the purpose of bathing, and, in the alternative, that all persons had the right of bathing in the sea adjoining the foreshore at Joss Bay, and for that purpose of going on foot on the foreshore there.

The alleged right by prescription was, however, given up at the trial, and his lordship found on the facts that no such custom as that alleged existed, as also that there had been no such dedication to the public as alleged.

Astbury, K.C., and *L. Mossop*, for the plaintiff.—The public have no general right of going on the foreshore for the purpose of bathing: *Blundell* v. *Catterall*, 5 B. & Ald. 268; *Mace* v. *Philcox*, 12 W. R. 670, 15 Com. Bench N. S. 681. Nor can the public acquire by dedication the right to wander over the foreshore and use it for bathing: *Chapman* v. *Cripps*, 2 Fos. & Fin. 864; *Schwinge* v. *Dowell*, 2 Fos. & Fin. 845; *Maddock* v. *Wallasey Local Board*, 55 L. J. Q. B. 267, 34 W. R. Dig. 80; and *Llandudno Urban District Council* v. *Wood*, 48 W. R. 43, [1899] 2 Ch. 705. There cannot be a highway to private property, as that would not be a *terminus ad quem*, and therefore there cannot be a highway to the foreshore of Joss Bay. Moreover, the courts will not construe acts of friendly indulgence by owners as acts of dedication: *Chamber Colliery Co.* v. *Hopwood*, 32 Ch. D. 549; and *Blount* v. *Layard*, [1891] 2 Ch. 681*n*.

Buckmaster, K.C., and *Sheldon*, for the defendant.—We must admit that *Blundell* v. *Catterall* is binding upon this court. But in that case the owner of the foreshore had a several right of fishery in the sea which is not proved here. *Blundell* v. *Catterall* only decides that the public have not a general right of using the foreshore for bathing. But the defendant here, and the boys with him, had lawful access to the foreshore by Joss Gap, and being able to reach the foreshore lawfully, were entitled to bathe from it. We rely on the observation of Erle, C.J., made during the argument in *Mace* v. *Philcox*, 15 Com. Bench N. S., at p. 611: "If you can lawfully get to the seashore, I apprehend that you may lawfully bathe there." The defendant and the boys also had a right to go by Joss Gap, and to bathe in Joss Bay as members of the public who have acquired that right by ancient usage.

Cur. adv. vult.

Jan. 23.—BUCKLEY, J.—The question I have to try is simply whether the defendant and his boys are as of right entitled to go on the foreshore at Joss Bay, which is the private property of the plaintiffs, and bathe in the sea. The defendant contends that that which he is doing is justified by a common law right, which he says exists, to do the acts complained of. The proposition is put in two ways: First, that there is a common law right to go upon the foreshore, to pass and repass there at will, and further, being there, to bathe in the sea; and secondly, supposing there is not this common law right to go upon the foreshore, and pass and repass thereon at will, that if the defendant shows, as he says he does, that he has in some way a right of access, then, being there in exercise of such right of access, he and his boys are entitled to bathe. I deal with these two in order. As to the first, no facts are wanted beyond that which I have stated—that this foreshore is the private property of the plaintiffs. The defendant contends that he has a common law right to go upon this land, being private property of the plaintiffs, and to bathe therefrom, because it is the foreshore. I propose to state what I understand to be the law as to the right of a member of the public to go on the foreshore of a private owner. By the common law all the King's subjects have in general a right of passage over the sea with vessels for the purposes of navigation and have, *primâ facie*, a common law right of fishery there, and they have the

same rights over that portion of the sea which lies over the foreshore at the times when the foreshore is covered with water. But when the sea recedes and the foreshore becomes dry there is not, as I understand the law, any general common law right in the public to pass over the foreshore. There are certain limited rights, and the fact that such limited rights exist goes to show that there cannot be a general right. For purposes of navigation there exists a common law right to cross the foreshore in case of peril or necessity. For the purpose of exercising the right of fishing it may be that there is—I do not say that there is—a right to cross the foreshore in order to launch a boat. In Broke's Abridgment, tit. Customs, pl. 46, all the judges agreed "that fishermen may justify going on the land adjoining the sea to fish in the sea, for this is for the good of the Commonwealth, affording sustenance to many persons, and is the common law." The right of navigation, it has been said, is for the general benefit of all the kingdom, and the right of fishing tends to the sustenance and beneficial enjoyment of individuals, and for these purposes it would seem that there are special rights to cross the foreshore. But it does not follow, and I think is not the law, that the public have the right to go upon or to cross the foreshore for all purposes. If there be such a general right by common law it must exist on every part of the foreshore; and the result would be that the erection of buildings, wharves, and quays so as to reach the water, the reclamation of additional land from the sea and its conversion to pasturage and tillage, the erection of stakes for nets upon the foreshore, and the digging of sand or stones which might leave dangerous openings in the foreshore, would all be indictable as being interferences with a right of highway over the foreshore. I have endeavoured thus to summarize the reasoning upon which, as it seems to me, in *Blundell* v. *Catterall*, it was, after citation of numerous passages from Lord Hale, *de jure maris*, decided that there is no common law right of going upon the foreshore with a view to bathing therefrom and exercising any supposed common law right of bathing. Holroyd, J. (5 B. & Ald. p. 301), puts the greater part of the matter in a small compass thus: "The public common law rights, too, with respect to the sea, &c., independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea and on the seashore when covered with water; and though, as incident thereto, the public must have the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the seashore, or the land adjoining thereto, except in case of peril or necessity." In *Blundell* v. *Catterall* there was found to be a public right of way along the shore, but, looking at Holroyd, J.'s, judgment at p. 289 of the report, the existence of such highway in no way affected the decision. The point was that the acts committed were committed for other purposes than as a general public highway, and out of the highway, by the latter of which I understand that the public left so much of the foreshore as was a highway and crossed over the part which was not a highway down to the sea and there bathed. *Blundell* v. *Catterall* has been followed in *Mace* v. *Philcox* and *Llandudno Urban District Council* v. *Woods*. It is binding upon me. The defendant before me sought to distinguish *Blundell* v. *Catterall* from the present case by pointing out that the owner of the foreshore there had an exclusive right of fishing; but I cannot see that that fact formed any essential base of the judgment. The judgment seems to me to have been rested upon the general principles which I have endeavoured to state.

I pass to the second point. The defendant says that I ought to infer that the lord of the manor has dedicated to the public, who could reach the foot of Joss Gap, the right to go upon and pass over the foreshore. Thirdly, the defendant says that the tenant of Joss Farm, by unlocking the bar, and other farmers in the district, by going round from Broadstairs, and otherwise approaching the foreshore, have gone with carts and collected seaweed. From these circumstances he seeks to evolve a right in the public to have access to the foreshore, and then argues that, having access to it, they have a common law right to bathe. From none of the circumstances above mentioned can I find any right in the public to a way over the foreshore. As regards Joss Gap, there is no suggestion of a *terminus a quo* and a *terminus ad quem*. What is suggested is a dedication of a right to wander at will anywhere over the foreshore and a right to wander at will in any direction down to the brink of the sea. Such a dedication cannot, I think, be maintained: *Chapman* v. *Cripps*. As a separate and independent consideration altogether, it is, I think, impossible to infer a dedication from the mere fact that the owner of the foreshore has not objected to the public wandering at will over the sand from time to time uncovered by the sea, they doing no harm in so doing. I refer, without reading them at length, to two passages upon this—the one in the judgment of Abbott, C.J., in *Blundell* v. *Catterall* (p. 315), as to wandering at will in all directions over wastes and commons, as to which he says, "No one ever thought that any right existed in favour of this enjoyment," and the other in the judgment of Bowen, L.J., in *Blount* v. *Layard* (the Mapledurham fishing case), where he uses these words: "Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood. I can conceive nothing more unfortunate than that the owners of the right of fishing on large streams should be driven to prevent the successors and followers of Izaac Walton from dropping their lines for trout for fear that their doing so should crystallize into a right. It would be a most unfortunate thing for the public if that should ever happen, and I think that, however continuous, however lengthy the indulgence may have been, a jury ought to be warned against extracting out of it an inference unfavourable to the person who has granted the indulgence." I refer also to *Chamber Colliery Co.* v. *Hopwood*. I think, therefore, that there was no such right of access at Joss Gap as the defendant sets up, and I only add that, if there were, this would only bring the case to *Blundell* v. *Catterall* again, where there was a public right of way along some part of the foreshore. The facts as to the boats are still weaker, and what I have said as to a possible right of access for the purpose of fishing is to be borne in mind. If such a right exists (I do not say it does) it will not help the defendant. The alleged right or claim of access to get seaweed seems to me even further from having any bearing upon the question for decision.

The defendant sought at the outset to defend the case upon other two grounds upon which I will say a word. The first was that he endeavoured to set up against the lord a prescriptive right in Harmsworth of pasing from Joss Gap over the foreshore, and a user by the defendant and his

boys of that prescriptive right by the leave and licence of Harmsworth. This was ultimately abandoned at the bar, for, as soon as it was shown that Harmsworth was a tenant of the manor and had been admitted tenant under services, it was of course impossible to contend that he could prescribe against the lord. Moreover, even if that had not been so, the considerations which I have suggested above as sufficient to defeat any claim of dedication to the public would, I think, defeat also any claim to prescription for an indefinite right to wander at will. The second was that it was attempted to set up a customary right in the inhabitants of the parish of St. Peter's to bathe at Joss Gap. I find that there is no such custom as alleged. The result of all this is that the defendant fails in establishing the right which he sets up. I declare that the plaintiffs, other than Turner, are entitled to the foreshore lying between ordinary high-water mark and ordinary low-water mark in Joss Bay, and I grant an injunction in the terms of paragraph 2 of the claim. The defendant must pay the costs of the action.

Judgment for plaintiffs.

Solicitors, *Saltwell, Tryon, & Saltwell; Lewis & Lewis.*

K. B. Div. (Bigham, J.) March 14.

ELLINGER & CO. AND SCHLESINGER *v.* MUTUAL LIFE INSURANCE CO. OF NEW YORK. (*a.*)

Insurance—Life—Undertaking not to commit suicide—Insurance for benefit of creditor—Executor suing as trustee for creditor.

An application for a policy was expressed to be "the basis and a part of a proposed" insurance contract, and the policy commenced by stating that "in consideration of the application . . . which is hereby made part of this contract," the company would insure the life subject to certain conditions. The application contained the following clause: "I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract," which was signed by the person proposing to have his life insured. During the period of one year the assured committed suicide during a fit of temporary insanity.

Held, that the breach of the undertaking not to commit suicide rendered the policy void. The undertaking was a limitation of the defendants' liability, and not a personal undertaking the breach of which might give the defendants a claim against the estate of the deceased person.

Action tried in the Commercial Court.

This was an action brought upon a policy of life insurance. The plaintiffs Ellinger & Co. were the creditors of one Max Firnberg, deceased. The plaintiff Schlesinger was Firnberg's executor, and sued as trustee for Ellinger & Co.

Firnberg, being indebted to Ellinger & Co., decided to insure his life for their benefit. Accordingly on the 23rd of May, 1902, he signed an application form for a policy with the defendant company.

The application was as follows: "This application made to the Mutual Life Insurance Co. of New York, is the basis and a part of a proposed contract for insurance . . . I hereby agree that all the following statements and answers . . . in continuation of this application are by me warranted to be true, and are offered to the company as a consideration of the contract, which I hereby agree to accept. . . ."

Then followed twenty statements, No. 9 of which was "The full name of the person to whom the insurance is payable is Ellinger & Co., Manchester."

No. 12 was "The insurable interest of the said beneficiary in the life proposed for insurance, other than that of family relationship, is to cover debt."

The application also contained the three following clauses:—

(i.) "I hereby warrant and agree that during the next two years following the date of issue of the contract of insurance for which application is hereby made, I will not travel or reside in any part of the Torrid Zone . . . and will not engage in any of the following extra-hazardous occupations or employments. . . ."

(ii.) "I further warrant and agree that I will not engage in any military or naval service in time of war, during the continuance of the said contract, without first obtaining written permission from this company."

(iii.) "I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract."

The policy, which was dated the 24th of May, 1902, commenced as follows: "In consideration of the application for this policy which is hereby made part of this contract, the Mutual Life Assurance Co. of New York promises to pay . . . unto Ellinger & Co. . . . creditors of Max Firnberg, £4,000 . . . upon acceptance of satisfactory proofs of the death of the said Max Firnberg, provided such death takes place within the term of five years from the date hereof, during the continuance of this policy, upon the following condition and subject to the provisions . . . stated on the back of this policy . . . which are . . . made part hereof."

On the back of the policy was the following provision: "Military and naval service of any kind, the volunteer service of Great Britain and Ireland in the time of peace excepted . . . without permission in writing . . . is prohibited under this contract."

In November, 1902, and not till then, did Firnberg inform Ellinger & Co. of what he had done. On the 19th of February, 1903, Max Firnberg committed suicide in a fit of insanity.

The plaintiffs contended that the defendants were liable to pay upon the policy, that the breach of the undertaking not to commit suicide did not render the policy void. It was an independent promise by Firnberg, the breach of which might give the defendants a claim against the estate of the deceased. The act of suicide during temporary insanitary was merely an accident or misfortune.

The defendants contended that the breach of the undertaking made the policy void.

C. A. Russell, K.C., and *Cababé*, for the plaintiffs.

R. B. Haldane, K.C., and *Rowlatt*, for the defendants.

The following cases were referred to: *Stoneham* v. *Ocean, Railway, and General Accident Insurance Co.*, 35 W. R. 716. 19 Q. B. D. 237; *Hambrough* v. *The Mutual Life Insurance Co. of New York*, 72 L. T. 140; *Fowkes* v. *The Manchester and London Life Assurance and Loan Association*, 11 W. R. 622, 3 B. & S. 917, 32 L. J. Q. B. 153; *Crawley* v. *National Employers' Accident and General Assurance Association*, 1 T. L. Rep. 255, 1 Cababé & Ellis 597; *Llanelly Railway and Dock Co.* v. *London and North-Western Railway Co.*, 21 W. R. 889, L. R. 8 Ch. App. 942; and *Barnard* v. *Faber*, 41 W. R. 193, [1893] 1 Q. B. 340.

Cur. adv. vult.

(*a.*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

BIGHAM, J.—On the 23rd of May, 1902, Max Firnberg signed an application addressed to the defendant company for a policy of insurance for £4,000 for five years on his own life. The material parts of the document are as follows: "This application made to the Mutual Life Insurance Co. of New York is the basis and a part of a proposed contract for insurance. . . . I hereby agree that all the following statements and answers and all those that I make to the company's medical examiner in continuation of this application are by me warranted to be true, and are offered to the company as a consideration of the contract which I hereby agree to accept. . . ." Then follows twenty numbered statements, beginning with name of the applicant. The ninth statement is as follows: "The full name of the person to whom the insurance is payable is *Ellinger & Co., Manchester*." The twelfth statement is as follows: "The insurable interest of the said beneficiary in the life proposed for insurance other than that of family relationship is to *cover debt*." The words in italics are written. After these statements there are three clauses in the following words: "I hereby warrant and agree that during the next two years following the date of issue of the contract of insurance for which application is hereby made I will not travel or reside in any part of the torrid zone, or north of the parallel of 60° north latitude in the Western Hemisphere, or north of the parallel of 70° north latitude in the Eastern Hemisphere, and will not engage in any of the following extra hazardous occupations or employments—retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labour, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad, train, or track, or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the company. I further warrant and agree that I will not engage in any military or naval service in time of war during the continuance of the said contract without first obtaining written permission from this company. I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract." The question in this case is as to the meaning and effect of the last of these three clauses, which refers to suicide. The policy was issued on the 24th of May, 1902. It commences with these words: "In consideration of the application for this policy, which is hereby made a part of this contract the Mutual Life Insurance Co. of New York promises to pay . . . unto Ellinger & Co. . . . creditors of Max Firnberg . . . their successors or assigns, £4,000 . . . upon . . . proofs of the death of the said Max Firnberg provided such death takes place within the term of five years from the date hereof . . . upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof. The half annual premium of £56 16s. 8d. shall be paid in advance on the delivery of this policy and thereafter to the company at its principal agency in Great Britain on the 24th day of November and May in every year during the continuance of this contract until premiums for five full years shall have been duly paid to the said company." A number of provisions are printed on the back of the policy, only one of which need be referred to. It is as follows: "Military and naval service of any kind, the volunteer service of Great Britain and Ireland in time of peace excepted, whether as combatant or non-combatant, without permission in writing, signed by one of the officers of the company, is prohibited under this contract." I have read the different so-called warranties and provisions because the plaintiffs relied upon them as showing in some way that the clause as to suicide was merely intended to operate as an independent promise and not as a limitation of the defendants' liability. It appears that when Firnberg took out this policy he owed money to Ellinger & Co. for some business debt. In November, 1902. Ellinger & Co. were pressing for payment of this debt, and then for the first time Firnberg told them that by way of securing the payment of their debt he had effected this policy. In February, 1903, Firnberg, during a fit of insanity, committed suicide. On the 25th of November, 1903, this action was brought upon the policy against the defendant company, the plaintiffs being Ellinger & Co., the creditors, and Richard Schlesinger, the executor of Firnberg's will, who is described as suing as trustee for Ellinger & Co. Firnberg died insolvent owing Ellinger & Co. £4,000 or more. The plaintiffs contend that the policy must be regarded as having been taken out by Firnberg on their behalf, and that they are therefore entitled to ratify and recover on it, and they say that the clause as to suicide amounts to nothing more than a personal undertaking by Firnberg, for the breach of which the defendants' remedy is limited to a claim against Firnberg's bankrupt estate. On the other hand, the defendants contend that the effect of the clause is to exclude liability on their part if death is due to suicide. I am of opinion that the defendants' contention is the right one. The policy was made by the defendants with Firnberg and with no one else. It is in no sense a contract with Ellinger & Co. Firnberg alone was responsible for the payment of the premiums. Neither subsequent notice to Ellinger & Co. of its existence nor ratification of it by them could alter or affect its original meaning. What, then, did the parties, Firnberg and the defendant company, intend when they inserted the warranty that Firnberg should not commit suicide? I think it is clear that they intended that in the event of suicide the company should not be liable on the policy. It does not matter, I think, whether the clause is called a warranty or not. It constitutes a limitation of the defendants' liability. Death within five years is the event upon the happening of which the defendants were to pay, but death by suicide within the first twelve months is excluded. Apt words have been used to express that intention, and it is, I think, impossible to read the clause as merely giving to the company a cross-claim against the estate of the deceased for damages.

Judgment for the defendants.

Solicitor for plaintiffs, *G. Trenam*, for *Addleshaw & Co.*, Manchester.

Solicitors for defendants, *Freshfields*.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) — Dec. 11, 14.

REX *v.* GILLESPIE AND OTHERS. (*a.*)

Local government—Poor law—Rating—Part payment—Issue of distress warrant for balance—12 & 13 Vict. c. 14.

A ratepayer who was summoned for non-payment of a rate tendered a substantial portion of the rate in court, which tender was refused.

Held, that the magistrate was justified in refusing to issue a distress warrant except for the balance of the rate over and above the amount so tendered.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Rule *nisi* for a *mandamus* to the stipendiary magistrate to issue a distress warrant.

The following facts appeared from the magistrate's affidavit: A complaint by John Kendall, an assistant overseer of the parish of West Ham, that Messrs. Boardman & Sons, being persons duly rated to the poor in a rate made on the 28th of April, 1903, in the sum of £441 8s. 9d. had not paid the said sum, but had refused and neglected to do so. A summons was then issued which was heard on the 22nd of July, 1903.

The assistant overseer produced the book containing the poor rate with the allowance by justices and the non-payment for seven days previous to the summons. He admitted in cross-examination that a tender of £416 had been made by Messrs. Boardman on account of the rate, but it had been returned to them. A similar tender made by Messrs. Boardman in court was refused. The magistrate refused to issue a distress warrant for more than £25 8s. 9d., being the balance of the rate. The magistrate was of opinion that it was contemplated by the statute that the ratepayers might tender and overseers might accept part payment of the rate. It was his duty to ensure payment to the overseers of the full amount of the rate, and he considered he did this by enabling them to take £416 in cash and granting them a distress warrant for £25 8s. 9d.

Robson, K.C. (*Macmorran, K.C.*, and *Artemus Jones* with him), showed cause against the rule.—The Act contemplates that the magistrate should know whether the ratepayer has paid the rate or any part thereof before he issues his distress warrant, and here the ratepayer offered to pay the major portion of the rate. Non-payment of rates being a penal offence, the costs should not be unnecessarily increased against the ratepayer.

Danckwerts, K.C. (*E. Morten* and *Sturges* with him), in support of the rule.—The magistrate in these cases acts ministerially and not judicially. If he has proof that the rate is legal and that the defaulting ratepayer is liable, he must make the order. The rate is a debt, and the overseers as a creditor could say that they would not accept part payment.

He cited *R.* v. *Price*, 5 Q. B. D. 300; *Newbould* v. *Coltman*, 6 Ex. 189; *Southwark Water Co.* v. *Hampton Urban District Council*, 47 W. R. 177, [1899] 1 Q. B. 273; *R.* v. *Handsley*, 30 W. R. 368, 7 Q. B. D. 386; *R.* v. *Blenkinsop*, 40 W. R. 272, [1892] 1 Q. B. 43; *Searles* v. *Sadgrave*, 5 El. & B. 639; and *Dixon* v. *Clark*, 5 C. B. 306.

Lord ALVERSTONE, L.C.J.—I am of opinion this rule must be discharged. The question in this case we have to decide is, whether when an application is made to a magistrate under 12 & 13 Vict. c. 14, and the person against whom the application is made, who must be summoned, and who must be there, says, "Here is a part of the money; you can take it today," whether the magistrate is bound to issue a distress warrant for the whole amount. With the greater part of what has been said by counsel for the overseers I agree, and I also agree that the overseer is not bound to accept less than the full amount of the rate.

It is also the case that in general the duties of a magistrate on such an application are ministerial. The decisions show that where the rate has been legally made, and the magistrate is satisfied that the person summoned is the occupier and has not paid the rate, the grounds upon which he can refuse to issue a distress warrant are very limited. I do not think it necessary to go through those grounds or to give a complete catalogue of them, but I am not aware that there is any decision to justify the view that a magistrate is obliged to issue a distress warrant even if the defendant is prepared then and there to pay the whole amount, nor do I know of any authority which suggests that he must issue a distress warrant for the whole, if the overseers are offered then and there in cash a part of the amount due. I do not think that anyone can read 12 & 13 Vict. c. 14 without coming to the conclusion that the Legislature contemplated process being issued to enforce payment of part of the rate as well as the whole. It contemplates, on the one hand, that there may be an application for a warrant for less than the full amount, and it contemplates on the other that there may be an application for more than the full amount of the particular rate, because it orders the justices, in cases where applicable, to issue a distress warrant for the amount of the rate, and also of all arrears that may be due. It is perfectly true that the Act does not imperatively require the forms in the schedule to be followed, for it says in section 8 that forms to the same or like effect shall be sufficient in law, but still the wording of the forms in the schedule shows that it was intended that the Act might be put in force for the recovery of a part of the rate only. It has been urged upon us by counsel that the cases in which distress warrants have been issued for less than the full amount are all cases in which they have been so issued at the request of the overseers. That is probably true; but I think that, according to the principles of justice, seeing that the statute contemplates process going for a part of the rate when the magistrate is satisfied that a part of the money claimed is to be had in court for the asking, and the process of the court is only required to enforce payment of the balance, he has a right to refuse to issue his distress warrant for more than the balance. To hold otherwise would be to throw upon the recalcitrant ratepayer larger costs than is necessary, because the parties levying would be entitled to recover larger fees in respect of the larger amount.

LAWRANCE, J.—I agree.

KENNEDY, J.—I am of the same opinion. The question is whether we are by this procedure in *mandamus* to compel a magistrate to issue a distress warrant in respect of the whole of a rate when on the hearing of the summons an actual tender of a large portion is made there and then in court before him. *Primâ facie* that would seem to be an unlikely course for the law to be compelled to sanction. Though it would involve no gain to the overseers, it would involve considerably greater cost to the ratepayer. And I see nothing in any previous decision which compels the court to hold that the *mandamus* ought to go. A ratepayer must, of course, pay the rate as ordered by law, and a magistrate, before whom the ratepayer is brought for non-payment of the rate, in issuing a distress warrant acts ministerally and not judicially, in this sense—that if it is a valid rate, and the ratepayer is in visible occupation of the property rated, the magistrate cannot go into any question except that of the rate being due and unpaid. In that sense his office is ministerial. But then arises the question, Is the magistrate, while accepting the amount of the rate as the amount for which he must put in force his powers under the Act, bound to disregard the fact that the person sought to be charged with the full amount offers to the overseers in court before him a less sum in part payment? I know of no authority obliging me to come to such a conclusion, and on the face of it, it seems most unreasonable to my mind. The cases cited by Mr. Danckwerts as to tender of a portion of the entire debt are beside the question, for no one suggests that

any previous tender by a ratepeyer of a part of the debt would better his position. The magistrate is not there to try the question as to whether there has been a valid tender of the whole or part. But here the ratepayer actually offers cash in part payment in court, and what the magistrate has to look to is the amount which is actually unpaid. It could hardly be contended that if the ratepayer, having previously to the hearing refused to pay the rate, were to tender the whole amount of the rate in court, the overseers would be entitled to refuse the money and insist upon the distress warrant being issued. No doubt it might be the magistrate's duty to order the ratepayer in such a case to pay the costs incurred up to that point; it is quite another thing to say that he is bound to inflict upon him the heavier costs which the issue of a distress warrant would entail. While it is not the function of a magistrate to consider previous tenders, it seems to me that it would not be right to compel him to issue his warrant for the whole amount of a rate when either the whole or a part of it is actually offered in court before him.

Rule discharged.

Solicitors for overseers, *Hillearys.*

Solicitors for the respondents, *Lloyd-George, Roberts & Co.*

House of Lords.

From C. A. (England). Nov. 13.

LAWRENCE & BULLEN *v.* AFLALO AND COOK. (*a.*)

Copyright — Literary copyright — Encyclopædia — Separate articles—Writer and publisher—Ownership of copyright—Separate publication—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 18.

Where an author agrees with publishers to write for payment certain articles for an encyclopædia to be published and paid for by them, and the articles are published and paid for, then, there being no express agreement as to copyright, or evidence to the contrary, the natural and true inference of fact is that the copyright in the contributed articles belongs to the publishers.

Sweet v. Benning, 3 *W. R.* 519, 16 *C. B.* 459; Lamb *v.* Evans, 41 *W. R.* 405, [1893] 1 *Ch.* 218, *approved.*

Decision of Court of Appeal (51 *W. R.* 360, [1903] 1 *Ch.* 318) *reversed.*

This was an appeal from an order of the Court of Appeal (Romer and Stirling, L.JJ., Vaughan Williams, L.J., dissenting) (51 W. R. 360, [1903] 1 Ch. 318), affirming a decision of Joyce, J. (50 W. R. 24, [1902] 1 Ch. 264).

In the year 1896 the respondent Aflalo submitted to the appellants, who are a firm of publishers, a scheme for the publication of a work to be called the Encyclopædia of Sport, with a view to their undertaking the publishing of it. The work was to consist of articles by well-known writers on various branches of sport. The appellants acquiesced, and by an agreement in writing dated the 10th of July, 1896, agreed to bear all the costs of publication, and to pay to Aflalo a fee of £500 for his editorial services, and he agreed to write, without further fee, seven thousand words of the special articles, and to contribute all the unsigned articles that might be required.

The encyclopædia was published in a series of parts, and was ultimately completed, under the part editorship of Aflalo, in 1899, and afterwards published in two volumes. The total cost of the producing of the encyclopædia to the publishers was about £19,000.

Aflalo contributed a signed article entitled "Sea Fishing," and a number of unsigned articles, and was duly paid by the defendants the agreed sum of £500. The respondent Cook agreed to write certain articles on specified terms and contributed three articles, entitled respectively "Coarse Fish," "Trout," and "Pike," and was paid for the same by the appellants at the agreed rate. Neither of the agreements contained any express stipulation as to the proprietorship of or copyright in any of the articles so contributed by them, and the respondents did not publish any of their articles separately or otherwise.

On the 27th of November, 1900, being the day before the issue of the writ in this action, the respondents respectively registered themselves in the book of registry as proprietors of the copyright in the four above-mentioned articles, all of which were published in the encyclopædia.

Early in 1900 the respondents published a book called the Young Sportsman, containing copies of each of these articles. This book was an abridged edition of the Encyclopædia of Sport. Subsequently the appellants called upon the respondents to discontinue the further sale and publication of this book, and to compensate them for the alleged infringement of their copyright; and upon their refusal to do so brought this action.

Joyce, J., decided in favour of the respondents, and this was upheld by a majority of Court of Appeal.

By section 2 of the Copyright Act, 1842, the word "book" is to mean and include "every volume, part or division of a volume, pamphlet," &c., "separately published." Section 3 enacts that the copyright in every "book" shall be the property of the author and his assigns. Section 18 enacts that when the proprietor of "any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts" shall employ persons to compose the same, or any volumes, parts, essays, or portions thereof for publication in or as part of the same," and such work, volumes, &c., shall be composed under such employment, "on the terms that the copyright therein shall belong to such proprietor, . . . and paid for" by him, the copyright in such work "and in every volume, part, essay, article, and portion so composed and paid for shall be the property of such proprietor, . . . who shall enjoy the same rights as if he were the actual author thereof."

Haldane, K.C., and *Younger, K.C.* (*T. L. Gilmour* with them), for the appellants.—*Sweet* v. *Benning*, 3 W. R. 519, 16 C. B. 459, which was approved by the Court of Appeal in *Lamb* v. *Evans*, 41 W. R. 405, [1893] 1 Ch. 218, decided that no writing is necessary under section 18 of the Copyright Act, 1842, for the assignment of copyright. When such articles are written and paid for, the reasonable inference is that they are bought out and out.

Hughes, K.C., and *Scrutton, K.C.* (*R. J. Parker* with them), for the respondents.

Earl of HALSBURY, L.C.—If I had not come to the conclusion that this case was covered by authority, I should have desired further time to consider the mode in which I should express the views I entertain.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

I think it is impossible, after the decision arrived at just about half a century ago in *Sweet* v. *Benning* upon this very point, confirmed as it is by the decision of the Court of Appeal in *Lamb* v. *Evans*, to doubt what the decision on this appeal ought to be. There may be a distinction between the inference of fact that would be drawn in different cases. As I have said more than once during the argument, it is not a question of law: it is a question of fact to be derived from all the circumstances of the case, what is the nature of the contract entered into between the parties.

I thought we had arrived at some sort of concurrence by the learned counsel in the course of the argument that, on the construction of this section 18 of the Copyright Act, 1842, there were, at all events, two propositions that could not be disputed. The first was that the bargain between the parties involving this question of copyright need not be in writing: as to that, I understand there is no dispute now, that it need not be in writing; secondly, that no express words were necessary in order to constitute the contract contemplated by the statute. One of the learned counsel has, I think, repudiated agreement with that proposition; the other, I think, without prejudice to his learned leader's argument, is disposed to concede it. But whether they are in agreement or not, I can entertain no doubt that this, like a great many other things in law, is one of those inferences which you are entitled to draw, but for which you can lay down no abstract rule. That which may be implied in a contract must depend very much on what the nature of the contract is, and whether or not the written contract displaces every other term whatsoever; because, in the infinite variety of dealings among mankind, there are some things which no one would think of expressing in terms, although undoubtedly they would form part of any contract made on such a subject. Although the decision in *Sweet* v. *Benning* is open to review in this House—in the sense that we are not estopped from considering it, as we should be by a decision of our own House—yet, where a state of law has been recognized for half a century and confirmed by the Court of Appeal, it would be, I think, a startling novelty for your lordships to treat that as *res integra* which we should determine for ourselves without reference to previous decisions. I should feel great hesitation in disagreeing with any proposition that had been laid down by such a court, presided over by such judges as those who decided *Sweet* v. *Benning*. I doubt very much whether in the whole history of English law it would be possible to find a collection of learned judges of keener intellect and more profound learning than those who decided that case—Jervis, C.J., Maule, J., and Cresswell, J. Speaking for myself, and remembering the sort of reputation those learned judges had when I was practising at the bar, and the authority given to their decisions, he would have been a very bold man indeed who, when those three judges agreed—not to mention Crowther, J.—would have ventured to question the authority of a decision of theirs. And that decision was approved by Lindley, Bowen, and Kay, L.JJ., in *Lamb* v. *Evans*.

The judges in *Sweet* v. *Benning* were unanimous in their decision that you could infer from the facts that the copyright was intended to belong to the publisher, though there was no express contract on the point. People do not spend money except upon the hypothesis that they will get something for it, and unless you give to the bargain the effect which the language itself seems to import, that the person who is the projector, the publisher, and who is called "the proprietor," is to stand in the shoes of the actual author, he would get nothing for his money; the whole object of his publication might be defeated the very next day by the same person to whom he had paid the money. It seems to me it would be a most unreasonable inference to draw from the facts in proof in this case if I were not to suppose that the person who paid the money and incurred the risk—I think to the extent of £19,000—was not to have the complete right such as the original author would have had, if the matter were not published in this way, to publish it himself. Therefore I think the judgment of the Court of Appeal ought to be reversed.

Upon the other question—the meaning of the words "separately published"—I have not actually formed any opinion. It seems to me to involve a considerable amount of doubt and difficulty, and I propose to leave that question, because it is not necessary to decide it for the purposes of the present case. I move that the judgment be reversed.

Lord SHAND.—As the House has resolved that there shall be no decision given on the question which has been raised under section 2 of the statute as to the effect of the words "separately published," I shall say no more than that I am certainly not prepared, from the arguments we have heard, to agree with Vaughan Williams, L.J., in what he alone has said on that subject.

With reference to the case otherwise, I agree with what has fallen from the Lord Chancellor. I quite agree with what was decided in *Sweet* v. *Benning*; and if this question had now come up for the first time I should have been disposed to agree entirely in the general view taken by Vaughan Williams, L.J., upon it. Looking at all the circumstances in the present case, it appears to me that the articles are contributed on the footing that on payment under such employment they shall become the property of the publisher.

On these grounds, I am of opinion that the decision of the Court of Appeal should be reversed.

Lord DAVEY.—I am of the same opinion. If this matter could be regarded as *res integra*, I think there would be a great deal to be said upon the construction of section 18—that it was for the publisher to prove an agreement that the author was employed upon the actual terms that the copyright should belong to the publisher. But any such proposition as that would be inconsistent with the law as laid down in *Sweet* v. *Benning*, and the more recent case of *Lamb* v. *Evans*.

The law which I understand to be laid down in *Sweet* v. *Benning* is that it is not necessary, according to the true construction of section 18 of the Copyright Act, 1842, that you should find an actual agreement that the copyright should belong to the proprietor; nor, indeed, is it even necessary to find special circumstances which lead to that conclusion. In *Sweet* v. *Benning*, the special case upon which the opinion of the Common Pleas was delivered contained a statement that nothing was said between the parties affecting copyright. I can find no special circumstances stated in the special case, and the decision seems to me to have been founded only upon the nature of the employment, the nature of the publication, and the relation of the parties. Joyce, J., says in his judgment in the present case, "I decide this case on the short ground that I see no special circumstance either in the nature of the work or in the terms or in the nature of the employment, from which I must infer that which is not expressed — namely, that the copyright is to belong to the publishers." That being so, he says in another passage that the consequence would not be different from what it would be in an ordinary case. I do not think that that decision was consistent with *Sweet* v. *Benning* or *Lamb* v. *Evans*. I think that what the court has to do is to look at all the circumstances of the case, and to say as

a jury what is the inference which you would draw—or, as Bowen, L.J., puts it in his judgment in *Lamb* v. *Evans*, what is the way in which business men would look at the question.

The circumstances here are that the publisher is minded for his own profit to publish an encyclopedia of sport; he is prepared to spend, and he does spend, a very large sum of money, amounting to some thousands of pounds, upon the enterprize in which he is engaged; he employs a gentleman to act as editor and also to write some of the articles at a given salary, and through the editor he employs another gentleman to write articles for a given remuneration. Those are all the material facts of the case; and I have to ask myself what is the inference that I draw from those facts. That, I repeat, is a matter of fact, not a matter of law. No doubt one may gain some assistance from the way in which a similar set of facts have been regarded in other cases; but, after all, where it is a question of fact each case must stand upon its own merits. If I were to express my opinion as a juryman upon the facts I have mentioned, I should say that it was one of the terms on which these gentlemen were employed to write articles for the encyclopedia that the copyright should belong to the proprietor; and I say so for this reason: The encyclopedia was to be his property, it was to be his book, he was to derive the benefit and profit to be derived from its publication; and therefore I should assume that, in buying the articles written by these gentlemen, the inference is that both parties intended that the proprietor should have the right that was necessary for him adequately to protect the property which he had purchased, and the enterprize for the purpose of which these articles were intended to be used. In my judgment, he could not adequately protect the articles which he had purchased, or his property in the book for the purpose of which the articles were written and purchased, without having the right to prevent an invasion of the copyright in those articles. Therefore the inference I should draw would be the same as was drawn in *Sweet* v. *Benning* and *Lamb* v. *Evans*; and I am prepared to adopt every word of the judgments of Bowen, L.J., and of Kay, L.J., as well as the judgments in the earlier case. I will read one passage from the judgment of Kay, L.J.: "What is the fair inference from the facts of the case? Surely the inference is that the man who is to go to the expense of printing and publishing this book will, as between him and the agents he may have employed to assist him in the compilation of it, have in himself whatever property the law will give him in that book. That is the inference I should certainly draw; and, I think, in this case it is sufficiently clear, in the absence of evidence to the contrary, that the terms of employment of those several agents involved this, that the copyright in the portions of this book which they composed should belong to the owner of the book."

With regard to the other question—the construction of the words "separately published" in section 2 of the Copyright Act, 1842—I will only say that I think it is a question of some difficulty, and it is one which it is not necessary to deal with for the decision of this case, and therefore I shall not express any opinion upon it.

Lord ROBERTSON.—In my opinion this case ought to have been decided on the authority of *Sweet* v. *Benning* and *Lamb* v. *Evans*, as furnishing a principle applicable to the facts of the present case.

I do not think that the conclusion which I support is accurately described as inferring one of three statutory requirements from the existence of two. Whether that inference be legitimate or not must depend on the nature and the conditions of the employment; and the cases to which I refer do nothing to take the question out of the region of fact. But it is obvious that the facts of employment and of payment stand in a different category from the terms on which employment and payment take place, those terms being necessarily an element or ingredient in the employment and not a separate or independent fact. Accordingly, the view of the two lords justices about the three conditions all requiring, by the structure of the section, to be proved, really means that an express agreement about copyright must be proved or the writer retains the copyright. Unable as I am to accept this view, which is opposed to the decision in *Sweet* v. *Benning*, and indeed was not supported by counsel for the respondents, I am free to consider what is *primâ facie* the proper inference; and I prefer, on its merits and also from its authority, the inference of *Sweet* v. *Benning*.

I desire to say that I do not proceed at all on the argument of the words "separately published," which was raised at a late stage in the Court of Appeal and was apparently adopted by Vaughan Williams, L.J.

Appeal allowed.

Solicitors for the appellants, *Elkin & Henriques.*

Solicitors for the respondents, *Field, Emery, Roscoe, & Medley.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Feb. 12.

In re SUSSEX BRICK CO. (LIMITED). (*a.*)

Company—Winding up—Shares—Transfer—Registration—Special resolution for reconstruction before registration of transfer—Delay of company—Application for registration nunc pro tunc—*Notice of dissent from resolution—Liquidation proceedings—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 98, 131, 161, *and* 162.

Two transferees of two sets of fully paid-up shares in a company, transferred at different times, repeatedly applied to the secretary that they should be registered. The secretary replied that these transfers would be submitted at the next meeting of the company. Before these shares were registered in the names of the transferees, however, the company was voluntarily wound up, and a special resolution for reconstruction passed. The transferees thereupon sent in notices of dissent to the resolution, under section 161 *of the Companies Act,* 1862; *and as the liquidator refused to register their names, applied to have these transfers registered* nunc pro tunc, *and the certificates sent them.*

Held, that, as unnecessary delay had taken place, the court had power under section 35 *of the Companies Act,* 1862, *even after liquidation to make an order* nunc pro tunc, *if it did not work injustice to anyone, but such order was not* ex debito justitiæ, *but only at the discretion of the court.*

Judgment of Buckley, J., *varied.*

In re Joint Stock Discount Co., Nation's case, 15 *W. R.* 143, *L. R.* 3 *Eq.* 77, *discussed and followed.*

This was an appeal by the plaintiffs from part of an order by Buckley, J., and a cross-appeal by the defendant.

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

The facts were as follows:

G. B. Brown and D. G. H. Pollock, the applicants, on the 16th of January, 1901, had transferred to them 5,000 fully paid-up shares in the Sussex Brick Co.; this transfer was not at the time registered, but on the 3rd of March a further transfer of 17,234 shares was made to them. On the 12th of March the old certificates and transfer of these last shares, viz., 17,000 odd, were sent to the company, and the secretary in sending a receipt said it would be laid before the board, and the new certificate sent in due course. On the 27th of March, the transfer of the earlier shares, viz., the 5,000, was sent in, with a postal order, and at the same time a request that the certificate for the 17,000 might be sent back. On the 1st of April the secretary replied, saying that the books were closed until after the meeting (either of the board or of the company). On the 4th of April the applicants again applied for the certificates, and on the same day they received a letter from the secretary, saying that the transfer of the 5,000 shares had been duly received, and a certificate would be sent. Later, on the 6th of April, the applicants again pressed for the certificates. Meanwhile, on the 2nd of April, a resolution had been passed for the voluntary winding-up of the company, and on the 20th of April this resolution was confirmed, and a determination to reconstruct the company agreed on. The purpose was reconstruction, but the resolution was for a sale under section 161 of the Companies Act, 1862 (25 & 26 Vict. c. 89). On the 25th of April, Brown and Pollock gave notice of their dissent, within the seven days prescribed by section 161, as they considered that they had done everything that was necessary to get themselves registered. The liquidator said he could not accept them as being registered shareholders, and as the directors had no power to register they could not be registered. The terms of the resolution of the 2nd of April, confirmed on the 20th, were: "That, it being desirable to reconstruct the company, the company be wound up; and that F. A. Rawlings be and he is hereby appointed liquidator. That a new company having the name of the 'Sussex Brick and Estates Co. (Limited)' or other suitable name be formed . . . for the purposes *inter alia* of acquiring the properties, assets, and undertaking of this company. That the liquidator be and is hereby authorized, pursuant to section 161 of the Companies Act, 1862, to enter into and carry into effect, with such modification (if any) as he shall approve, an agreement for the sale and transfer of the properties, assets, and undertaking of this company to the said new company, a draft whereof is submitted to this meeting."

On the refusal of the liquidator to register their names, as they were not already on the register of members, the applicants, as transferees, applied by originating summons to have the transfers registered *nunc pro tunc*, by inserting their names as members, as joint holders of the shares. The application asked that the registration might date as from the date when the shares ought to have been registered—viz., as to the said 17,254 shares from the said 20th of March, 1903, and as to the said 5,000 shares as from the 4th of April, 1903.

Buckley, J., ordered that the register of members of the Sussex Brick Co. be rectified by registering therein the two transfers; but refused to date back the registrations to the 20th of March and the 4th of April respectively. As this was not all that was asked for, the plaintiffs appealed.

There was a cross-appeal by the respondent liquidator that the whole of Buckley, J.'s, order should be reversed.

Muir Mackenzie, for the appellant plaintiffs.—Where the register is rectified for undue delay, and if not rectified would render the person liable as a member, the court will date back the registration: *In re Joint Stock Discount Co., Nation's case*, 15 W. R. 143, L. R. 3 Eq. 77. Here the plaintiffs are entitled to have the registration dated back, because on the 4th of April and the 21st of March respectively they were entitled to be members of the company. [VAUGHAN WILLIAMS, L.J.—The 35th section provides for rectification, not only where a wrong name is on the register, but where there has been unnecessary delay.] This order of Buckley, J., ought to be varied.

He referred to sections 161 and 162 of the Companies Act, 1862 (25 & 26 Vict. c. 89).

Gore-Browne, K.C., and *J. E. Harman*, for the defendant, the liquidator.—*Nation's case* was decided under section 98 of the Companies Act, which links together for this purpose the settling of the list of contributories and the rectifying of the register. [VAUGHAN WILLIAMS, L.J.—Buckley, J., in his book says *Nation's case* was decided under section 35; section 98 is not mentioned once in the case.] If that is so, the only remedy for the plaintiffs is under section 35, and perhaps damages. Section 35 is preserved in section 98. Up to liquidation the governing document is the document of registration, after liquidation it is the list of contributories. The object of the scheme of reconstruction is to find out how to carry on the business. If application is made under section 35 it entitles a man only to have the registration rectified.

They referred to *In re National Bank of Wales* (*Taylor, Phillips*, and *Rickard cases*), 45 W. R. 401, [1897] 1 Ch. 298.

Muir Mackenzie replied.

VAUGHAN WILLIAMS, L.J.—I think that the plaintiffs' appeal must be allowed. I propose to deal with this case as a case in which there has been an unfortunate accident, which resulted in very unnecessary delay in the putting of the names of the applicants Brown and Pollock upon the register. If one looks at section 35 of the Act of 1862, it says: "If the name of any person is without sufficient cause entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company or the company itself, may, as respects companies registered in England or Ireland, by motion in any of his Majesty's superior courts of law or equity . . . or in such other manner as the said courts may direct, apply for an order of the court that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained." Now, in this case there can be no doubt that the names of these gentlemen ought to have been on the register at an earlier time, and, so far as this case is concerned, at a date earlier than the time of the holding of the meetings with regard to the reconstruction of this company. Now, under these circumstances, if one looks at *Nation's case*, 15 W. R. 143, 3 Eq. 77, and sees what is said there, there can be no doubt that that case is an authority for the proposition that where it is right that an order for rectification should be made (and Lord Romilly draws no distinction between whether there is an order for rectification by

taking the name off or by putting a name on to the register), the court may make an order not only that the right name shall be put on or taken off the register, as the case may be, but that the register shall be treated as if the name had been on or off the register, when it ought to have been on or off the register.

Now what is suggested is this. It is said, on behalf of the liquidator, "It is quite true that may be done in the exercise of the power given by section 35 of the Act," but really the power which was actually exercised by Lord Romilly was a power exercised in respect of a list of contributories; and after the commencement of liquidation the only power under which the register can be rectified is under the 98th section, and you are no longer acting under the 35th section. The 98th section says, "As soon as may be after making an order for winding up the company the court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities." It is said that after the liquidation, rectification is really under section 98, and that under these circumstances this rectification ought not to be made *nunc pro tunc*. On that point there is the case of *In re The Scottish Universal Finance Bank* (*Buckridge's case*), 13 W. R. 677, 2 H. & M. 642 (Wood, V.C.). Really, when one looks at it, this particular point was raised there. Mr. Morris in argument says, "The 98th section of the Act is a positive direction as to the course which is to be pursued. The court is to settle a list of contributories, with power to rectify the register, so far as may be necessary." When the learned Vice-Chancellor came to give judgment, what he says is this, at p. 645: "It is said in opposition to the motion, that it is irregular after a winding-up order has been made, because the whole matter is then in the hands of the court, and I am referred to the 98th section of the Act to show that the rectification of the register is, after such an order, a matter merely auxiliary to the settlement of the list of contributories. But there is nothing in that section to prohibit the court from acting in respect of the share register of the company, in any manner in which it might have acted had that section not existed, and I cannot therefore hold that the hands of the court are in any manner tied by that section." Really that decision of Wood, V.C., seems to me to be exactly in point, and to negative the argument which counsel for the respondent liquidator has submitted to us. I see really that that view is taken by Buckley, J., in the last edition of his book (Buckley on the Companies Acts (8th ed., 1902), at p. 322), in which he cites several other authorities besides *Buckridge's case*, which I have just referred to, and although I have not looked at them, I have no doubt that those other authorities cited by him bear out the same proposition. Buckley, J., says: "After a winding-up order has been made, the power of rectification given to the court by section 35 is not cut down and reduced to a mere power of rectification in the settling of the list of the contributories. It is open to a contributory after the order has been made, and before the list of contributories has been settled, to move for rectification under this section and the 35th section." I have only to add this, that I do not mean for a moment to suggest that anyone is entitled to such an order *ex debito justitiæ*; it is a matter in the discretion of the judge, and there might be cases in which the learned judge might refuse to make an order in favour of the applicant if he thought it would work injustice in respect of other people. If I thought here that it would work injustice to other people, and especially if I thought it would work injustice to persons who are not in any way bound to bear the mistakes of the company, I should carefully consider before I made any order. But in the present case there is no suggestion of any such state of things at all. The suggestions that have been made are that if we make this order we shall invalidate the resolution, because the meeting will not have been properly called, and a variety of other suggestions of that sort, which were dealt with in the course of the argument. As the matter stands we can do justice and prevent any wrong accruing to the applicants Brown and Pollock without doing injustice to anyone else.

STIRLING, L.J.—I am of the same opinion. The first objection raised in this case to the exercise of the jurisdiction, which is conferred on the court by section 35 of the Companies Act, 1862, is that the court is deprived of the power of exercising that jurisdiction, except for the purpose of settling the list of contributories. That objection is based on the wording of section 98. It is said that the power, therefore, of rectification which is derived under section 35 is confined to the settlement of the list of contributories. I think that is entirely contrary to previous decisions. There is not only the case to which Vaughan Williams, L.J., has referred—namely, *Buckridge's case*, but I observe in looking at another case which is cited in Buckley, J.'s, book, *Reese River Mining Co.* v. *Smith*, L. R. 4 H. L. 64, at p. 80, there is the high authority of Lord Cairns for the proposition which was laid down by Sir W. Page-Wood in *Buckridge's case*. Lord Cairns says: "Notwithstanding the winding up, the court, under section 98, is to rectify the register of members in all cases where such rectification is required in pursuance of the Act—that is to say, at all events, in those cases pointed out by section 35." Now, the present case falls within the 35th section because, as the learned judge has found, and the finding of fact is really not disputed, in the language of the Act, "unnecessary delay has taken place in the entering on the register the fact of a person having ceased to be a member of the company," and he has also found that the names of the applicants, Brown and Pollock, have been omitted without sufficient cause from the register. That being so, the jurisdiction to make such an order as Buckley, J., has made exists, and the order therefore must be sustained as far as it goes. But then it is said the present appeal, which was opened on behalf of the plaintiffs, seeks to fix the date at which the change on the register is to be operative. Now, it is contended that the court, under section 35, has no power to do that. There again it seems to me we have the guidance of authority as old as the decision of Lord Romilly, M.R., in *Nation's case*, which was given in the year 1866. That order was made by the Master of the Rolls, no doubt, having regard to section 98, in the exercise of the powers conferred by section 35. It is therefore an authority that in a proper case the court has power to fix a date at which the change in the register is to be made.

But then after that there comes, no doubt, a serious question. The application of the appellants is in substance that the registration be made *nunc pro tunc*. Now when an application of that sort is made, the court ought to very careful to see that it does no injustice by making the registration really retrospective. I may point out that the power which is conferred by section 35 is not imperative. All that it provides is that the court may, in a proper case, make an order for rectification. Therefore the court has full discretion to deal with every particular case

which comes before it, in such a way as may produce complete justice; but in the present case I fail to see that any injustice will be done if the alteration is made as is asked. What took place is this: the present applicants, pressing to have their transfers registered, and seeking their certificates as early as possible, get answers from the secretary of the company which led them to believe that by the date of the last meeting the register would be altered, and they would appear as members. Supposing this had been done, although they had not received their certificates, they sent in notices of dissent from the special resolution in the way prescribed by section 161 of the Act. That gave the liquidator full notice of the position that they took in the matter, and he chose to disregard it. Then this application is made to Buckley, J., with the result that the register is altered in favour of the applicants. There is no evidence before us to satisfy me in any way that any injustice is likely to accrue from the alteration of the register being dated so as to cover the notice which was given by the present appellants in the exercise of the rights which they had as members under section 161. I think, therefore that the order asked for ought to be made.

COZENS-HARDY, L.J.—I am entirely of the same opinion. It seems to me that the argument of counsel for the respondent liquidator is really based on this hypothesis, that the register of members is a thing which ceases to have any real operation or existence after the winding-up order, that the only right which can then be dealt with, after a winding-up order, is to be given effect to by making some change in the list of contributories. Well, if one comes to look at the scheme and method of the Act, the register of members is one thing, and the list of contributories is an entirely different thing. The list of contributories, to mention one distinction, what is known as list "A" and list "B," is something larger than, and different from, the register of members; and the Act itself, as it seems to me, indicates in no doubtful manner that notwithstanding a winding-up the register of members and the status of members may be altered. Now section 131, the very section under which Buckley, J., has acted, or under which he has partly acted, says: "Whenever a company is wound up voluntarily the company shall, from the date of the commencement of such winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof, and all transfers of shares, except transfers made to or with the sanction of the liquidators, or alterations in the status of the members of the company taking place after the commencement of such winding-up shall be void. . . ." That section asserts that there may be after a winding-up transfers of shares with the sanction of the liquidators. That being so, it seems to me that quite apart from any list of contributories there is the register of members to which all the provisions of section 35 of the Act ought to be applied. The authorities to which Vaughan Williams and Stirling, L.JJ., have called attention seem to me conclusively to show, that the power given by section 35 is independent of that which is found by reference under section 98. I therefore cannot doubt that the court now has the right to exercise every power which is conferred by section 35 where we find there has been an undue delay in registering a transfer. That there has been undue delay here, is found as a fact by the learned judge, and the accuracy of that finding is really not disputed. Then we have authority going back to the very early days of the Companies Act that an order under section 35 may be made having a retrospective effect—"may," I say, not "must" be made—may be made in a proper case, may be made imposing such conditions as the court thinks necessary to protect the rights of any third persons. But in a case like this, where there has been no real serious suggestion of any ill result or any unjust consequence which would follow from dating the transfers as at the date when they ought have been made, I think the order proposed is quite right.

Plaintiffs' appeal allowed; Respondent's appeal dismissed.

Solicitors for the appellants, *Ingle, Holmes, Sons & Pott.*

Solicitors for the respondent, *Morris Fuller, & Co.*

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) Dec. 16.

CROWTHER v. WEST RIDING WINDOW CLEANING CO. (a.)

Master and servant—Employers' liability—Accident—Compensation — Building — Scaffolding — Ladder — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the injured workman and another man were engaged at the time of the accident in whitewashing the interior of a shed more than* 30 *feet in height, and that they made use of a ladder by either standing or sitting on the rungs for the purpose of applying the whitewash to the higher parts of the shed. The county court judge found as a fact that the ladder was not a scaffolding within the meaning of the Act.*

Held, that this finding was not wrong in point of law.

Appeal from a decision of the judge of the Bradford County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a workman who had been injured by an accident in the course of his employment.

The employers had undertaken the work of whitewashing the interior of a wool-combing shed, which was more than 30ft. in height, and the work was being carried out by the applicant and another workman by means of a pump and a flexible pipe. It appeared that there was a ladder in the shed, and the men made use of it in their work by placing it against the wall and either standing or sitting on the rungs. This enabled them more easily to apply the whitewash to the higher parts of the building. By an accidental bursting of part of the apparatus some of the whitewash flew into the applicant's face and he lost the sight of one eye.

The county court judge found as a fact that the shed was not being repaired by means of scaffolding within the meaning of section 7 of the Workmen's Compensation Act, 1897, and on that ground refused to make an award of compensation.

The applicant appealed.

J. J. Wright, for the applicant.—The county court judge was wrong in point of law. He thought he was bound to hold that this ladder was not a scaffolding within the meaning of the Act, by the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.,* 49 W. R. 380, [1901] A. C. 49. But that decision shows that a "scaffolding" within the Act covers more than is popularly understood by the

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

term. In *Veazey* v. *Chattle*, 50 W. R. 263, [1902] 1 K. B. 494, the Master of the Rolls said that the effect of *Hoddinott* v. *Newton, Chambers, & Co.* was that a ladder might be a scaffolding. This case is distinguishable from *Marshall* v. *Rudeforth*, 50 W. R. 596, [1902] 2 K. B. 175. There the ladder was used merely as a ladder for the purpose of ascent and descent. Here the ladder was used in the way in which scaffolding is generally used in the repair of a building.

Compston, for the employers, was not called upon to argue.

COLLINS, M.R.—As I understand the decision of the county court judge, he found as a matter of fact that this ladder was not a scaffolding within the meaning of the Workmen's Compensation Act. We have no jurisdiction to interfere with a finding of fact if there is evidence to support it. The applicant therefore argued that the decision was wrong in point of law, and that a ladder, used as the ladder in this case was used, must as a matter of law be a scaffolding. I am not prepared to assent to that. Having regard to the case of *Hoddinott* v. *Newton, Chambers, & Co.*, I do not think it can be laid down that a ladder cannot under any circumstances be a scaffolding. But I am not prepared to say that the finding of fact of the county court judge that this particular ladder used in this particular way was not a scaffolding is wrong in law.

MATHEW and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the applicant, *Wrensted & Hind*, for *W. H. Scott*, Bradford.

Solicitors for the employers, *W. A. Crump & Son*, for *Neill & Holland*, Bradford.

High Court of Justice.

Chan. Div. } Feb. 20.
Byrne, J. }

In re CHURCH STRETTON MINERAL WATER CO. (LIMITED). (*a.*)

Practice — Debenture-holders' action — Short cause— Affidavits in support.

In actions coming on as short causes without pleadings or notice of motion copies of the affidavits in support should be left with the papers for the use of the judge.

This was a debenture-holder's action which the master had directed to be set down as a short cause to come on with minutes of the proposed order.

H. E. Wright.

Ryland.

Llewellyn Williams.

Upon the hearing,

BYRNE, J.—In cases like the present, which come on as short causes without pleadings or notice of motion, copies of the affidavit in support should be left with the papers for the use of the judge.

Solicitors. *Chester, Broome, & Griffithes; Woodcock, Ryland, & Parker; A. W. Osmond.*

(*a.*) Reported by PERCY WINFIELD, Esq., Barrister-at-Law.

Chan. Div. } Feb. 26; March 1.
Farwell, J. }

LAWSON v. REYNOLDS. (*a.*)

Justices — Petty sessions — County business — Borough business — County justices — Jurisdiction — Precedence of mayor.

The county justices for the petty sessional division of Highgate sat at Hornsey in petty sessions. The business of the court included an information against H. for an offence committed within the borough on a summons against H. signed by a county justice. The mayor of Hornsey claimed the right to take the chair.

Held, when a case has once been earmarked as county business or borough business by the issue of a proper summons to appear before the county or the borough tribunal, the county justices or the borough justices, as the case may be, have seisin of it, and the other body of justices, although having concurrent jurisdiction, cannot intercept the case. The business in this case was not borough business for the purpose of founding a claim for the mayor to take the chair. It was, in fact, ab initio *and remained throughout, county business.*

This was an action by the Mayor of Hornsey claiming a declaration that he is entitled by virtue of section 155 of the Municipal Corporations Act, 1882, to precedence over all justices of the peace for the county when sitting at petty sessions within the borough.

The facts are set out in the judgment of Farwell, J.

The Municipal Corporations Act, 1882, provides: Section 155.—"(1) The mayor shall, by virtue of his office, be a justice for the borough, and shall, unless disqualified to be mayor, continue to be such a justice during the year next after he ceases to be mayor. (2) The mayor shall have precedence over all other justices acting in and for the borough, and be entitled to take the chair at all meetings of justices held in the borough at which he is present by virtue of his office as mayor; except that he shall not, by virtue of this section, have precedence over the justices acting in and for the county in which the borough or any part thereof is situate, unless when acting in relation to the business of the borough, or over any stipendiary magistrate engaged in administering justice."

Macmorran, K.C., and *E. Beaumont*, for the plaintiff.

Warmington, K.C., Danckwerts, K.C., and *Eustace Hills*, for the defendants.

FARWELL, J., in giving judgment, said: The mayor of Hornsey claims a declaration that he is entitled, by virtue of section 155 of the Municipal Corporations Act, 1882, to precedence over all justices of the peace for the county when sitting at petty sessions within the borough and acting in relation to the business of the borough under the following circumstances: The borough of Hornsey forms part of the county of Middlesex, and was incorporated by Royal Charter of the 17th of August, 1903. The plaintiff was duly elected mayor of the borough on the 9th of November, 1903, and has taken the oath of allegiance and the judicial oaths required to be taken by a justice of the peace for the borough and also by a justice of the peace for the county. The borough has not a separate court of quarter sessions, nor has it a separate commission of the peace, and the county justices continue to hold petty sessional courts for the Highgate division in exactly the same way as they held them before the incorporation, and their jurisdiction is in no way abridged or affected by the incorporation.

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

The question turns on the true construction of section 155 of the Municipal Corporations Act, 1882. [His lordship read the section, and continued:] The Act obviously contemplates that the mayor will sit with the county justices, and gives him the right to take the chair at all meetings of justices held in the borough at which he is present *virtute officii*, and not merely at meetings of borough justices, for, having regard to the exception, I cannot read "justices" as if it were "such justices." This right to attend meetings of the county justices is in accordance with the general law as laid down in *Rex* v. *Amos*, 2 B. & A. 533, and stated by Lord Blackburn in *Mayor of Reigate* v. *Hart*, 16 W. R. 896, L. R. 3 Q. B., at p. 248, that in a borough where there is no court of quarter sessions and no non-intromittant clause in the charter (which is this case) the justices of the borough have no exclusive jurisdiction within the borough and no jurisdiction beyond the borough, but act in ease and in aid of the county justices, so far as they act upon what are at the same time borough and county offences, and all acts that the borough justices can do can be done by the county justices. The county justices and the borough justices have exactly the same powers and authorities, but the ambit of the exercise of such powers is different—that of the county justices includes, and that of the borough justices is limited to, offences committed within the borough. They may act together (per Lord Kenyon, *Rex* v. *Sainsbury*, 4 T. R .456), and the county justices cannot lawfully exclude the borough justices (*Reg.* v. *Williamson*, 7 Times L. R. 534), and the county justices can, if they please, sit with the borough justices in petty sessions for the borough and dispose of borough business. This brings me to the consideration of the exception. I observe that the sub-section begins by giving precedence and the right to take the chair, while the exception specifies precedence only, and I do not forget that under the Act 5 & 6 Will. 4, c. 76, it was held that words giving precedence only applied to social and not to magisterial precedence—*e.g.*, *Ex parte The Mayor of Birmingham*, 9 W. R. 34, 30 L. J. Q. B. 2; but I do not think that it is possible so to limit the exception, having regard to the reference to business.

The next question, to my mind, is, "What is meant by 'the business of the borough'?" The facts in the present case, and on which alone I express an opinion are as follows: On the 9th of December, 1903, the county justices for the petty sessional division of Highgate sat at Hornsey in petty sessions. The business of the court included an information laid against Gerald Herman for throwing stones within the borough on a summons against Herman signed by a county justice. On the case being called on the mayor claimed the right to take the chair, on the ground that he was entitled so to do in all cases in which the offence had been committed within the borough. His right was not admitted, and this action is brought to establish such right. I am of opinion that the mayor has no such right. The court was sitting as a petty sessional division, not as petty sessions. The summons was granted by a county justice, and the connty justices had full jurisdiction to deal with the case. The fact that if there were a mayor and ex-mayor, so as to constitute a quorum, they could have sat in petty sessions (see *Reg.* v. *Whittles*, 13 Q. B., at p. 254), and have granted a summons to bring the prisoner before them does not make the trial of this offence business of the borough. It was, in fact, business of the county, and not the less so because it might in certain events have been dealt with as business of the borough. Even if there were a quorum of borough justices, they could not as such try the case after the jurisdiction of the county justices had attached. When a case has once been earmarked as county business or borough business by the issue of a proper summons to appear before the county or the borough tribunal, as the case may be, the county justices or the borough justices, as the case may be, have seisin of it, and the other body of justices, although having concurrent jurisdiction, cannot intercept the case.

The question before me is governed, in my opinion, by the decision of the Court of King's Bench in *Rex* v. *Sainsbury*, 4 T. R. 451, that where two sets of magistrates have a concurrent jurisdiction and one appoints a meeting to grant ale licences their jurisdiction attaches so as to exclude the others, although both might sit together. In that case the mayor and some of the aldermen of the City had by charter jurisdiction in Southwark, but as the charter contained no intromittant clause the justices of Surrey had a concurrent jurisdiction. Lord Kenyon at p. 456 says: "But another question has arisen, and which is proper should be settled—whether it be legal (for whether it be decent or decorous no person can doubt) for two different sets of magistrates, having concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction? It is of infinite importance to the public that the acts of the magistrates should not only be substantially good, but also that they should be decorous. The facts in this case are shortly these. Some of the justices for the county of Surrey, having before them the statute of 26 Geo. 2, and knowing that the licences ought to be granted on a certain day and time, appointed a day—the 4th of September—for licensing alehouses in this division, on which day they accordingly held their meeting; and certain of the magistrates of the City of London, who in general are competent to this purpose, appointed another meeting on a subsequent day. But the jurisdiction of the justices who had appointed the first meeting had attached before this time, not indeed, so as to exclude the City justices from acting at the first meeting, for they might all have acted together, but it excluded the City justices of their jurisdiction to act on the subsequent day. On the general question, therefore, I am clearly of opinion that the Surrey justices and the magistrates for the City have a co-ordinate jurisdiction in this district; that the meeting of the City justices in this case was illegal, the jurisdiction of the other magistrates having first attached."

In my opinion the mayor in the case before me could not issue a summons against, or hold a petty sessions for the borough on, a prisoner already summoned before the county justices, because the jurisdiction of the latter had already appropriated it as county business, and by parity of reasoning he cannot be heard to intervene and say that it is borough business for the purpose of founding upon it a claim to take the chair at a meeting of the county justices sitting for the petty sessional division to try it. It was, in fact, *ab initio* and remained throughout county business. In the same way, if there were a borough petty sessions and the summons had required the prisoner to attend there, the county justices could not have intercepted it, and if they had chosen to sit at the borough sessions the mayor would have taken the chair. The result is that the action fails and is dismissed with costs.

Solicitors for the plaintiff, *L. J. Lathom.*

Solicitor for the defendant, *Sir Richard Nicholson.*

Chan. Div.
Swinfen Eady, J. } Feb. 16, 18, 23.

In re FRENCH BREWSTER.
WALTERS *v.* FRENCH BREWSTER. (*a.*)

Merger—Charge—Intestacy of portioner—Owner of land next-of-kin—No administration—Merger of beneficial interest.

A father was the settlor of a portion term which became vested in his son. The father became beneficially entitled to the portion on the decease of his son intestate in the father's lifetime. The father did not take out letters of administration to the son.

Held, that it was for the benefit of the father that the portion should sink into the estate. That the father's own beneficial interest in the charge, as the sole next-of-kin of the son, had merged in the estate.

Originating summons.

Robert A. B. French Brewster married Geraldine Cooper in 1876.

This marriage was dissolved in 1891. There was issue of the marriage four sons, the eldest being Robert A. French Brewster. The second son, Henry G. French Brewster, who attained twenty-one in his father's lifetime died in January, 1900, and was not married. Arthur A. French Brewster, and a fourth son who died in infancy. R. A. B. French Brewster married a second time, and his widow, Mrs. Annie V. French Brewster, was still living.

Mrs. Geraldine French Brewster was also living.

By a marriage settlement dated the 27th of September, 1876, on his marriage with G. Cooper, R. A. B. French Brewster charged his Irish properties with rent-charges for his wife, and a portions charge of £15,000 for the younger children.

On the dissolution of the marriage of R. A. B. French Brewster and G. French Brewster a deed of covenant, dated the 2nd of June, 1891, was entered into by R. A. B. French Brewster in the terms of an order of the Divorce Division. R. A. B. French Brewster died in May, 1901. His will and codicil were proved in November, 1901.

In July, 1902, an originating summons was issued at the instance of Mrs. Annie French Brewster for the administration of the estate of R. A. B. French Brewster.

The trustees of the settlement took out the present summons for the settlement of the following amongst other questions: whether the sum of £7,500 (being the moiety of the portions charge of £15,000) which became vested in Henry G. French Brewster had merged and was no longer raisable.

Eve, K.C., and *E. J. Elgood*, for the trustees of the settlement charging the portions, submitted that a question has arisen by reason of the death of the second son Henry, who attained twenty-one and who was killed in January, 1900. His right to the £7,500 had vested, and the question is whether by reason of his death, leaving his father his sole next-of-kin, the sum of £7,500 being a moiety of the portions charge of £15,000, has merged in the fee simple settled by the marriage settlement, which, subject to the jointure rent-charge and portions charge thereby created, belonged absolutely to the testator, or whether it is still raisable. This is a question between the eldest son and the son Arthur. The eldest son takes it if it is raisable, and if it is sunk into the inheritance they benefit rateably between the two.

Hon. Frank Russell, for the defendant, Robert A. French Brewster, submitted that it was his interest to contend that there had been no merger, in order that the personal estate of which Robert was tenant for life might be freed.

Hodge, for Arthur A. French Brewster, submitted that the £7,500 never became vested in the son Henry, so that the father became entitled, as being sunk in the inheritance.

Vernon Smith, K.C., and *A. E. Russell*, for the executors of the father, Robert A. B. French Brewster.

Martelli, for a jointress.

SWINFEN EADY, J., in giving judgment, said: The only remaining question is whether the portion of £7,500 which vested, but which the father became beneficially entitled to on the decease of his son intestate in the father's lifetime, has sunk into the estate out of which it was to be raised, or must be treated as still subsisting and forming part of the father's personal estate.

In my opinion it was clearly for the benefit of the father that it should sink into the estate, having regard to the father's covenant that the premises should continue to be of the full clear yearly value of £1,800. The extinction of this charge would reduce the father's liability upon this covenant, and the lands charged would become a better security for the remaining moiety of the portion of £15,000. Again, the father never manifested any intention of keeping alive the charge, and although the son died in January, 1900, and the father not until the 20th of May, 1901, the father did not take out any letters of administration to his son.

The objection urged to the merger or extinguishment of the charge is that the father did not own the estate and the charge in the same right. He was entitled to the estate beneficially, but was only entitled to the charge upon taking out administration to his son, and that any debts of the son would first have to be paid before the title of the father to the residue was cleared.

The answer to this objection is that no question of merger arises until all debts and other claims (if any) against the son's estate have been discharged. It is only in respect of the interest, which the father takes beneficially in the son's estate, that merger arises, so that no prejudice can be occasioned to third parties. It is not claimed that if the father had taken out letters of administration to his son merger would at once have taken place, irrespective of any liabilities of the son. The father would not in that case have been entitled to the land and the estate of his son in the same right, and there would not have been any merger to the prejudice of the son's creditors: *In re Radcliffe, Radcliffe* v. *Baver*, 40 W. R. 323, [1892] 1 Ch. 227.

This, however, does not affect the question before me, which is whether the father's own benefical interest in the £7,500, as the sole next-of-kin of the son has not merged, and in my opinion it has.

Having once arrived at the conclusion that it was for the benefit of the father that it should merge, I see nothing to prevent the extinguishment of the charge taking place.

It is established by unquestionable authority that where the owner of land becomes entitled beneficially to a charge thereon as next-of-kin of a person entitled to the charge, the charge will sink, if it is for the benefit of the person entitled to the land that it should, even although some person other than the owner of the land became the legal personal representative of the owner of the charge, and even although the charge be secured by an outstanding term vested in trustees, for the purpose of raising the charge. This was decided by Lord Loughborough

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

in 1793 in the case of *Lord Compton* v. *Oxenden*, 2 Ves. jun. 261. In that case a lunatic was entitled to land, and his sister Elizabeth Bromfield was entitled to two sums of £1,500 each, secured upon it, one of which two sums was secured by a trust term. She died intestate, leaving her brother her sole next-of-kin. After the lunatic's death, a bill was filed by his next-of-kin, claiming that these two sums of £1,500 each formed part of the lunatic's estate, and had not sunk into the land, and on the other hand it was insisted by Sir Henry Oxenden, the heir-at-law of the lunatic, that he inherited the land free from any charge in favour of the personal estate. It was urged on behalf of the plaintiff that the two sums of £1,500 each would have been liable for the debts of Elizabeth, and that in the absence of any election by the lunatic it ought not to be held that the charge had merged, merely because as sole next-of-kin to his sister the lunatic had become entitled to the benefit of the charge. Lord Loughborough, however, held that the heir took the land discharged from the burden which had become merged in the inheritance, and that it made no difference that one of the two sums was secured by a trust term. This case is precisely in point, and the circumstances are undistinguishable from the present.

Again, in *Forbes* v. *Moffatt*, 18 Ves. 384, Sir William Grant said: "Upon the subject" (of merger or extinguishment of a charge) "a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged."

Again, in *Swabey* v. *Swabey*, 15 Sim. 106, it was held by Shadwell, V.C., that certain charges on real estate were kept alive so far as was necessary for the payment of certain debts and legacies, and subject thereto sunk into the inheritance, and that the next-of-kin had no equity to have the balance of the amount of the charges raised and paid to them.

Accordingly I decide that the £7,500 in question in this case has sunk into the inheritance.

Solicitors. *Gush, Phillips, Walters, & Williams; Martineau & Reid; Robert Todd.*

K. B. Div. (Buckley, J.) — Feb. 19, 22; March 1.

SOUTH-WEST SUBURBAN WATER CO. *v.* ST. MARYLEBONE GUARDIANS. (*a.*)

Water — Pauper school — Supply of water for domestic purposes—Trade, manufacture, or business—Waterworks Clauses Act, 1847 (10 *&* 11 *Vict. c.* 17), *ss.* 35, 53—*Waterworks Clauses Act,* 1863 (26 *&* 27 *Vict. c.* 93), *s.* 12.

Although the maintenance and education of pauper children by guardians of the poor is a "business" within section 12 *of the Waterworks Clauses Act,* 1863, *yet, inasmuch as the premises wherein such business is carried on constitute a "dwelling-house" within section* 53 *of the Waterworks Clauses Act,* 1847, *the guardians are entitled to demand a supply of water to the premises for domestic purposes, provided that they put themselves into a position to confine the user of the water so supplied to purposes which are domestic.*

The meaning of the term "domestic purposes" discussed.

Observations on Barnard Castle Urban District Council *v.* Wilson, 50 *W. R.* 92, 51 *W. R.* 102, [1901] 2 *Ch.* 813, [1902] 2 *Ch.* 746.

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

This action, which was tried before Buckley, J., sitting as an additional judge of the King's Bench Division, raised the question whether guardians are entitled to demand from a water company a supply of water for domestic purposes in respect of their pauper schools.

The following statement of the facts and relevant statutory provisions is taken in substance from his lordship's judgment:

The plaintiffs, under an order of 1878, supply water to the district within which are situate certain pauper schools belonging to the defendants, the Guardians of the Poor of St. Marylebone.

On the 6th of December, 1901, the plaintiffs gave the defendants notice to terminate on the 25th of March, 1902, an agreement then subsisting between the plaintiffs and the defendants for the supply of water to the schools, offering at the same time to enter into a new agreement for the further supply of water. The agreement thus terminated was one by which the defendants paid a certain price for 1,000 gallons by meter, and for its supply a 3in. service pipe had been laid.

On the 10th of March, 1902, the defendants passed a resolution to demand of the plaintiffs a supply of water for domestic purposes for the schools on the annual rack-rent or value of their premises, discontinuing at the same time any supply for the use of the defendants' swimming-bath.

On the 11th of March, 1902, the defendants communicated that resolution to the plaintiffs.

On the 20th of March the plaintiffs wrote to the defendants that, inasmuch as the defendants required a supply for domestic purposes only, the 3in. pipe must be disconnected, and a ½in. service pipe substituted, and that certain alterations, which the plaintiffs briefly indicated, must be made by the defendants in their system so as to disconnect the supply from purposes not of a domestic nature. The letter concluded by stating that the plaintiffs would supply, as from the 25th of March, water for domestic purposes for which the charge would be based upon the annual value of the premises.

On the 25th of March the defendants replied that they had instructed the superintendent of their schools neither to make nor to allow any alterations to be made to the schools or service mains connected with the supply of water, except to disconnect the swimming-bath, and they sent a copy of a resolution which the defendants had passed that the defendants' solicitors be instructed to resist any action on the part of the plaintiffs to avoid the defendants' resolution of the 10th of March, and that the solicitors be instructed to enforce the performance of that resolution on the part of the plaintiffs.

On the 5th of June, 1902, the plaintiffs, having been allowed inspection of the defendants' water service, gave details of the alterations which the plaintiffs said were necessary.

On the 25th of June the defendants, in reply, simply referred to their previous resolution demanding a supply for domestic purposes.

On the 30th of June, the plaintiffs replied that if the guardians wished for a domestic supply only, they must comply with the plaintiffs' previous request. The defendants, however, refused to make any alterations at all.

Subsequently the plaintiffs demanded payment upon the footing of so much per 1,000 gallons, and the defendants tendered payment on the footing of an annual charge based on the annual value. This tender the plaintiffs did not accept. The plaintiffs did not cut off the supply, but by writ issued on the 17th of April, 1903, commenced the present action.

By their statement of claim the plaintiffs claimed

(1) £461 18s. 6d., being the value placed by the plaintiffs on the amount of water actually consumed by the defendants from the 25th of March, 1902, to the 25th of March, 1903; and declarations that the defendants were not entitled (2) without an agreement in that behalf to require the plaintiffs to supply water to the schools for any purpose, or, alternatively, for certain purposes therein mentioned and described in the judgment, and (3) without the plaintiffs' consent, to maintain the three-inch pipe and a certain bye-pass and valve which allowed the use of water in case of fire without passing through a meter.

The defendants counterclaimed for a declaration that they were entitled to be supplied with water for certain of the specific purposes mentioned in the statement of claim at a rate based on the annual value of their schools.

The relevant statutory provisions are shortly as follows:

The order of 1878 incorporates the Waterworks Clauses Act, 1847.

By section 48 of that Act any owner or occupier of a dwelling-house may lay pipes from the undertakers' pipes into his premises.

By section 50 the bore of any such pipe is not to exceed the prescribed limits, or, if none be prescribed, is not to exceed half an inch, except with the consent of the undertakers.

By section 53 every owner and occupier of a dwelling-house shall, when he has laid his communication pipes, be entitled to demand and receive a sufficient supply of water for his domestic purposes.

By section 35 the undertakers are to provide a supply of water sufficient for the domestic use of all the inhabitants, who shall be entitled to demand a supply.

By the Waterworks Clauses Act, 1863, s. 12, a supply of water for domestic purposes is not to include, amongst other things, a supply for any trade, manufacture, or business.

By the order of 1878, section 17, the undertakers shall, at the request of the owner or occupier of any dwelling-house, furnish a sufficient supply for domestic purposes.

By section 19 of the order the undertakers may make and enforce reasonable regulations for preventing the waste or misuse of water, and may prescribe the pipes, cocks, cisterns, and apparatus suitable for the purposes of supply.

By section 20, in the event of the regulations not being observed, the undertakers may refuse to supply, or may cut off the supply, unless and until the regulations are complied with, and any difference as to whether the regulations are reasonable or have been complied with may be referred by either party to, and shall be settled by, two justices.

By section 21 the undertakers may supply water for other than domestic purposes for such remuneration and upon such terms as may be agreed.

Danckwerts, K.C., and *G. Wallace*, for the plaintiffs.—The guardians are carrying on the business of teaching and fitting for life the pauper children; it is immaterial that no payment is taken: *Rolls* v. *Miller*, 32 W. R. 806, 27 Ch. D. 71. Unless, therefore, they can show that they require a supply for domestic purposes other than those which are necessarily incidental to their business, they are not entitled to any supply at all. The contrary was assumed, but not decided, in *Barnard Castle Urban District Council* v. *Wilson*. [On this point they referred to and distinguished *Pidgeon* v. *Great Yarmouth Waterworks Co.*, [1902] 1 K. B. 310, 50 W. R. Dig. 183, and *Bristol Waterworks Co.* v. *Uren*, 15 Q. B. D. 637, 33 W. R. Dig. 239.] Secondly, assuming that they are entitled to demand a supply for domestic purposes at all, they must not use the water supplied on the basis of rateable value for purposes which are not domestic. The specific purposes for which they use the water, and of which we complain, are either so unreasonable as that they cease to be domestic, or if domestic, are contrary to the plaintiffs' regulations.

Macmorran, K.C., and *R. C. Glen*, for the defendants.—A workhouse is entitled to a supply for domestic purposes (*Liskeard Union* v. *Liskeard Waterworks Co.*, 30 W. R. 292, 7 Q. B. D. 505), and a pauper school is merely a detached part of a workhouse. Even if a business is being carried on, the premises constitute a dwelling-house, and persons residing in them are entitled to a supply for domestic purposes: *Pidgeon* v. *Great Yarmouth Waterworks Co.*; *Smith* v. *Müller*, 38 SOLICITORS' JOURNAL 26, [1894] 1 Q. B. 192; *Cooke* v. *New River Co.*, 38 Ch. D. 56, 14 A. C. 698, 36 W. R. Dig. 218, 38 W. R. Dig. 209.

They also cited *Weaver* v. *Corporation of Cardiff*, 48 L. T. 906, 31 W. R. Dig. 215.

Danckwerts, K.C., in reply, cited *Riley* v. *Read*, 27 W. R. 414, 4 Ex. D. 100, and *Charterhouse School* v. *Gayler*, 44 W. R. 412, [1896] 1 Q. B. 437. The argument in regard to the purposes for and the manner in which the defendants used the water is sufficiently indicated in the judgment.

Cur. adv. vult.

BUCKLEY, J., in stating the facts, said that in adopting the attitude disclosed by the letter of the 25th of March the defendants were in the wrong, because some of the purposes for which the existing supply was then used were not domestic, and because the supply so far as used for domestic purposes, was used in a manner not permissible by the plaintiffs' regulations duly made under the order of 1878. His lordship continued: The correspondence shows that the plaintiffs did not thereby deny the right of the defendants to receive a supply for domestic purposes upon complying with proper conditions. By their statement of claim, however, and at the bar, they have put forward a contention that the defendants are not entitled except by agreement to a supply for domestic purposes at all. This contention is based upon an argument that the purposes of these schools constitute a business; and that section 12 of the Act of 1863 excludes them from a supply for domestic purposes. Even if (which is not here the case) the premises were occupied, not as a dwelling-house by persons resident and sleeping there, but purely for the purposes of a business—say, of a factory—I should not be prepared to hold, at least without further argument, that, even in that case, the supply of water for what I may call sanitary purposes—such as supplying washhand-basins or the ordinary flushing of water-closets—could be refused upon the mere ground that no one, or only a caretaker, slept upon the premises. It is noticeable that for domestic purposes there is a right to demand a supply, and that there is no right to demand a supply for other purposes. It is the character of the purpose, not the character of the premises in which the water is used, that is here the important factor. The test of residence is not a test of the purposes of user. If the contention be well founded, a factory would be excluded from a right of supply for even sanitary purposes, a conclusion at which I should be very slow to arrive. The contention rests upon the basis that a house is not a dwelling-house unless the residence in or occupation of the house extends to sleeping in it. In *Cooke* v. *New River Co.* (38 Ch. D. at p. 66), Lindley, L.J., speaking, no doubt, of a different Act expressed in different terms, says: "I am disposed to

think that anything is a dwelling-house within the meaning of this section, which is a house, and in which water is required for domestic purposes, or for any other purposes for which rates are fixed." As at present advised I think this is true of the Waterworks Clauses Acts. Upon the same point I refer to *Smith* v. *Müller*. The point, however, does not arise in this case, for these schools are occupied by children, and by those who govern and control them, being persons who are all resident on the premises. There is no question, in my judgment, but that these premises constitute a dwelling-house; *Liskeard Union* v. *Liskeard Waterworks*. As a dwelling-house they are, I think, entitled to a supply for domestic purposes, if such premises can be spoken of as having domestic purposes.

But, granting that the schools are a dwelling-house, the next contention of the plaintiffs is that these premises have not, and cannot have, domestic purposes, because that which is carried on upon the premises is a business, and that all the supply is for the purposes of that business, and they say that section 12 of the Act of 1863 applies. If I were to define the business carried on, I should say that it is the business of providing for, maintaining, and training pauper children, and that this is none the less a business because it is carried on, not for profit, but, on the contrary, at a large expense. It was held in *Rolls* v. *Miller* that a home for working girls is a business. This, no doubt, was upon a covenant which involved some considerations not relevant here, but the reasoning in that case is, I think, applicable to the present case. But, although that which is carried on upon the premises is a business, it is, in my judgment, perfectly consistent that in business premises, water may be wanted for domestic purposes. The question is, what is the character of the purpose, not what is the character of the place or user? Thus a boarding-house is a business, but persons in a boarding-house may and do want water for domestic purposes: *Pidgeon* v. *Great Yarmouth Waterworks Co.* The inhabitants of the workhouse, although maintained for a public purpose, can demand water for domestic purposes—that is to say, for use within the workhouse for purposes which are domestic purposes as distinguished from purposes of trade: *Liskeard Union* v. *Liskeard Waterworks*. If within the same premises water is required both for domestic and for trade purposes the solution of the matter is, I think, that there must be two supplies—the one for that which can be demanded, and for which payment is to be made upon the rateable value of the premises, and the other for that which cannot be demanded, and can be taken only by agreement at such price as may be agreed, based probably upon the consumption as ascertained by meter. If, therefore, the defendants here wanted water for two such purposes the plaintiffs were, I think, right in saying: "As to the supply which you demand for domestic purposes, put yourself in a position to confine the user to domestic purposes, and we will give you the supply." As to the rest, the matter would have to await agreement between the parties.

It remains to investigate whether the purposes to which the defendants put the water supplied were wholly, or in part, and to what extent respectively domestic and not domestic, and, so far as they were domestic, whether the plaintiffs' reasonable regulations were complied with. The short way to deal with this is to indicate those which were not domestic, and those for which, being domestic, the water was not taken in accordance with the regulations. It is convenient here to refer to the plaintiffs' statement of claim. No one says, having regard to section 12 of the Act of 1863, that water for garden and greenhouse supply is domestic. Further, the defendants do not say that water for washing out the swimming-bath is domestic. As appears by the correspondence, they had ceased to require any supply to the swimming-bath before the dispute arose. The matters which remain fall substantially under the following heads: (*a*) Automatic flushing cisterns with a continuous action by day and by night. Of these there are ten of capacity from 40 to 90 gallons discharging 12 or 15 times in the 24 hours at a total consumption of 6,180 gallons for 24 hours, equal to 1,265,700 gallons per annum. The plaintiffs have made regulations under section 19 of the order. These automatic cisterns are in breach of the regulations. There are 40 water-closets flushed from fixed cisterns. By regulation 21 no cistern for a water-closet must deliver more than two gallons at a flush; 13 of these water-closets discharge 2½ gallons, and 26 discharge three gallons at a flush. These are in breach of the regulations. The observation upon this head, is not that the water is not taken for a domestic purpose, but that it is taken in a way not allowed by the regulations, which seem to me reasonable, and which, until two justices under section 20 of the order shall have held otherwise, I take to be reasonable. By section 20 of the order the undertakers may refuse to supply until those regulations are complied with. The next head (*c*) is for a continuous and constantly running supply for urinals. This continuous flow is in breach of the regulations. My observation on this is the same as on the previous head (*b*). The next head (*d*) is for hydrants. Of these there are 11. There has, happily, never been occasion to use them for purposes of fire, for which they are intended, but they are used for washing purposes by attaching a hose and washing the yards and paths of the premises. This, I think, is a domestic purpose, but, again, it is in breach of regulation 28. It is obvious that a very large amount of water may thus be used which may be unreasonable. The next head (*e*) relates to three large Lancashire boilers, which are used for three purposes. First for heating water for warming the buildings by circulation. This seems to me to be a domestic purpose. But, secondly, they are used for purposes of power, to drive machinery of two classes; the one is machinery which is used in the laundry, and the other consists of certain pumps, which are employed for raising water from certain wells which the defendants have on their ground. In my opinion the supply of power for the above is not a domestic purpose. Reading the judgment of the Court of Appeal in *Barnard Castle Urban District Council* v. *Wilson* it seems to me that the wide scope which Vaughan Williams, L.J., there thought should be given to the words "domestic purposes" was not adopted by the other two members of the court. It is plain that it was not adopted by Romer, L.J. It is a little more difficult to say what was the view of Stirling, L.J. But I think the result of the case is that, in arriving at a decision on the words "for domestic purposes" regard is to be had to that which is reasonable having regard to the purposes for which, according to the ordinary habits of domestic life in this country, people require water in their houses. As to the particular question of the use of water for power, I refer to what Romer, L.J., says at the top of p. 756, that to use water at a high pressure to drive a dynamo for purposes of lighting by electricity is not a domestic purpose. I think the same is true of the use of water to generate steam for purposes of power. I notice that in *Pidgeon* v. *Great Yarmouth Waterworks Co.*, Channell, J., seems to have thought, although Darling, J., certainly did not, that I had in the *Barnard Castle case* when it was before me held that the use of water for a large swimming-bath in a private house would be use for

a domestic purpose. I think it is well to point out that I decided nothing of the kind. Counsel for the plaintiff before me admitted that water for a swimming-bath in a private house would be for a domestic purpose, and although I used some pressure to induce him to argue the contrary (for my opinion was the other way), I did not succeed in arriving at that result. All that I decided was that, it being conceded that the use of water for a swimming-bath in a private house would be for a domestic purpose, the same proposition was true in the case with which I had to deal. I thought the swimming-bath there was not educational, and if a swimming-bath in a private house would be domestic, the affirmative of which the plaintiff admitted, then, I, upon that hypothesis, thought it was domestic. The Court of Appeal only differed from me on the question of fact, and held that the swimming-bath there was educational. Under these circumstances they had not to decide whether it could have been justified as domestic. If they had had to decide the point I think they would not have been unanimous in opinion. I think the true result of the cases is that the words "domestic purposes" include user not merely for washing, drinking, flushing closets, and the like, but extend to user for what in the *Bristol Waterworks Co.* v. *Uren* (at p. 648) were called the amenities of the house, but that the limits of such amenities must be ascertained with due regard to what is reasonable and what is the ordinary user in our day. This user of the boilers for power is not, in my opinion, a user for domestic purposes. Thirdly, the boilers are used for laundry purposes. Here a subdivision is necessary. So far as they are employed for power to drive laundry machinery, the purpose is not, in my opinion, domestic. So far as they are employed simply for the supply of hot water for laundry purposes the user is, I think, domestic. The latter, again, is said to require a sub-qualification. To some extent the laundry is used for educational purposes. A few of the elder girls go there, one at a time, say three days in a week, to be taught laundry work in the laundry. Strictly, no doubt, this is educational, not domestic. But the matter is too small to be worth attention. A parallel case would be a case where a mother sent her daughter into the laundry on washing days to learn something of the laundry work. As regards the bore of the service pipe, section 50 of the Act of 1847 provides that it shall not exceed the prescribed limits, and where no limit is prescribed shall not exceed half an inch, except with the consent of the undertakers. No 12 of the plaintiffs' regulations allows a bore of half an inch or three-quarters of an inch for the service of a supply for domestic purposes. The defendants are entitled (if and when they put themselves in a position to take a domestic supply) to use a pipe of three-quarters of an inch bore, but not a larger bore without the plaintiffs' consent. I find nothing to limit them to one such pipe. They are entitled to so many pipes of a bore of three-quarters of an inch as are necessary for obtaining a sufficient supply within section 53 of the Act of 1847.

For the determination of this action it is sufficient to say that the defendants have not at any time during the period in respect of which the plaintiffs sue for payment put themselves in a position to demand a supply for domestic purposes. It results that the plaintiffs are entitled to payment upon the basis of the fair value of the amount of water supplied. It is, therefore, not necessary for the determination of this action to declare which of the purposes to which the water is at present supplied are and which are not domestic purposes. It is sufficient that some of them are not domestic, and that as regards such as are domestic the regulations are not complied with. For the guidance of the parties I have endeavoured to express as clearly as I can which are of the one and which are of the other character. But it is unnecessary, and I think inexpedient, to introduce into the order declarations addressed specifically to each case. For instance, as regards the water to the boilers, the question whether the supply to them is domestic or not domestic turns upon the uses to which the boilers are put. Again, the supply to the flushing cisterns is objectionable, not because the flushing of water-closets is not a domestic purpose, but because the nature of the user which the defendants make is in breach of the plaintiffs' regulations. If, hereafter, any question should arise as to whether any particular user is domestic or not domestic, or is in breach of the regulations, it should be raised, I think, in a concrete form.

The order which I make is as follows: I declare that the defendants, upon complying with the reasonable regulations for the time being lawfully made by the plaintiffs, under section 19 of the order of 1878, will be entitled to a supply for domestic purposes at the rate provided for by the same order. I declare that the defendants are not entitled, without the plaintiffs' consent, to have or maintain for that purpose any pipe with a bore exceeding three-quarters of an inch communicating with the plaintiffs' pipes, or to have the by-pass and valve mentioned in the statement of claim. I declare that the defendants had not, during the period over which the plaintiffs seek to recover payment in this action, complied with such regulations or provided a pipe or pipes of the bore lawfully useable for that purpose, and had not become entitled to a supply for domestic purposes. I declare that the plaintiffs are entitled in this action to payment upon the basis of a supply by meter at a reasonable price per 1,000 gallons. I hope the parties will agree as to what is a reasonable price, but if not, I must put that in course of trial in a proper manner, for it has not been the subject of evidence before me. There will be one order in the action and counterclaim. The defendants must pay the costs of both the action and counterclaim.

Solicitors, *Bolton & Co.; Clarkson, Greenwell, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) — Dec. 14, 15.

ELLIS (*Appellant*) *v.* LONDON COUNTY COUNCIL (*Respondents*). (*a.*)

Metropolis—Buildings—Drainage of houses on low-lying land—Recovery of penalty—Time for commencing proceedings—London Building Act, 1894 (57 & 58 *Vict. c. cxiii.*), *ss.* 122, 200, *sub-section* 9.

Section 122 *of the London Building Act,* 1894, *enacts that "It shall not be lawful for any person upon land of which the surface is below the level of Trinity high-water mark, and which is so situate as not to admit of being drained by gravitation into an existing sewer of the council, to erect any building to be used wholly or in part as a dwelling-house . . . except with the permission of the council."*

Low-lying land, if it is situate at such a level that the drainage from it finds its way by gravitation into an existing sewer of the council under the ordinary conditions of the sewer, does not come within the above pro-

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

hibition merely because that sewer during a substantial number of days in each year is so surcharged with flood water that the drainage is then prevented from passing into it.

Proceedings to recover a penalty under section 200, sub-section 9, of the Act, for contravening the above section are in time if they are taken within six months of the completion of the erection of the building, although more than six months have elapsed since the commencement of the erection.

Case stated by Rupert Kettle, Esq., metropolitan police magistrate sitting at Woolwich police-court.

On the 28th of January, 1903, ten several informations were laid before the magistrate by Thomas Chilvers, on behalf of the respondents, that the appellant in each of ten cases, between the 29th of July and the 30th of November, 1902, at the south side of Cedar-grove, Charlton, in the borough of Greenwich, in the county of London, and within the said district, did unlawfully erect otherwise than in accordance with the provisions of Part XI. of the London Building Act, 1894, a building to which the said Part XI. of the Act relates, to wit, without the permission of the London County Council, upon land of which the surface is below the level of Trinity high-water mark, and which is so situated as not to admit of being drained by gravitation into an existing sewer of the said council, did erect a building to be used wholly or in part as a dwelling-house, whereby he became liable to the penalty prescribed by section 200, sub-section 9, of the said London Building Act, 1894.

Upon the hearing of the summons it was proved or admitted that the appellant was the owner and the person who erected the dwelling-houses situate on a piece of land at the south side of and running at right angles to Cedar-grove, Charlton, in the county and district aforesaid. Such houses constituted a terrace or row and fronted on a length of roadway which had some time previously been constructed by the appellant in continuation of the line of Ransom-road, the ground on which such houses were being built being about five feet six inches lower than the surface of such roadway.

The appellant commenced to erect the buildings as a whole on or about the 14th of July, 1902, and more than six calendar months before the informations were laid, and the buildings were covered in in the month of November, 1902. Prior to commencing the erection of such buildings, the appellant gave notice in that behalf to the district surveyor of his intention so to do, but no permission of the respondents was obtained by the appellant. Before the buildings were commenced the appellant was warned by the district surveyor that such buildings would be in contravention of Part XI. of the Act above referred to.

The level of the lowest floor of the ten houses is seven feet above ordnance datum, and the land on which the houses were built is about eighteen inches or two feet below such lowest floor, *i.e.*, about five feet or five feet six inches above ordnance datum. Trinity high-water mark is about twelve and a-half feet above the ordnance datum, so that such land is about seven feet to seven feet six inches below Trinity high-water mark.

Provision was made by the appellant for draining the houses into a sewer of the borough of Greenwich (hereinafter referred to as the Ransom-road sewer) laid under Ransom-road, having a diameter of fifteen inches, and falling towards and opening into the respondents' southern main outfall sewer which runs underneath the Woolwich-road. The said outfall sewer is of circular section, having an internal diameter of eleven feet six inches, the invert being twenty-two feet six inches below the surface of the Woolwich-road. The inner or lower side of the arch of this sewer is 5·53 feet above ordnance datum, so that the appellant's land on which the said houses were built is as nearly as may be on the same level as the inner or lower side of the arch of this sewer. The Ransom-road sewer is connected with the said outfall sewer at a point about half-way up its side (*i.e.*, on its horizontal diameter), and the opening or junction is protected by a hinged flap which, when the outfall sewer becomes flooded, closes or should close automatically, and so prevent the metropolitan sewage flowing along the said outfall sewer from passing up into Ransom-road sewer. At the point of inlet into the Ransom-road sewer of the drain provided as aforesaid by the appellant, is a manhole which is situated ninety feet from the nearest and 250 feet from the farthest of the said ten houses, and the length of the Ransom-road sewer from the manhole to the inlet into the outfall sewer is about 350 feet.

The Ransom-road sewer was constructed and connected with the outfall sewer in 1894 by the permission and sanction of and in accordance with the requirements of the respondents pursuant to the Metropolis Local Management Acts. The outfall sewer is discharged and emptied by means of a pumping station at Crossness, on the south side of the River Thames, erected for that purpose, and under the control and management of the respondents.

The total length of the drain, so provided by the appellant as aforesaid, from the farthest off of the appellant's houses to the manhole aforesaid is about 250 feet, and the total fall of the drain in that distance is five and a half feet—*i.e.*, one inch in four feet.

The total fall of the Ransom-road sewer from the manhole aforesaid to the outfall sewer, which is a distance of about 350 feet as aforesaid, is two feet seven inches—*i.e.*, one inch in eleven feet.

The outfall sewer necessarily receives much of the flood water of the metropolis, so that in times of flood and even after moderate rainfall it becomes full and surcharged. The effect of this condition of the outfall sewer upon the Ransom-road sewer is that at times of flood and moderate rainfall no sewage or drainage can pass away from the latter sewer at all, and it necessarily becomes more or less full.

It will be seen that all these flood levels were substantially above the appellant's land, above referred to, on which the said houses were built and that if such flood were free to reach a corresponding level at the appellant's land the latter would be flooded. The flap aforesaid in the said outfall sewer at the inlet of it into the Ransom-road sewer would, however, normally prevent the contents of the outfall sewer from escaping into the Ransom-road sewer.

There was no evidence before the magistrate, save in the one instance, as to how far in times of flood the water in the Ransom-road sewer rose, or to what distance towards or past the said manhole the flooding or surcharging of or in the said Ransom-road sewer or the appellant's said drains extended.

There is no land in the county of London lying so low as to be below the bottom of the said outfall sewer. It was not suggested that the appellant's land could be drained by gravitation into any existing sewer of the respondents other than the said outfall sewer.

Upon the above facts the respondents contended that the appellant's land did not admit of being drained by gravitation into the said outfall sewer as then existing and that the offence charged had been proved.

The appellant contended that the offence charged had not been proved and that it was not proved that

his said land was so situate as not to admit of being drained by gravitation into an existing sewer of the respondents; that the Ransom-road sewer was such a sewer, that in fact his land was drained by gravitation into the Ransom-road sewer and also into the said outfall sewer; that the respondents ought not to be heard to say that the drainage by gravitation was not proper and efficient by reason of the Ransom-road sewer being constructed and connected with the said outfall sewer with the permission and sanction of the respondents or by reason of the use or management of the said outfall sewer; and that the temporary non-escape in time of floods as aforesaid of the contents of the Ransom-road sewer into the said outfall sewer did not prevent the land being so situate as to admit of its being drained by gravitation within the meaning of this section. The appellant further contended that the information and proceedings were out of time, having been laid and commenced more than six calendar months after the commencement of the erection of the buildings.

Taking the facts as above set out, and considering all the circumstances of the case, the learned magistrate found that the ten houses above mentioned were erected by the appellant upon land of which the surface was below the level of Trinity high-water mark and that the same were intended to be used as dwelling-houses; that during the greater part of the year the houses admitted of being and were drained by gravitation into the Ransom-road sewer and through that into the southern outfall sewer, but that for a substantial number of days in the year the drainage of the land upon which such houses were erected could not pass into the said outfall sewer; that the Ransom-road sewer being a sewer of the Greenwich Borough Council is not, but that the southern outfall sewer is, an existing sewer of the respondents within the meaning of section 122 of the London Building Act, 1894, and that there was no other existing sewer of the respondents into which it was possible to drain the said land.

He held that it was immaterial whether the impossibility of draining the land into the outfall sewer at certain periods as above-mentioned was or was not due to insufficient pumping arrangements provided at Crossness by the respondents, or whether it was or was not due to the insufficiency or incapacity of the sewer, and that for the purposes of the section the sewer and the appliances connected therewith must be taken as they existed at the time the buildings were erected; and that as the land did not admit of being constantly and effectually drained by gravitation into the outfall sewer, it did not admit of being drained by gravitation into an existing sewer of the respondents within the meaning of section 122 of the said Act.

He further held that the informations were laid and the proceedings commenced within six calendar months from the erection of the building and therefore within the time prescribed. He therefore convicted the appellant. The question for the opinion of the court was whether upon the above statement of facts the learned magistrate came to a correct decision in point of law.

The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 122, provides as follows: "It shall not be lawful for any person upon land of which the surface is below the level of Trinity high-water mark, and which is so situate as not to admit of being drained by gravitation into an existing sewer of the council, to erect any building to be used wholly or in part as a dwelling-house, or to adapt any building to be used wholly or in part as a dwelling-house, except with the permission of the council, and subject to and in accordance with such regulations as the council may from time to time prescribe with reference to the erection of buildings on such land."

The appellant in person.

Avory, K.C., for the respondents.

Lord ALVERSTONE, L.C.J.—Upon the point taken, that these proceedings were too late, I am clearly of opinion that there is no ground for interfering with the entertaining of the case by the learned police magistrate. Sub-section 9 of section 200 says that the person who erects under this very section, "or adapts or commences to erect or adapt otherwise than in accordance with the provisions of Part XI. of this Act, any building to which Part XI. of this Act relates shall be liable to a penalty." It is contended that because the appellant commenced the ten houses more than six months before the laying of the information, although they were not completed until well within the six months, that the six months ran from its commencement. In my opinion that would give no effect to the words "erect or adapt" as distinguished from "commence to erect or adapt." The object of what I may call the double provision is obvious; it may be necessary to wait until the houses are complete in order to see whether they fall within the section or not. On the other hand, there may be a case in which it is quite clear that what is going to be done may be an infraction of the section, and then power is given to take proceedings as soon as work of that character is commenced.

On the other part of the case I think the learned magistrate has gone too far—that is to say, that he has applied a test which is not laid down by section 122 of the statute. Section 122 says that "It shall not be lawful for any person upon land of which the surface is below the level of Trinity high-water mark, and which is so situate as not to admit of being drained by gravitation into an existing sewer of the council, to erect any building to be used wholly or in part as a dwelling-house." Now, the learned magistrate has found that the ten houses above-mentioned, which have been erected by the appellant, are on land of which the surface was below the level of Trinity high-water mark, and that therefore *primâ facie* the section applies, and that they were also intended to be used as dwelling-houses. He then finds facts which I need not detail, showing that the houses are on a level which admits of their being drained by gravitation. It is not disputed that if there were no other sewer or no other special construction or special use of the sewer in the Woolwich-road, the houses could be drained by gravitation into that sewer. Then he says this: "During the greater part of the year the said houses admit of being and are drained by gravitation into the said Ransom-road sewer and through that into the said southern outfall sewer." Therefore that fact is obvious: that the situation of the houses is such that they admit of being drained by gravitation and it does not alter that fact that they could not be drained, in the ordinary sense of the word, for the whole of the year, but that for a considerable number of days in the year the drainage of the land would not pass into the outfall sewer. Then he goes on to say that he thinks that it is is immaterial as to why it would not pass. It is in that respect that I think he has applied a wrong construction of the law, because it turns out, and the fact is, that this outfall sewer being very heavily charged in times of flood, or in times of excessive or even moderate rainfall, so much water comes down the sewer that the flaps which are made to shut with the pressure of the water close the mouth of the Ransom-road sewer, so that the water cannot go out owing to the greater pressure of water in the

main outfall sewer. That does not make the house one which is so situate as not to admit of being drained by gravitation. What it does mean is that on those particular days the sewer is so used by the London Council that the water will not go out. In my opinion it was not intended that the particular house-owner or landowner whose houses are within the terms of the section should be prevented from draining because on certain days of the year the sewer is so used that the water will not go out; and as I clearly pointed out in the course of the argument of this case, really the question of the level of the houses has nothing to do with the case. We have to see whether they fall within the section or not, not merely as being below the level of high-water mark, because assuming the level of the houses was ten feet higher still the same objection applies—namely, that on those days of the year the water would not go out of the sewer because it would be headed back owing to the pressure of the water in the main sewer. I desire to say that no point is raised as to any improper connection of the drains of the houses with the Ransom-road sewer. I deal with this case solely upon the point raised—namely, that it is objected by the London County Council that because the water in the Ransom-road sewer was on a certain number of days in the year headed back by the water in the outfall sewer that therefore the houses were not houses capable of being drained by gravitation into the existing sewer. I think the learned magistrate was wrong, and that, therefore, the appeal ought to be allowed.

LAWRANCE, J.—I quite agree.

KENNEDY, J.—I also entirely agree.

Appeal allowed.

Solicitor for respondents, *W. A. Blaxland.*

IN BANKRUPTCY.

K. B. Div. (Buckley, J.) — Feb. 29.

In re BROWNE.

Ex parte MARTINGELL. (*a.*)

Bankruptcy—Proof—Gambling debt—Gaming Act, 1892 (55 & 56 *Vict. c.* 9).

The debtor had been sued by a creditor for a gambling debt, and successfully pleaded the Gaming Act of 1892. *After the decision against him the creditor wrote to the debtor's clubs informing them of his conduct. The debtor thereupon agreed to pay the creditor* £100 *in cash and to give bills for the remainder of the debt, in consideration of the creditor withdrawing those letters, which agreement was carried out. Upon the debtor becoming bankrupt the creditor proved in the bankruptcy for the amount of the bills then due, but his proof was rejected by the trustee.*

Held, that the bills had not been given for an illegal consideration, and that the proof was wrongly rejected on that ground.

Appeal by a creditor from the rejection of his proof by the trustee in the bankruptcy.

The appellant Martingell had acted as agent for the bankrupt Browne in making bets with bookmakers, and had paid losses for Browne to the amount of £800.

In 1900 Martingell brought an action against Browne to recover that sum, but Browne pleaded the Gaming Act of 1892, and succeeded in his defence both in the King's Bench Division and in the Court of Appeal.

Martingell thereupon wrote to the secretaries of two clubs of which Browne was a member, and informed them of Browne's conduct. Browne thereupon offered terms of settlement, and it was agreed that Browne should pay £100 in cash and give bills for the remainder of the debt, and that Martingell should withdraw the letters he had written to Browne's clubs. Browne paid the £100 and gave the bills, and Martingell withdrew the letters to the clubs. Subsequently Browne failed to meet some of the bills and became bankrupt. Martingell tendered a proof on the bills, but it was rejected by the trustee on the ground that the bills had been given for an "illegal consideration."

Martingell appealed.

Reed, K.C., and *Simmonds,* for the appellant.—The consideration for the bills was not the gambling debt; that was disposed of for ever by the judgment for the defendant in the action of *Martingell* v. *Browne,* and could never be sued for again. There was a new consideration given for the bills—namely, the withdrawal by Martingell of the letters he had sent to the bankrupt's clubs. It cannot be contended that this was an "illegal consideration."

Muir Mackenzie, for the trustee.—It may be that the bankrupt would have had no answer to this claim, but the trustee representing the other creditors can inquire into the real consideration and go behind the judgment. The consideration alleged is not such as can stand against the other creditors: *Ex parte Seaton, In re Deerhurst,* 8 Morr. 97, 39 W. R. Dig. 24.

Reed, K.C., was not called upon to reply.

BUCKLEY, J.—In this case the trustee has rejected the appellant's proof on the ground that it was founded on an illegal consideration. The material facts are that the appellant sued the bankrupt to recover what is called "a debt of honour," and failed in his action and on appeal. The result is that that debt is at an end. After that, for a new consideration altogether — namely, the withdrawal by the appellant of certain letters he had written to the bankrupt's clubs, the bankrupt agreed to pay £100, and to give bills for the remainder of the debt. That was a wholly new transaction. It was said that this was merely a further agreement to pay the gaming debt, and *Ex parte Seaton, In re Deerhurst,* was cited, but that case was the contrary of the present, as the creditor there had obtained by default a judgment for a gaming debt which was bad, and the debtor had agreed, in consideration of the creditor not posting him as a defaulter, to treat the bad judgment as a good one. The bills in this case were given for a new consideration altogether, which is not an illegal consideration, and the trustee was wrong in rejecting the proof upon that ground. The decision of the trustee must be reversed without prejudice to his setting up other grounds for rejection within fourteen days.

Appeal allowed.

Solicitor for the appellant, *J. J. Hands.*

Solicitors for the respondent, *Andrew Wood, Purves, & Sutton.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) March 10, 14.

MOORE, NETTLEFOLD, & CO. v. SINGER MANUFACTURING CO. (a.)

Landlord and tenant—Distress for rent—Sale of goods—Purchase by landlord—2 W. & M., Sess. 1, c. 5, s. 2—Practice—Appeal to Court of Appeal—County court appeal—"Right of appeal to the High Court"—County Courts Act, 1888 (51 & 52 *Vict. c* 43), *s.* 120—*Judicature Act,* 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 5.

A landlord who has distrained goods for rent in arrear cannot himself purchase them.

King *v.* England, 12 *W. R.* 308, 4 *B. & S.* 782, *approved and followed.*

Section 1, *sub-section* 5, *of the Judicature Act,* 1894, *which empowers the Court of Appeal to give leave to appeal from the High Court in all cases "where there is a right of appeal to the High Court from any court," includes cases in which there is an appeal to the High Court with the leave of the county court judge as well as cases where there is an appeal without leave.*

Judgment of the Divisional Court (51 *W. R.* 699, [1903] 2 *K. B.* 168) *affirmed.*

Appeal from a judgment of a Divisional Court (Lord Alverstone, L.C J., and Wills and Channell, JJ.), reversing the decision of Judge Smyly, K.C., at the Shoreditch County Court (reported in 51 W. R. 699, [1903] 2 K. B. 168).

The action was brought to recover damages for the conversion of a sewing-machine, the amount claimed being £17.

The facts were as follows: A man named Anton, who was in the employment of the plaintiffs, was the tenant of a house belonging to them.

The defendants let the sewing-machine in question to Anton under a hire-purchase agreement, by one of the terms of which the property in the machine was to remain in the defendants until all the instalments were paid, and the defendants could seize the machine if any of the instalments were in arrear.

The rent of the house being in arrear, the plaintiffs distrained for the rent, and seized, among other things, the sewing-machine, and it was put up for sale by auction. At the auction the sewing-machine was bought in by the plaintiffs' manager for the plaintiffs, who by an agreement in writing let the machine on hire to Anton, and it was handed back to him. The defendants, who had not heard of the distress, seized the machine upon the instalments due under the original hiring agreement falling into arrear. The plaintiffs thereupon brought this action in the county court.

The county court judge found that there was a *bonâ fide* sale of the sewing-machine to the plaintiffs, and he held that the sale was a valid sale, and that the property in the machine passed to the plaintiffs. He accordingly gave judgment for the plaintiffs, but gave the defendants leave to appeal.

The Divisional Court reversed the decision of the county court judge, and gave judgment for the defendants, holding upon the authority of *King* v. *England*, 12 W. R. 308, 4 B. & S. 782, that the sale must be to a third party, and that the property in the goods did not pass to the plaintiffs.

The Divisional Court refused leave to appeal, but the Court of Appeal granted leave.

March 10.—*Hugo Young, K.C.*, and *Lawless*, for the defendants, took a preliminary objection to the hearing of the appeal. The judgment of the Divisional Court in this case is final and conclusive, by virtue of section 45 of the Judicature Act, 1873, which governs this case notwithstanding the more recent enactment of section 1, sub-section 5, of the Judicature Act, 1894. By section 45 of the Act of 1873 all appeals from inferior courts are to be heard and determined by the Divisional Court, and the determination of such appeals by the Divisional Court is final unless special leave to appeal from the same to the Court of Appeal is given by the Divisional Court. Section 1, sub-section 5, of the Act of 1894 is as follows: "In all cases were there is a right of appeal to the High Court from any court or person, the appeal shall be heard and determined by a Divisional Court constituted as may be prescribed by rules of court; and the determination thereof by the Divisional Court shall be final, unless leave to appeal is given by that court or by the Court of Appeal." In this case there was no "right of appeal" from the county court to the High Court within the meaning of that sub-section, as the claim was for less than £20. The words "where there is a right of appeal" mean cases in which the party has an absolute right to appeal without asking for any leave, and do not include a case where, as here, the party has obtained leave to appeal from the county court judge: see the judgment of A. L. Smith, L.J., in the case of *In re Oddy*, 43 W. R. 363, [1895] 1 Q. B. 392. The same expression occurs in section 120 of the County Courts Act, 1888, which provides that at the trial of any action "in which there is a right of appeal" the judge shall at the request of either party make a note of any question of law. That must refer to cases in which there is an absolute right to appeal apart from special leave. Therefore, the Divisional Court having refused to give leave to appeal from their decision, no appeal can be brought to this court, even with the leave of this court.

Montague Lush, K.C. (*Lincoln Reed* and *Arthur Page* with him), for the plaintiffs.—Where a county court judge has given leave to appeal, the party has a right to appeal within the meaning of section 1, sub-section 5, of the Act of 1894. That sub-section therefore applies, and this court may give leave to appeal notwithstanding the fact that the Divisional Court has refused leave to appeal.

COLLINS, M.R.—I am of opinion that the preliminary objection fails. When we examine section 1, sub-section 5, of the Judicature Act, 1894, and look to see with what point of time the Legislature are there dealing, it seems to me to be clear that they are not concerned with the initial character of the action, but are looking at the time when the Divisional Court has to be formed for the purpose of hearing appeals from inferior courts. In some of the cases coming from inferior courts, the parties have an absolute right to appeal; in some cases the parties have the right to appeal given to them by leave. The court to be constituted has to consider all the cases which have a right to be entered in the list. In my opinion the words "where there is a right of appeal," in this sub-section, apply to all those appealable cases, and are not confined to those cases in which there is an absolute right of appeal without leave. It is suggested that the same words, where they are used in section 120 of the County Courts Act, 1888, must be directed to the inception of the action. That may or may not be so, but the words are there used in a

(a.) Reported by W. F. BARRY and F. G. RÜCKER, Esqrs., Barristers-at-Law.

different context. There being no authority contrary to the view which I take, I think the objection must be overruled.

ROMER and MATHEW, L.JJ., concurred.

Preliminary objection overruled.

March 14. — The appeal on the merits was, by consent, heard before two judges.

Montague Lush, K.C., and *Arthur Page* (*Lincoln Reed* with them), for the plaintiffs.—The Divisional Court were wrong in holding that a landlord cannot buy the distrained goods. To allow a landlord to buy distrained goods would not, as the Divisional Court thought, open the door to abuses. On the contrary, it would be in the interests of the tenant to allow the landlord to bid, because a better price would be obtained for the goods. The Divisional Court based their judgment upon the case of *King* v. *England*, 12 W. R. 308, 4 B. & S. 782. But there the court held that there was no sale at all as the landlord took the goods at their appaised value. In that case there was a *dictum* of Blackburn, J., that the sale must be to a third person. That, however, was only a *dictum*. When distrained goods are sold the landlord is not the seller. The goods are in the custody of the law, as in the case of goods taken in execution. The distrainer gains neither a general nor a special property, nor even a possession, in the things distrained; he cannot maintain trover or trespass, for they are in the custody of the law: per Parker, C.B., in *King* v. *Cotton*, 2 Ves. sen. 288, at p. 294. The law transfers the property in the goods to the purchaser, as in the case of the sale of goods seized in execution by the sheriff. The landlord is not the seller, and therefore it cannot be said that the landlord sells to himself. The auctioneer is not the landlord's agent to sell. At the moment of the contract he is the purchaser's agent to buy: *Emmerson* v. *Heelis*, 2 Taunt. 38, at p. 47. The judgment is therefore wrong.

They also referred to *Bishop* v. *Bryant*, 6 C. & P. 484.

Hugo Young, K.C., and *Lawless*, for the defendants. —A landlord may himself distrain or he may employ a certified bailiff to distrain. He may sell the distrained goods by private treaty or by public auction. The plaintiffs' contention must come to this, that a landlord may sell by private treaty to himself. That was what *King* v. *England* said that a landlord could not do. In that case there was a sale of the distrained goods by the landlord to himself by private treaty, and the court held that it was not a proper sale under 2 W. & M., Sess. 1, c. 5, s. 2, Blackburn, J., adding that the sale must be to a third person. By 2 W. & M., Sess. 1, c. 5, s. 2, the landlord is the person selling, though he has not the property in the goods. He sells another person's property by virtue of the Act, and if he is allowed to buy the goods when sold by auction it may give rise to gross abuses. For instance, the landlord could employ an auctioneer of his own choosing; he might direct the sale to take place where he liked; and he might lot the goods in a way most inconvenient to other would-be buyers. The interests of third persons whose goods were seized would be imperilled if a landlord could buy, as he would wish to buy at the cheapest price so long as his rent was covered. In *Rocke* v. *Hills*, 3 Times L. R. 298, it was held that the person who had acted as the landlord's agent in the distress could not be one of the appraisers to value the goods. That decision was before the Law of Distress Amendment Act, 1888, section 5 of which did away with the necessity of appraisement, but it shows that the sale must be conducted quite independently of the landlord. The sale must be an independent sale.

Page replied.

COLLINS, M.R.—The question here arises upon a distress for rent put in by the plaintiffs as landlords. Among the goods seized was a sewing-machine which had been hired out by the defendants to the tenant on a hire-purchase agreement. The landlords sold the sewing-machine under the distress by public auction, and at the sale an agent employed by them bought in the machine on their behalf at what was apparently a fair price, and the landlords thereupon let the machine to the tenant. The defendants, who had originally let the sewing-machine to the tenant, seized the machine upon the instalments due under their hire-purchase agreement falling into arrear, and the landlords brought this action to recover damages for conversion of the machine. That raises the question whether the landlords have acquired a title to the machine.

The facts of the case are on all fours with those in *King* v. *England*. In *King* v. *England* there had been an appraisement of the goods, which at that date was necessary, and the landlord, who was the person authorized by the statute of 2 W. & M., Sess. 1, c. 5, s. 2, to sell the goods, took over the goods of a third person at the appraised value with the consent of the tenant. The true owner of the goods then seized them, and the plaintiff, to whom the landlord had given them, brought an action of conversion as in the present case. The only material difference between the two cases is that here the formality of a sale by auction took place. The real substance, however, of the matter is the same in both cases—namely, a sale of the goods by the landlord to himself. By the statute the person distraining is the person selling. It is true that the auctioner may be the agent of both buyer and seller for some purposes, but in selling he acts primarily as agent for the person selling, though in the course of the transaction he may become for some purposes the agent of the purchaser. The same mischief might arise here as was referred to in *King* v. *England*, the landlord being both seller and buyer, and the likelihood of that mischief arising was pointed out by Blackburn, J., in *King* v. *England*, and by Wills, J., in the present case. Therefore it seems to me, both upon principle and upon authority, that the judgment of the Divisional Court was right, and that this appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. The Act of 2 W. & M., Sess. 1, c. 5, s. 2, makes the case quite clear. The statute empowered the landlord who distrains to sell the distrained goods. A sale there referred to does not mean a sale by the landlord to himself. The word sale would be an improper description of a transaction of that kind. The sale must be to someone other than the landlord. In the present case the auctioneer was employed by the landlord as his agent to effect the sale, though he might become the agent of the buyer to record the sale. The case comes clearly within the authority of *King* v. *England*.

Appeal dismissed.

Solicitor for the plaintiffs, *James Morley*.

Solicitor for the defendants, *G. D. Wansbrough*.

From K. B. Div. (Romer and Mathew, L.J.) March 7.

GRAY v. BONSAL. (a.)

Landlord and tenant — Lease — Forfeiture — Relief — Underlessee — Non-payment of rent — Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14 — *Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 4.

The court has power, under section 4 *of the Conveyancing and Law of Property Act*, 1892, *to grant to an underlessee relief against forfeiture of the superior lease incurred by reason of non-payment of rent.*

Appeal from an order made by Bucknill, J., granting relief against forfeiture of a lease.

The plaintiffs' predecessors in title had granted a lease of the premises, which consisted of a hotel and a yard, for a term of years. The lessee underlet the yard to the Midland Railway Co., and subsequently assigned the term to the defendant.

The plaintiffs having recovered judgment against the defendant in an action for possession of the demised premises on a forfeiture for non-payment of rent, the Midland Railway Co. applied for relief against the forfeiture.

It appeared that the defendant desired to disclaim all interest in the property, and that nothing was known as to the original lessee.

Bucknill, J., granted relief against the forfeiture on payment of arrears of rent and costs.

The plaintiffs appealed.

Montague Lush, K.C., and *B. A. Cohen*, for the plaintiffs.—The learned judge had no jurisdiction to grant relief under section 4 of the Conveyancing Act, 1892. Section 14 of the Conveyancing Act, 1881, contains a code dealing with the granting of relief to lessees against forfeiture of their leases. By sub-section 8 that section is not to apply to a case of forfeiture for non-payment of rent. In that sub-section the Legislature followed the practice of the Court of Chancery and the practice under the Common Law Procedure Act, 1860. It was held that the benefits of section 14 could not be claimed by an underlessee of a part only of the demised premises, and, in order to cure this blot, section 4 of the Conveyancing Act, 1892, was passed. But that section is subject to the same limitations as section 14 of the Act of 1881. It does no more than place underlessees in the same position as lessees. Neither one section nor the other applies to the case of forfeiture for non-payment of rent. In *Wardens of Cholmeley School, Highgate* v. *Sewell*, [1894] 2 Q. B. D. 906, Charles, J., held that under section 4 of the Act of 1892 the court might grant relief to an underlessee in some cases in which relief could not be granted to the lessee himself. That, however, was a case of forfeiture by reason of bankruptcy. [ROMER, L.J., referred to *Imray* v. *Oakshette*, 45 W. R. 681, [1897] 2 Q. B. 218.] That was a case of forfeiture by a breach of a covenant not to assign or underlet without licence. The law has always treated forfeiture by non-payment of rent as being on a separate footing from other forfeitures. In *London Bridge Buildings Co.* v. *Thomson*, 89 L. T. 50, Joyce, J., assumed that section 4 of the Act of 1892 applied to forfeiture for non-payment of rent, but there the point was overlooked. Neither was there jurisdiction in this case to grant relief under the Common Law Procedure Act, 1860. The underlessees could not claim relief under that Act without making the original lessee and the assignee of the lease parties to the application: *Hare* v. *Elms*, 41 W. R. 297, [1893] 1 Q. B. 604.

Neville, K.C., and *C. H. Sargant*, for the Midland Railway Co.

ROMER, L.J.—I am of opinion that in substance the learned judge was right in holding that relief ought to be granted to the underlessees in this case. But I am not satisfied that the order has been made in the right form. It is clear to my mind that relief could have been granted to the underlessees, either under the Common Law Procedure Act, 1860, or under section 4 of the Conveyancing Act, 1892. But there are certain difficulties which would have arisen in imposing the terms which are required to be imposed by the Common Law Procedure Act, in consequence of the fact that the original lessee and his assignee are not before the court. Those difficulties do not arise if the Conveyancing Act, 1892, is applied; and in my opinion the general powers conferred on the court by section 4 of that statute for protecting underlessees on forfeiture of superior leases, ought to be enforced here. I think those powers are most useful in a case like this. It is suggested on the part of the appellants that that section does not enable the court to grant any relief to underlessees other than such relief as was formerly granted either by the Court of Chancery under its equitable jurisdiction or by the Common Law Courts under the Act of 1860, and that it does not extend to relief against forfeiture on non-payment of rent. That suggestion is founded on sub-section 8 of section 14 of the Conveyancing Act, 1881. That section deals with the right of lessees to relief against forfeiture, and sub-section 8 provides that the section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent. It is argued that that provision is imported into section 4 of the Act of 1892, and that the court has no wider powers in dealing with an application of an underlessee for relief than it had under the earlier law.

I am of opinion that section 4 of the Act of 1892 is not a mere amendment of section 14 of the Act of 1881, but that it is a general enabling clause empowering the court to grant relief to underlessees on forfeiture of superior leases under any circumstances on such terms as may appear to the court to be just. I am supported in this view by the judgment of the Court of Appeal in *Imray* v. *Oakshette*, [1897] 2 Q. B. 218. There a similar question arose, and the argument which has been addressed to us was used and failed. Lopes and Rigby, L.JJ., held that the court had jurisdiction under the Act of 1892 to relieve an underlessee against a forfeiture of the original lease, though such forfeiture was occasioned by breach of a covenant not to assign or underlet without licence, and therefore could not be relieved against in favour of the lessee under the Act of 1881. They treated section 4 of the Act of 1892 as being a substantive section in itself. I therefore think that the objection to our applying section 4 of the Act of 1892 falls to the ground. With regard to the form of the order, I think we ought to grant relief to the underlessees under section 4 by vesting in the underlessees the term of the underlease, and making them covenant with the landlord during the term to pay the rent and also to perform the covenants contained in the original lease as to the demised premises. It is said that there may have been breaches of the covenant to repair. If so, it ought to be made a term or condition of the relief that those breaches should be made good. The case will be referred back to the court below for the purpose of an investigation being made into that matter. There will be no costs of this appeal.

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

MATHEW, L.J., concurred.

Order varied.

Solicitors for the plaintiffs, *Druces & Attlee.*

Solicitors for the railway company, *Beale & Co.*

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) March 5.

BOULTON *v.* HOULDER BROTHERS & Co. (*a.*)

Practice—Discovery—Marine insurance—Discovery of ship's papers — Action by underwriters to recover money paid on fraudulent claim.

In an action brought by underwriters claiming repayment of sums obtained from them by the defendants by false and fraudulent claims under policies of marine insurance, and alleging a conspiracy to defraud,

Held, that the underwriters were entitled to the same full discovery as if they had been defendants being sued on the policies.

Appeal from an order of Bucknill, J., for the production of certain documents by the defendants.

The action was brought by a number of underwriters at Lloyd's against Houlder Brothers & Co., and Houlder Brothers & Co. (Limited), and several other defendants.

Between the years 1890 and 1901 the defendant firm, Houlder Brothers & Co., effected with the plaintiffs in their own names various policies of marine insurance on steamships which were known collectively as the Houlder Line, and of which the defendant firm were owners or managing owners.

During the period covered by the insurances the defendant firm, or the defendant company, Houlder Brothers & Co. (Limited), which was incorporated in 1898, promoted the formation of a number of single-ship companies for the purpose of owning particular ships in the Houlder Line, and many of these companies, having gone into voluntary liquidation, were amalgamated in a new company called Houlder Line (Limited).

The plaintiffs, by their statement of claim, alleged that all the defendants had conspired, by means of false receipts and false reports, to prepare various inflated and manipulated accounts of repairs to the ships insured, and that the plaintiffs had thereby been induced to pay to the defendant firm in respect of the policies sums largely in excess of what was due.

The sixth paragraph of the statement of claim was as follows: "From time to time during the period aforesaid the defendants Houlder Brothers & Co. effected with the insurers insurances in their own names on the said ships covering losses by the perils enumerated in the said policies, including general and particular average losses, and in due course each of the policies so effected as aforesaid was handed over to Houlder Brothers & Co., who subsequently thereto put forward claims for alleged losses thereunder as being just and honest claims, but which were in fact both false and fraudulent, and they supported and gave colour to such dishonest claims by means of false receipts and false and inflated and manipulated accounts prepared and obtained as aforesaid for the purpose of deceiving and defrauding the insurers of such ships and fraudulently obtaining payment of such claims from them."

The plaintiffs claimed to recover for the defendant firm the sums paid by them in respect of the policies, and they also claimed damages against all the defendants for conspiracy.

The defendant firm and the defendant company pleaded that until October, 1900, they had no knowledge that any claims had been presented to the underwriters in excess of the amounts properly claimable; and, while denying liability, they paid into court a sum which they said was sufficient to meet the overcharge.

The plaintiffs obtained an order on the defendants to produce for inspection all the policies referred to in the pleadings.

On an application by the defendants for an extension of time for complying with the order for production, it was stated on the part of the defendants, Houlder Brothers & Co., that, with regard to certain policies referred to in the pleadings, some of them were in their possession only in their representative character as directors of Houlder Line (Limited), and some of them, which had been in their possession, were now in the possession of the liquidator of the single-ship companies. Neither Houlder Line (Limited) nor the liquidator were parties to the action.

The master granted an extension of time, but ordered the defendants Houlder Brothers & Co. to produce all the policies referred to in the pleadings for the inspection of the plaintiffs, subject to any order of the liquidator.

On appeal by Houlder Brothers & Co., Bucknill, J., varied the order for production by excluding therefrom all such policies as were in the possession of the liquidator or Houlder Line (Limited).

The plaintiffs appealed.

Rufus Isaacs, Sims Williams, and *Theobald Mathew,* for the plaintiffs.

J. A. Hamilton, K.C., Bremner, and *G. Hay Morgan,* for Houlder Brothers & Co.

The following cases were cited: *Twizell* v. *Allen,* 5 M. & W. 337; *Goldschmidt* v. *Marryat,* 1 Camp. 559; *China Steamship Co.* v. *Commercial Union Assurance Co.,* 30 W. R. 224, 8 Q. B. D. 142; *Kearsley* v. *Philips,* 31 W. R. 467, 10 Q. B. D. 465.

COLLINS, M.R.—This is an appeal from an order made by Bucknill, J., on an application by the plaintiffs for discovery of documents by the defendants. The present case has this peculiarity, that the plaintiffs are underwriters who are seeking to recover from the defendants sums of money which they say they have overpaid to some of the defendants as the assured under certain policies of marine insurance. It is an admitted fact, and it is common ground, that these defendants, being the assured of the plaintiff underwriters, did demand and receive from the underwriters sums of money in respect of ships insured, which were in excess of the sums really due under the policies of insurance. The case is complicated in this way, that the persons who received these sums of money were agents acting for certain companies, though they were also to a certain extent acting for themselves. If proceedings had been taken by the assured on these policies, and the underwriters had resisted their claim, there can be no doubt whatever that the underwriters would have been entitled to the fullest possible discovery of documents. It is admitted that in such a case the assured would have been under an obligation to make that full discovery, which would have included an obligation on them, who would in such a case be the plaintiffs, to produce for the inspection of the defendant underwriters all material documents, even documents not now in their own custody, and documents which they had in their custody as agents for others, or else to account to the court for their inability to

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

produce them. That would have been the case if the underwriters had sought to sift or investigate the claim put forward by the assured, or had disputed the liability which was asserted against them. But the underwriters in the present case, acting as honourable men, did not seek to sift or investigate the claims put forward, and did not demand the discovery to which they were entitled, but paid the amount of the claims without question. It turned out that in this way they paid an amount largely in excess of what was due. In these circumstances, having become aware of the fact that they had in many instances paid sums in respect of losses which had not occurred, they brought this action to recover the excess. The action is in form an action for fraudulent conspiracy, but it is in reality brought for the purpose of exacting repayment of the sums paid in excess of what was due. The case standing thus, the underwriters, being plaintiffs, demand from the assured the same discovery as they would have been entitled to have from the same persons if they had been defendants being sued by those persons. They say that they ought not to be placed in a worse position merely because they forewent their right to investigate the claims when they were first put forward. It is asked on the part of the defendants whether we ought to order the same discovery in an action of conspiracy like this as we would order in an action on a policy of marine insurance. In my opinion the answer to that question is yes, because the substance of the matter is that this is an action on a policy of marine insurance. It has been entirely brought about by the defendants that the position of the parties has been changed. Where the position of the parties on the record has been changed owing to misstatements in the claim of the assured, I am of opinion that the underwriter ought not to be in a worse position with regard to discovery than if he had sifted and investigated the claim when it was put forward. We are not extending the principle underlying the rule which allows underwriters a very wide discovery. It does not seem to me to matter which of the parties is plaintiff and which is defendant. The foundation of the rule is the well-established principle that the position of an underwriter towards his assured is such that he is entitled to the fullest discovery.

It is said on the part of the defendants that the order for wide discovery is in practice only made in actions against underwriters, and that there is no decided case in which the order has been made in an action by an underwriter. It is suggested that the history of this order is to be traced to the introduction by Lord Mansfield of the practice of consolidating actions of marine insurance, and that it was in its origin one of the terms of allowing a consolidation of actions. That may possibly have been the occasion of the first making of the order, but it does not constitute the ground of the order. The ground of the order is the principle which I have stated, though the application of the consolidation rule may have afforded the opportunity of putting the principle into effect.

The reason for asking in this case for that larger discovery which is incident to an action on a policy of marine insurance is that some of the policies of which discovery is sought are said to be in the custody of the defendants as agents for other persons, and some to be in the possession of the liquidator of certain companies. I am of opinion that the plaintiffs are entitled to the discovery for which they ask. As the form of the order which the court will make will be a matter of some nicety, it would be well that the order should be drawn up by the parties and then settled by one of the members of the court.

I am of opinion that the discovery to be given ought to contain a statement on oath as to what steps the defendants have taken to produce the documents in question for inspection by the plaintiffs, and that the defendants should give all the information which they can obtain by the exercise of reasonable exertions. In my judgment the underwriters are entitled to the same measure of discovery as if they were defendants in an action on the policies.

ROMER, L.J.—I have felt some doubts as to this case which have not been wholly removed. But my brethren are of opinion that the order asked for ought to be made against the defendants, and I will not dissent from the conclusion at which they have arrived. My doubt arises from the fact that the defendants seem to have effected these policies on behalf of certain limited companies which are not defendants to the action, and that the action is for fraud alleged to have been committed by the defendants. I have the less hesitation in agreeing that the appeal should be allowed because on the merits I can see no reason why these policies should not be produced.

MATHEW, L.J.—I am clearly of opinion that the order for production ought to be made, and, further, that the defendants should be required to state on oath what they know as to the contents of the policies.

The action is brought to recover the amount of overcharges made by the defendants Houlder Brothers & Co. against the plaintiffs on policies of insurance, and paid by the plaintiffs. These defendants in their defence admit that they have recently discovered items of overcharges, and they have paid a sum into court with a denial of liability. Under these circumstances, in order that the underwriters may be fairly treated, the defendants ought to give them the fullest discovery, including the production of all ship's papers. I also think that the defendants ought to explain on oath exactly what steps they have taken to obtain the documents.

Appeal allowed.

Solicitors for the plaintiffs, *Lewis & Lewis.*

Solicitors for the defendants, *W. A. Crump & Son.*

From P. D. & Ad. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Feb. 20, 23.

GORDON v. GORDON AND GORDON. (*a.*)

Practice—Contempt of court—Married woman—Right to be heard—Costs—Separate estate—Restraint on anticipation—"Proceeding instituted"—Summons in divorce suit—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

If an appellant, who is in contempt of court, alleges that the order from which he is appealing was made without jurisdiction, the court will not refuse to hear him on account of his contempt, although the order appealed from was made after the contempt had been committed.

In a divorce suit, in which the husband was the petitioner, a decree was made for dissolution of the marriage and that the child of the marriage should be delivered up to the custody of the petitioner by the respondent. The respondent (the wife) applied that the decree might be varied by entrusting the custody of the

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

child to herself, and gave an undertaking not to remove the child out of the jurisdiction. On the 10th of March, 1903, the wife's application was dismissed, and it was ordered that the husband's costs of and incident to this application should be payable out of the separate property of the wife, notwithstanding that such property was subject to a restraint on anticipation; and it was further ordered that the child be forthwith delivered up by the wife to the custody of the husband "until further order." The wife, however, in breach of her undertaking, secretly sent the child out of the jurisdiction shortly before the 10th of March, and went out of the jurisdiction herself on that day. On the 12th of March an order was made declaring the wife in contempt for breach of her undertaking. On the 12th of May the wife gave notice of appeal against so much of the order of the 10th of March as directed the payment of the costs of her application (dismissed on that day) out of her separate property, notwithstanding the restraint on anticipation. The wife was still in contempt at the time her appeal came on for hearing.

Held, that, notwithstanding her contempt, the appellant was entitled to be heard.

Held, further, that the wife's application to have the decree in the divorce suit varied—which application was dismissed on the 10th of March—was merely a step in the divorce suit, and not a "proceeding instituted by" the wife within the meaning of section 2 of the Married Women's Property Act, 1893; and consequently that so much of the order of the 10th of March as directed payment of the costs out of the separate property restrained from anticipation of the married woman was void for want of jurisdiction, and should be discharged.

Decision of Jeune, P. ([1903] *P.* 141, 51 *W. R. Dig.* 63), *reversed.*

This was an appeal by Lady Granville Gordon from a decision of the President (Sir F. Jeune) (reported [1903] P. D. 141, 51 W. R. Dig. 63), ordering that the costs in the divorce proceedings should be paid out of her separate estate, notwithstanding that it was subject to a restraint on anticipation.

On the 25th of November, 1901, the appellant's former husband, Mr. C. F. Gordon, obtained a decree *nisi* for the dissolution of the marriage, Lord Granville Gordon being the co-respondent. The decree was made absolute on the 2nd of June, 1902, after which the divorced wife married Lord Granville Gordon. It was ordered by the decree *nisi* of the 25th of November, 1901, that the only child of the marriage should remain in the custody of the father. There was a later order, made *ex parte* in chambers, that the child should be delivered up to the father immediately. However, as the wife was out of England at the time this order was made, she took no notice of it. Subsequently in October, 1902, she returned to England, and on the 15th of October took out a summons to rescind the order for the custody of the child. This summons was, however, dismissed on the 10th of March, 1903, and an order was then made ordering the child to be delivered up to the father; and it was also then further ordered that the applicant (the wife) should pay to her former husband the costs of and incident to the summons, and that the same were payable out of her separate estate, notwithstanding that it was subject to a restraint on anticipation. In the meantime, the wife, the respondent to the divorce proceedings, had given an undertaking, through her counsel, not to remove the child out of the jurisdiction of the court pending the hearing of the application. As soon, however, as the order of the 10th of March was made, and it was attempted to enforce it, it was found that she had surreptitiously sent the child abroad, and gone away herself, and had not since returned.

The President, on the 12th of March, then made an order for her committal for contempt of court, and a writ of attachment for her arrest was issued against her for non-compliance with the order of the 25th of November, 1901, but as she remained out of England, she could not be arrested.

On the 12th of May, 1903, the divorced wife gave notice of appeal from such part of the order of the 10th of March as related to the payment out of her separate estate of the costs of the summons taken out by her on the 15th of October, 1902, to rescind the order for the custody of the child.

On the opening of the appeal, the preliminary objection was taken by counsel for the husband that until the appellant had purged her contempt she could not be heard.

Burgrave Deane, K.C., and *Methold*, for the divorced wife.—The appellant is entitled to come to the court and appeal against this order. If she can show cause against the contempt, she can show cause against a correlative order: *Chuck* v. *Cremer*, 1 Coop. (temp. Cottenham), and the cases therein cited, viz., *Green* v. *Green*, 2 Sim. 394, 430; *Barker* v. *Dawson*, 1 Coop. 207. Here, therefore, this order could be appealed from on the ground of irregularity; the judge had no power to order these costs to be paid out of the appellant's separate estate: *Parry* v. *Perryman* (in *Chuck* v. *Cremer*), also *King* v. *Bryant*, 3 Myl. & Cr. 191; *Wilson* v. *Bates*, 3 Myl. & Cr. 197, 201; *Ricketts* v. *Mornington*, 7 Sim. 200; *In re Brady* 1 Moll. Ch. Reps. in Ir. 254; *Hawkins* v. *Hall*, 1 Beav. 73; *Anon* v. *Lord Gort*, 1 Hog. 77; *Valle* v. *O'Reilly*, 1 Hog. 199; *Morrison* v. *Morrison*, 4 Hare 590. If the appellant is in contempt when the order for costs against her separate estate is made, then she is in contempt from the time she disobeys the injunction. *Ex parte Chadwick*, 15 Jurist 597, shows a person in contempt may object to anything after the contempt, if it is on the ground of irregularity. It is said the order is first, and the contempt after, and therefore these cases cannot apply, but nevertheless a person in contempt may be heard. [Stirling, L.J., referred to *Chatterton* v. *Thomas*, 36 L. J. Ch. N. S. 592, 15 W. R. Ch. Dig. 110.] There is no difference as to the order of dates in which the facts happened. It is said it is an invalid order, but the trustees have no power to object; supposing it were a receiving order, it would not be served on the trustees, and the result would be the trustees would keep the money in hand. This order operates as an injunction on the trustees, preventing them paying the income to her. The appellant cannot be punished by an invalid order, it must be done by law. This order should be discharged.

They also cited the following cases: *Futvoye* v. *Kennard*, 2 Giffard Reps. 110; *Fry* v. *Ernest*, 12 W. R. 97; *Barnardo* v. *Ford*, *Gossage's case*, 41 W. R. 333, [1892] A. C. 326; and *Cattel* v. *Symons*, 5 Beav. 396. [VAUGHAN WILLIAMS, L.J., referred to *In re Fernandez*, *Ex parte Fernandez*, 9 W. R. 559 and 832, 10 C. B. N. S. 3.]

Duke, K.C., and *Priestley, K.C.*, for the respondent husband.—On the 12th of March the appellant was admittedly in contempt of court. The rule in common law cases was to commit such a person.

They cited *Cavendish* v. *Cavendish and Rochefoucauld*, 15 W. R. 182; *Garstin* v. *Garstin*, 13 W. R. 508, 4 Sw. & T. 73; *Curtis* v. *Curtis* 5 Moore P. C. 252; *Howard* v. *Newman*, 1 Moll. Ch. Reps. in Ir. 221; *Anonymous case*, 15 Ves. jun. 174; *Wenman* v. *Osbaldiston*, 2 Bro. P.C. 276; *Hewitt* v. *McCartney*, 13 Ves. jun. 560; and Daniel's Chancery Practice (7th ed.), vol. 1, p. 724.

Bargrave Deane, K.C., replied.

VAUGHAN WILLIAMS, L.J.—This is an appeal against an order of the 10th of March, 1903, and a preliminary objection has been taken that the appellant is in contempt, and that therefore this appeal ought not to be heard. Now, the appeal is not against the whole of the order of the 10th of March, it is only against so much of it as orders that the costs incident to a summons which was taken out by the wife in chambers, and which was adjourned into court, should be payable out of her separate property, notwithstanding that such property is subject to a restraint on anticipation. The contempt which is relied upon as debarring the wife (the respondent in the divorce proceedings) from appealing against that part of the order is thus set forth in the 7th paragraph of the affidavit of Sir George Lewis: "Notwithstanding the undertaking of the respondent not to remove the said child out of the jurisdiction of the court, and in defiance thereof, the respondent two or three days before the decision of the court surreptitiously sent the child out of the country, and on the day the court gave judgment she herself left England." The undertaking was given antecedently to the summons being heard in court, and the question which we have to determine is whether this objection that the respondent is in contempt ought to prevail here. I think that it ought not to prevail here. We have heard of a great many cases which were decided in the Court of Chancery and of the rules and principles which were laid down by various judges, including Lord Cottenham, in reference to this matter of contempt, and when it should, and when it should not, debar a would-be appellant or a would-be applicant from being heard. The greater part of the cases are to be found set out in the notes to *Chuck* v. *Cremer*, in 1 Cooper (temp. Cottenham) 205; but I do not think it will be necessary to go through those cases. I think there are general principles which apply to this case which are not really affected by the decisions to which our attention was particularly called. What I mean by that is, that, taking it generally, it has not been disputed in this discussion that this rule about not hearing a person who is in contempt *primâ facie* applies to voluntary applications on his part, to cases where he comes and asks for something, and not to cases in which all that he is seeking, is to be heard in respect of matters of defence. Not that I am suggesting for one moment that it is every matter of defence which entitles a person in contempt to be heard; for instance, if there has been an order made in exercise of the discretion of the court, and someone who is oppressed, or thinks himself oppressed, by that order wants to show that the court exercised its discretion wrongly, that person, if he is in contempt, cannot be heard to say anything of the sort until he has purged his contempt. *Garstin* v. *Garstin*, 13 W. R. 508, 4 Swa. & T. 73, is an instance of that sort. But when you have to deal with an order as to which it is suggested that it may have been made without jurisdiction, then if upon looking at the order one sees that that is really the ground of appeal, it seems to me that such cases have always been treated as cases where the court will entertain the objection to the order, though the person making the objection is in contempt. It was admitted, and could not be otherwise than admitted, that if the objection was to the very order itself that created the contempt, and if the objection was of the character that I have described, the fact that the objector was in contempt did not deprive him of the right to be heard. I wish to mention here that I do not propose to go into the question of Lord Cottenham's rule as laid down in *Barker* v. *Dawson* (referred to in *Chuck* v. *Cremer* on p. 207) for this reason, that if you take the order of events here, as appearing upon Sir G. Lewis's affidavit, it will be seen that the particular case as to which Lord Cottenham laid down his rule in *Barker* v. *Dawson* was a case in which the sequence of events was different from the present sequence of events, and his rule has no application whatever to the events in the present case.

That being so, the simple point that we have to decide is this: Here is an order the objection to which is obviously of a character that does not depend upon the exercise of discretion at all. What is said is that it is unlawful to make such an order in respect of the separate property of a married woman restrained from anticipation—that is to say, unlawful for the court by which the order was made. And it is argued, on the other side, that we ought not to look at that order because this lady, the divorced wife, is in contempt. In my judgment that is not so. I think that having regard to the nature of the objection the present appellant, the respondent to the order, is merely coming here to say: "This order which has been made against me is an illegal order, and appears so upon the face of the order itself." I think, as that is so, there is no rule which has been brought to our notice which should prevent her being heard.

I have only to add this, that supposing this order is in fact an illegal order, and that we refused to hear this appellant now, it does not by any means follow that there would not be any opportunity hereafter of questioning the order. But be that as it may, I think that, having regard to the fact that the objection here is an objection to the legality of the order, it would not be right of the court to allow an order to continue in force without first determining the question of its legality. I think under those circumstances we ought to hear this appeal.

STIRLING, L.J.—I also think that this appeal ought to be heard. Counsel for the husband have relied on the decision of Lord Cottenham in *Chuck* v. *Cremer*. If our decision involved departing from what was laid down by Lord Cottenham there, I should myself desire further to consider the matter; but when the sequence of events in the present case is ascertained it appears to me that the case is not identical with *Chuck* v. *Cremer*. In that case the order of events was this. The defendant moved that an injunction granted *ex parte* might be dissolved; his application was unsuccessful, and then he gave notice of motion to appeal. Previous to the notice of appeal being given, an attachment was issued against the defendant, and he was in contempt; and that objection was taken to the appeal. The Lord Chancellor gave effect to the objection, but he said this: "That a party was entitled to be heard, if his object was to get rid of the order or other proceeding which placed him in contempt, and he was also entitled to be heard for the purpose of resisting or setting aside for irregularity any proceedings subsequent to his contempt." Here the contempt, according to the affidavit which the husband himself put forward, began two or three days before the order in question was made.

Therefore, in hearing the appeal, we are not doing anything contrary to what Lord Cottenham said. And here the question is not merely one of irregularity, but one of want of jurisdiction, and having regard to that, I entirely agree that the appeal ought to be heard.

COZENS-HARDY, L.J.—I agree. Until recently no court had any jurisdiction whatever to direct the payment of costs out of the separate estate of a

married woman subject to restraint on anticipation; but in 1893 an Act was passed which in terms by section 2 declared that the court shall have jurisdiction from time to time, in certain cases, to direct payment of costs out of the separate estate of a married woman whether subject to restraint on anticipation or not—plainly a limited jurisdiction. The only object of this appeal, as I understand it, is to raise the contention that this is not one of the limited class of cases in which jurisdiction is given to the court by the express language of section 2 of the Act. That being so, I entirely agree with my brethren that this preliminary objection ought to be disallowed, but I desire to limit my judgment to a case in which the appellant is simply seeking to say that the order so far as it is complained of, is outside the jurisdiction of the court, as distinguished from the case of an order which although within the jurisdiction of the court, ought not, it is said, to have been made. So far as I can see, there is certainly no principle in opposition to the view which we have taken, nor do I think that there is any authority against it. Speaking for myself I have been unable to understand or discover what principle, if any, is at the root of all the various decisions which have been brought before us, as to the distinction between contempt committed before, and contempt committed after, the making of the order which it is sought to set aside.

Bargrave Deane, K.C., and *Methold*, for the divorced wife

They cited *In re Lumley, Hood Barrs* v. *Cathcart*, 42 W. R. 534, 633, [1894] 3 Ch. 376; *Hood Barrs* v. *Heriot*, 45 W. R. 1, 17, 507, [1896] 2 Q. B. 338, 375, [1897] A. C. 177; section 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63).

Duke, K.C., and *Priestley, K.C.*, for the petitioner, the husband, referred to Divorce and Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 4, and Divorce Act, 1857 (20 & 21 Vict. c. 85). The distinction is not between proceedings taken in an action and proceedings not taken in an action. A divorce is a proceeding under the Act of 1859, and the appellant as a divorced wife is in no better position than if she had been a mere relation.

They cited *Nunn & Co.* v. *Tyson*, 50 W. R. 16, [1901] 2 K. B. 487.

Bargrave Deane, K.C., replied.

VAUGHAN WILLIAMS, L.J.—I have not the slightest doubt myself that this summons was a step in the divorce suit, and that this summons did not initiate any litigation at all. Under those circumstances it is quite plain, having regard to the decision in *Hood Barrs* v. *Cathcart* and other cases, that there is no jurisdiction to make this order for the payment of costs notwithstanding the lady was restrained from anticipation. I do not think it is necessary to say any more. Everyone is agreed that these costs cannot be ordered to be paid out of these funds as to which a married woman is restrained from anticipation, unless they come within the words of section 2 of the Married Women's Property Act, 1893; and everyone is agreed that the matter is not brought within the words of section 2 unless the proceeding is a proceeding initiated by the married woman. I am of opinion that this summons was not initiated by the married woman, but was a mere step in the previous litigation.

STIRLING, L.J.—I am of the same opinion. Two orders of the Divorce Court were made on the 25th of November, 1901, one being the decree *nisi* in the suit, by which, after provisions with reference to the dissolution of the marriage, it was ordered that "the child, the issue of the marriage between the petitioner and the respondent, do remain in the custody of the petitioner until further order of the court, but it is directed that such child be not removed out of the jurisdiction of the court without its sanction." The other order of the 25th of November, 1901, was an order that the child "be forthwith delivered up to and do remain in the custody of the petitioner until further order of the court." Both orders were of a temporary nature, simply "until further order." Afterwards, on the 15th of October, 1902, the wife takes out a summons, or applies by summons, that those orders should be varied. The question we have to decide is this: Whether, within the terms of the Married Women's Property Act, 1893, s. 2, this is "a proceeding instituted by" her. It has been held by the House of Lords, and also by the Court of Appeal that these words refer to an action or some other litigation initiated by the married woman. Now, can it be said that this summons was an action or other litigation initiated by the married woman. I think not. It seems to me simply a continuation of the old litigation which had been commenced by the husband by the institution of this suit for the dissolution of the marriage, in which, from the very first, the question of the custody of the child was a subject of litigation and was not finally determined by the two orders to which I have referred.

COZENS-HARDY, L.J.—I am of the same opinion. It seems to me both in form and in fact that the application of the lady was an application by her in the suit of *Gordon* v. *Gordon*, and was not an independent proceeding initiated by her.

Preliminary objection overruled and appeal allowed.

Solicitors, *Dangerfield & Blythe; Lewis & Lewis.*

High Court of Justice.

Chan. Div. Byrne, J. } Feb. 12.

In re ALLEN AND DRISCOLL'S CONTRACT. (a.)

Local government—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Expenses incurred by local authority—Charge upon premises—Date of charge—Completion of works—Vendor and purchaser.*

Expenses incurred by a local authority for works executed in a street after notice to the owners of adjoining premises, and failure to comply with such notice, do not become a charge upon the premises under section 257 *of the Public Health Act*, 1875, *until the completion of the works, notwithstanding that the works were executed by contractors in pursuance of a contract with the local authority under which the local authority became liable to pay for them.*

Originating summons.

This was a vendor and purchaser summons, which raised the question whether expenses incurred by a local authority in paving a street adjoining certain houses had become a charge upon them prior to the completion of the works under section 257 of the Public Health Act, 1875.

The houses in question were leasehold houses belonging to the vendors situate in Rusthall-avenue, in Acton, Middlesex, and in February, 1903, the Urban District Council of Acton sent notices to the owners and occupiers of the houses to sewer, level,

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

and pave the part of the street which adjoined the houses within five weeks of the date thereof.

These notices were not complied with, and on the 13th of July, 1903, the council entered into an agreement with a firm of contractors to execute, among other works, the paving works in question at a certain sum.

On the 22nd of July, 1903, an order was made in an action of *Allen* v. *Driscoll*, that the defendants in that action (the purchasers and applicants on this summons) should pay to the plaintiffs (the vendors and respondents) on or before the 29th of September, 1903, the sum of £4,440 in settlement of the purchase-money and interest due in respect of the houses in question, the plaintiffs undertaking to make a good title to the houses and to assign them to the defendants, the defendants undertaking to accept the houses; and it was ordered that the plaintiffs were to receive the rents and pay the outgoings in respect thereof up to the 29th of September, 1903.

The works were not wholly completed by this latter date, and the purchasers took out this summons asking for a declaration that the vendors were liable to pay and indemnify them against the amount when apportioned of the expenses incurred by the local authority under the Public Health Act, 1875, for paving and other works in respect of these houses.

Cozens-Hardy, for the purchasers. — Although several cases have decided that the expenses became a charge upon the premises at least as early as the time of completion of the works, yet no case has decided whether or not they do not become a charge at an earlier time. I submit that when the local authority entered into a binding contract with the contractors that these works should be done at a certain price they incurred the expense, and that therefore under section 257 of the Act this expense became a charge upon the houses.

He referred to *Tottenham Local Board* v. *Rowell*, 29 W. R. 36, 15 Ch. D. 378; *Mayor of West Ham* v. *Grant*, 40 Ch. D. 331, 37 W. R. Dig. 113; *Bettesworth and Richer's Contract*, 36 W. R. 544, 37 Ch. D. 535; *Stock* v. *Meakin*, 48 W. R. 420, [1900] 1 Ch. 683; *Surtees* v. *Woodhouse*, 51 W. R. 275, [1903] 1 K. B. 396.

Norton, K.C., and *Ashton Cross*, for the vendors.—*Stock* v. *Meakin* is precisely in point, and the court there decided that the date fixed by the Act for the commencement of the charge is that of completion of the works. *Stock* v. *Meakin* upon this point was also followed by your lordship in *In re Waterhouse's Contract*, 44 SOLICITORS' JOURNAL 645. Moreover, the expenses are not recoverable until service of a demand for them, which has not been made.

Cozens-Hardy in reply.—The charge arises independently of the personal liability: see observations of Kay, J., in *Mayor of West Ham* v. *Grant*, 40 Ch. D., p. 335.

BYRNE, J.—The decision in *Tottenham Local Board* v. *Rowell* left still open the question whether or not the date of completion of the works is the actual time when the charge first arises, or whether the expenses may be said to have been incurred within the meaning of section 257 before the date fixed for completion. It is also obvious that in *Mayor of West Ham* v. *Grant* the learned judge did not determine the question; and again, in *Bettesworth and Richer's Contract*, although the learned judge says "it seems to me that the expenses were a charge which came into existence, at all events as early as the 26th of June, 1886"—that being the date of completion of the works in that case—yet he leaves it open to argument whether it might come into existence at an earlier period. In the later case of *Scott* v. *Meakin* it is again true that it was not necessary to decide as between the date of completion and an earlier date, yet I do not doubt that the court did determine that the former was the date at which the expenses were first incurred, and I do not see why I should put another interpretation upon the section; and again, in *Surtees* v. *Woodhouse*, although the question was not the one raised before me, yet Stirling, J., speaking of *Stock* v. *Meakin*, said "it was held that the amount of the expenses incurred under the Private Street Works Act, 1892, becomes a charge on the premises on which they are apportioned as from the date of the completion of the works, and not from the date of final apportionment." In the result it appears to me that for the purpose of ascertaining the date when the charge first arises under section 257 of the Act the local authority did not incur the expenses within the meaning of that section before the date of completion of the works.

Solicitor for the applicants, *T. Blanco White*.

Solicitors for the respondents, *Taylor, Willcocks, & Lemon*.

Chan. Div. } Farwell, J. } Feb. 6.

MORTON v. BANK OF ENGLAND. (a.)

Poor law — School district — Board — Dissolution — Transfer of Consolidated Stock—Poor Law Amendment Act, 1844 (7 & 8 *Vict. c.* 101), *ss.* 40, 42, 45—*Dissolved Boards of Management and Guardians Act*, 1870 (33 & 34 *Vict. c.* 2), *ss.* 1, 12.

A school district and a board for such district were constituted under the Poor Law Amendment Act, 1844. *The district was dissolved. At the date of the dissolution there was standing in the books of the Bank of England a sum of* 2½ *per cent. Consolidated Stock, which represented surplus assets of the board of management.*

Held, that the corporate body remained in existence either by implication from section 1 *of* 33 & 34 *Vict. c.* 2 *or according to the common law rule so long as any one of the corporators remained alive. The plaintiffs, the last acting managers, were not entitled to claim that the property was vested in them automatically under* 33 & 34 *Vict. c.* 2, *section* 12, *and it would be necessary that the transfer of the Consolidated Stock be executed under the corporate seal of the board.*

Action.

The plaintiffs were the last acting managers of the South Metropolitan School District (dissolved).

The South Metropolitan School District was originally constituted by an order of the Poor Law Board dated the 12th of March, 1849.

By an order of the Local Government Board of the 30th of March, 1898, and by subsequent orders, the school district was dissolved from and after the 29th of September, 1902.

At the date of the dissolution of the school district there was standing in the books of the defendant, the Bank of England, the sum of £15,329 13s. 5d. 2½ per cent. Consolidated Stock, in the names of the board of management of the South Metropolitan School District.

Upon the dissolution of the school district the real and personal property belonging to the board of management (other than the said Consols) was realized under the authority of the Local Government Board, and the liabilities of the board of

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

married woman subject to restraint on anticipation; but in 1893 an Act was passed which in terms by section 2 declared that the court shall have jurisdiction from time to time, in certain cases, to direct payment of costs out of the separate estate of a married woman whether subject to restraint on anticipation or not—plainly a limited jurisdiction. The only object of this appeal, as I understand it, is to raise the contention that this is not one of the limited class of cases in which jurisdiction is given to the court by the express language of section 2 of the Act. That being so, I entirely agree with my brethren that this preliminary objection ought to be disallowed, but I desire to limit my judgment to a case in which the appellant is simply seeking to say that the order so far as it is complained of, is outside the jurisdiction of the court, as distinguished from the case of an order which although within the jurisdiction of the court, ought not, it is said, to have been made. So far as I can see, there is certainly no principle in opposition to the view which we have taken, nor do I think that there is any authority against it. Speaking for myself I have been unable to understand or discover what principle, if any, is at the root of all the various decisions which have been brought before us, as to the distinction between contempt committed before, and contempt committed after, the making of the order which it is sought to set aside.

Bargrave Deane, K.C., and *Methold*, for the divorced wife

They cited *In re Lumley, Hood Barrs* v. *Cathcart*, 42 W. R. 534, 633, [1894] 3 Ch. 376; *Hood Barrs* v. *Heriot*, 45 W. R. 1, 17, 507, [1896] 2 Q. B. 338, 375, [1897] A. C. 177; section 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63).

Duke, K.C., and *Priestley, K.C.*, for the petitioner, the husband, referred to Divorce and Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 4, and Divorce Act, 1857 (20 & 21 Vict. c. 85). The distinction is not between proceedings taken in an action and proceedings not taken in an action. A divorce is a proceeding under the Act of 1859, and the appellant as a divorced wife is in no better position than if she had been a mere relation.

They cited *Nunn & Co.* v. *Tyson*, 50 W. R. 16, [1901] 2 K. B. 487.

Bargrave Deane, K.C., replied.

VAUGHAN WILLIAMS, L.J.—I have not the slightest doubt myself that this summons was a step in the divorce suit, and that this summons did not initiate any litigation at all. Under those circumstances it is quite plain, having regard to the decision in *Hood Barrs* v. *Cathcart* and other cases, that there is no jurisdiction to make this order for the payment of costs notwithstanding the lady was restrained from anticipation. I do not think it is necessary to say any more. Everyone is agreed that these costs cannot be ordered to be paid out of these funds as to which a married woman is restrained from anticipation, unless they come within the words of section 2 of the Married Women's Property Act, 1893; and everyone is agreed that the matter is not brought within the words of section 2 unless the proceeding is a proceeding initiated by the married woman. I am of opinion that this summons was not initiated by the married woman, but was a mere step in the previous litigation.

STIRLING, L.J.—I am of the same opinion. Two orders of the Divorce Court were made on the 25th of November, 1901, one being the decree *nisi* in the suit, by which, after provisions with reference to the dissolution of the marriage, it was ordered that "the child, the issue of the marriage between the petitioner and the respondent, do remain in the custody of the petitioner until further order of the court, but it is directed that such child be not removed out of the jurisdiction of the court without its sanction." The other order of the 25th of November, 1901, was an order that the child "be forthwith delivered up to and do remain in the custody of the petitioner until further order of the court." Both orders were of a temporary nature, simply "until further order." Afterwards, on the 15th of October, 1902, the wife takes out a summons, or applies by summons, that those orders should be varied. The question we have to decide is this: Whether, within the terms of the Married Women's Property Act, 1893, s. 2, this is "a proceeding instituted by" her. It has been held by the House of Lords, and also by the Court of Appeal that these words refer to an action or some other litigation initiated by the married woman. Now, can it be said that this summons was an action or other litigation initiated by the married woman. I think not. It seems to me simply a continuation of the old litigation which had been commenced by the husband by the institution of this suit for the dissolution of the marriage, in which, from the very first, the question of the custody of the child was a subject of litigation and was not finally determined by the two orders to which I have referred.

COZENS-HARDY, L.J.—I am of the same opinion. It seems to me both in form and in fact that the application of the lady was an application by her in the suit of *Gordon* v. *Gordon*, and was not an independent proceeding initiated by her.

Preliminary objection overruled and appeal allowed.

Solicitors, *Dangerfield & Blythe; Lewis & Lewis.*

High Court of Justice.

Chan. Div. Byrne, J. — Feb. 12.

In re ALLEN AND DRISCOLL'S CONTRACT. (a.)

Local government—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Expenses incurred by local authority—Charge upon premises—Date of charge—Completion of works—Vendor and purchaser.*

Expenses incurred by a local authority for works executed in a street after notice to the owners of adjoining premises, and failure to comply with such notice, do not become a charge upon the premises under section 257 *of the Public Health Act*, 1875, *until the completion of the works, notwithstanding that the works were executed by contractors in pursuance of a contract with the local authority under which the local authority became liable to pay for them.*

Originating summons.

This was a vendor and purchaser summons, which raised the question whether expenses incurred by a local authority in paving a street adjoining certain houses had become a charge upon them prior to the completion of the works under section 257 of the Public Health Act, 1875.

The houses in question were leasehold houses belonging to the vendors situate in Rusthall-avenue, in Acton, Middlesex, and in February, 1903, the Urban District Council of Acton sent notices to the owners and occupiers of the houses to sewer, level,

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

and pave the part of the street which adjoined the houses within five weeks of the date thereof.

These notices were not complied with, and on the 13th of July, 1903, the council entered into an agreement with a firm of contractors to execute, among other works, the paving works in question at a certain sum.

On the 22nd of July, 1903, an order was made in an action of *Allen* v. *Driscoll*, that the defendants in that action (the purchasers and applicants on this summons) should pay to the plaintiffs (the vendors and respondents) on or before the 29th of September, 1903, the sum of £4,440 in settlement of the purchase-money and interest due in respect of the houses in question, the plaintiffs undertaking to make a good title to the houses and to assign them to the defendants, the defendants undertaking to accept the houses; and it was ordered that the plaintiffs were to receive the rents and pay the outgoings in respect thereof up to the 29th of September, 1903.

The works were not wholly completed by this latter date, and the purchasers took out this summons asking for a declaration that the vendors were liable to pay and indemnify them against the amount when apportioned of the expenses incurred by the local authority under the Public Health Act, 1875, for paving and other works in respect of these houses.

Cozens-Hardy, for the purchasers. — Although several cases have decided that the expenses became a charge upon the premises at least as early as the time of completion of the works, yet no case has decided whether or not they do not become a charge at an earlier time. I submit that when the local authority entered into a binding contract with the contractors that these works should be done at a certain price they incurred the expense, and that therefore under section 257 of the Act this expense became a charge upon the houses.

He referred to *Tottenham Local Board* v. *Rowell*, 29 W. R. 36, 15 Ch. D. 378; *Mayor of West Ham* v. *Grant*, 40 Ch. D. 331, 37 W. R. Dig. 113; *Betteswortb and Richer's Contract*, 36 W. R. 544, 37 Ch. D. 535; *Stock* v. *Meakin*, 48 W. R. 420, [1900] 1 Ch. 683; *Surtees* v. *Woodhouse*, 51 W. R. 275, [1903] 1 K. B. 396.

Norton, K.C., and *Ashton Cross*, for the vendors.—*Stock* v. *Meakin* is precisely in point, and the court there decided that the date fixed by the Act for the commencement of the charge is that of completion of the works. *Stock* v. *Meakin* upon this point was also followed by your lordship in *In re Waterhouse's Contract*, 44 SOLICITORS' JOURNAL 645. Moreover, the expenses are not recoverable until service of a demand for them, which has not been made.

Cozens-Hardy in reply.—The charge arises independently of the personal liability: see observations of Kay, J., in *Mayor of West Ham* v. *Grant*, 40 Ch. D., p. 335.

BYRNE, J.—The decision in *Tottenham Local Board* v. *Rowell* left still open the question whether or not the date of completion of the works is the actual time when the charge first arises, or whether the expenses may be said to have been incurred within the meaning of section 257 before the date fixed for completion. It is also obvious that in *Mayor of West Ham* v. *Grant* the learned judge did not determine the question; and again, in *Betteswortb and Richer's Contract*, although the learned judge says "it seems to me that the expenses were a charge which came into existence, at all events as early as the 26th of June, 1886"—that being the date of completion of the works in that case—yet he leaves it open to argument whether it might come into existence at an earlier period. In the later case of *Scott* v. *Meakin* it is again true that it was not necessary to decide as between the date of completion and an earlier date, yet I do not doubt that the court did determine that the former was the date at which the expenses were first incurred, and I do not see why I should put another interpretation upon the section; and again, in *Surtees* v. *Woodhouse*, although the question was not the one raised before me, yet Stirling, J., speaking of *Stock* v. *Meakin*, said "it was held that the amount of the expenses incurred under the Private Street Works Act, 1892, becomes a charge on the premises on which they are apportioned as from the date of the completion of the works, and not from the date of final apportionment." In the result it appears to me that for the purpose of ascertaining the date when the charge first arises under section 257 of the Act the local authority did not incur the expenses within the meaning of that section before the date of completion of the works.

Solicitor for the applicants, *T. Blanco White*.

Solicitors for the respondents, *Taylor, Willcocks, & Lemon*.

Chan. Div. } Farwell, J. } Feb. 6.

MORTON v. BANK OF ENGLAND. (*a*.)

Poor law — School district — Board — Dissolution — Transfer of Consolidated Stock—Poor Law Amendment Act, 1844 (7 & 8 *Vict. c.* 101), *ss.* 40, 42, 45—*Dissolved Boards of Management and Guardians Act*, 1870 (33 & 34 *Vict. c.* 2), *ss.* 1, 12.

A school district and a board for such district were constituted under the Poor Law Amendment Act, 1844. *The district was dissolved. At the date of the dissolution there was standing in the books of the Bank of England a sum of* 2½ *per cent. Consolidated Stock, which represented surplus assets of the board of management.*

Held, that the corporate body remained in existence either by implication from section 1 *of* 33 & 34 *Vict. c.* 2 *or according to the common law rule so long as any one of the corporators remained alive. The plaintiffs, the last acting managers, were not entitled to claim that the property was vested in them automatically under* 33 & 34 *Vict. c.* 2, *section* 12, *and it would be necessary that the transfer of the Consolidated Stock be executed under the corporate seal of the board.*

Action.

The plaintiffs were the last acting managers of the South Metropolitan School District (dissolved).

The South Metropolitan School District was originally constituted by an order of the Poor Law Board dated the 12th of March, 1849.

By an order of the Local Government Board of the 30th of March, 1898, and by subsequent orders, the school district was dissolved from and after the 29th of September, 1902.

At the date of the dissolution of the school district there was standing in the books of the defendant, the Bank of England, the sum of £15,329 13s. 5d. 2½ per cent. Consolidated Stock, in the names of the board of management of the South Metropolitan School District.

Upon the dissolution of the school district the real and personal property belonging to the board of management (other than the said Consols) was realized under the authority of the Local Government Board, and the liabilities of the board of

(*a*.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

management were discharged. The Consols represented surplus assets of the board of management.

By an order of the Local Government Board of the 10th of August, 1903, the plaintiffs, as the last acting managers of the school district, were ordered to transfer the Consols to the Guardians of the Poor of St. Giles', Greenwich, St. Olave's, Stepney, and Woolwich.

The plaintiffs claimed a declaration that they were entitled as joint tenants to the said Consols and that they were entitled to require the bank to transfer the Consols into their joint names. Alternatively that they were entitled as the last acting managers of the school district to transfer the Consols in the books of the bank into the names of the poor law guardians mentioned in the order of the Local Government Board.

The Dissolved Boards of Management and Guardians Act, 1870, provides:

Section 1. "When the Poor Law Board shall have dissolved or shall dissolve any district the component parts whereof shall not have been formed into one union . . . the persons who are acting as managers . . . at the time of the dissolution . . . and the survivors of them, shall continue in office for the purpose of paying and discharging the debts and liabilities of such district . . . and of receiving and recovering moneys or other property due to the said district . . . in like manner as the board of management . . . could have done if no dissolution . . . had taken place . . . and provided that no such managers or guardians shall be empowered to act in the manner aforesaid for a longer period than twelve months from the date of the dissolution . . . unless the Poor Law Board by their order shall authorize them to continue to act for some special purpose."

Section 12. "Upon the disolution of any district or union . . . the real and personal estate vested in the managers . . . of such district . . . shall be transferred to and vested in the persons who were acting as managers . . . at the time of such dissolution or addition to be held by them as joint tenants, according to the nature of such property, in trust for the parishes comprised in such district. . . ."

Bramwell Davis, K.C., and *J. B. Matthews*, for the plaintiffs, contended that section 12 of the Dissolved Boards, &c., Act, 1870, operated so as to automatically vest the Consols in them, and that they were entitled as shareholders to transfer the same under section 4 of the National Debt Act, 1870 (33 & 34 Vict. c. 37), s. 4.

Upjohn, K.C., and *Howard Wright*, for the defendants.

FARWELL, J., in giving judgment said: It is by no means easy to find one's way through the maze of these Acts of Parliament, but I have come to a clear conclusion upon the particular one before me, which is the only one I am concerned with.

By the Poor Law Amendment Act of 1834, s. 40, the commissioners formed school districts. By section 42 a board shall be constituted for every district. Now, these are obviously two different and distinct things. The district is one thing, the board for the district is another.

By section 45 every such district board is incorporated for the purpose of holding the property and suing and being sued. Then the Metropolis Poor Amendment Act of 1869 authorizes the Poor Law Board, as and when they shall see fit, to dissolve any school district. Now, that is obviously the district and not the board or the incorporated entity.

Then the Dissolved Boards of Management Act, 1870, contains a preamble, "Whereas it is expedient that better provision should be made for the proceedings of boards of management and boards of guardians when the districts or unions for which they have acted respectively are dissolved." That clearly again treats the board as existing after the dissolution of the district. It provides, section 1, that when the Poor Law Board shall have dissolved any district the persons who were acting as managers at the time of the dissolution shall continue in office for the purpose of practically winding up the affairs of the district and paying its debts and receiving and recovering its property, with a proviso that "No such managers or guardians shall be empowered to act in the manner aforesaid for a longer period than twelve months from the date of the dissolution, unless the Poor Law Board by their order shall authorize them to continue to act for some special purpose." Then, by section 12 of that Act, down to this point the district being dissolved, but the corporate board remaining, it is provided that upon the dissolution of any district the real and personal estate vested in the managers shall be transferred to and vested in the persons who were acting as managers at the time of such dissolution, to be held by them as joint tenants in trust for the parishes comprised in such district. Now, obviously the meaning of that is that you dissolve the district, splitting it thereupon into its various component parts, all of whom would have some share in the property which had formerly been held by the corporate body in trust for the district. The provision is that the real and personal estate vested in the managers shall be transferred to the district. The phrase is a little unfortunate, because it is not strictly accurate to say it is vested in the managers; it is vested in the board of management which has been incorporated, but I think, inasmuch as there may be cases in which the managers are not incorporated because this extends to various other districts, asylums, and unions, the reasonable construction is that property vested in the managers, whether it be vested in them as individuals or as a corporation, it shall be transferred and vested.

Now, in my opinion, that is not, as has been argued, an automatic vesting order, the phraseology of which we are familiar with. The words are "shall vest in." We all understand that, but when you say it shall be transferred to and vested in, it is not "vest in" but "vested in" which point to an act to be done by persons mentioned who are ordered to do the acts necessary for that purpose. That appears to me to be a simple and reasonable solution of the matter.

It has been suggested that it is absurd to leave this corporate body still existing. I do not see the absurdity. It is obvious that the property on the dissolution of the district must be somewhere or other, and if you *ipso facto* dissolve both districts and board at the same moment, the title to the real estate in land would, I suppose, vest in the Crown, and the title to the Consols in the bank would vest, I suppose, also in the Crown as *bona vacantia*. I do not know, but at any rate the Legislature appeared to me to have adopted a much more convenient course by keeping the corporate body in existence, either by implication from the first section of the Act of 1870, for so long a period as there remains anything to be done, or according to the common law rule, so long as any one of the corporators remain alive. I should prefer myself, if it were necessary to decide, that it was the first. I do not think that it is necessary for me on this particular occasion to determine to whom the property is to be transferred. On the face of it it is

to be to the persons who were acting as managers at the date of the dissolution.

Now the order of dissolution in this case was dated the 29th of March, 1898, directing the dissolution to take effect as from the 30th of September, 1899. A question has been raised which is one of very considerable importance as to the power of the Local Government Board to undo that dissolution and set up the board again, and then dissolve it again, or to continue the managers for a period of more than twelve months except for a special purpose specified on the face of the order. I do not think it is necessary for me to determine that, because I think it is sufficient for me to declare that the plaintiffs are not entitled to claim as they do, that the property is vested in them under this particular section, but that it would be necessary for the transfer to be executed under the corporate seal of the board, and thereupon, when that transfer is presented to the Bank of England, the bank will, no doubt, with their usual care and skill, consider whether the persons to whom the transfer is proposed to be made are the right and proper persons. But I hope they will not come to me again; I think that is the proper thing to do.

Solicitor for the plaintiffs, *Benjamin Avery.*

Solicitor for the defendants, *Freshfields.*

K. B. Div. (Buckley, J.) March 4, 10.

LIVINGSTONE *v.* MAYOR, &c., OF WESTMINSTER. (*a.*)

Local government—Metropolitan borough—Compensation to existing officer on abolition of office—Amount of salary and emoluments—Resolution assessing compensation—Rescission by subsequent resolution—Validity—London Government Act, 1899 (62 & 63 *Vict. c.* 14), *s.* 30 (2)—*Local Government Act,* 1894 (56 & 57 *Vict. c.* 73), *s.* 81 (7)—*Local Government Act,* 1888 (51 & 52 *Vict. c.* 41), *s.* 120.

A metropolitan borough council, successors to a vestry, resolved to abolish the office of an "existing officer," and passed a resolution assessing his compensation under section 120 *of the Local Government Act,* 1888. *The amount assessed was a proportion of a sum claimed by him as representing his emoluments. Afterwards the council being advised that this amount was excessive, and therefore illegally assessed, by reason of the fact that certain items were improperly included in his claim, passed another resolution rescinding the first, and assessing his compensation at the same proportion of a lesser sum.*

Held, that the amount of his emoluments was a question of fact to be ascertained by the council, subject to an appeal to the Treasury, and that the council, having ascertained that fact, and, by the first resolution, assessed the compensation, in the absence of an appeal to the Treasury, became bound to the officer to pay to him the compensation so assessed, and could not, by a subsequent resolution, relieve itself of that obligation.

This was an action (brought before his lordship sitting as an additional judge of the King's Bench Division) to recover arrears of compensation alleged to be due to the plaintiff as the former holder of an office which had been abolished by the defendants under section 30 of the London Government Act, 1899.

Between 1874 and the 9th of November, 1900, the plaintiff was in the service of the Vestry of St. George's, Hanover-square, as a surveyor. In addition to his salary he received, under a resolution of the vestry of the 19th of August, 1875, an allowance of £20 a year and the provision of fodder, stable room, and attendance in respect of the finding by him of a horse and vehicle to assist him in superintending outdoor work. By another resolution of the vestry of the 18th of October, 1900, the plaintiff received an honorarium in consideration of certain extra services.

On the 9th of November, 1900, the Westminster City Council came into office and, under the London Government Act, 1899, the plaintiff became one of its officers. Under a resolution of the 31st of January, 1901, he was, without prejudice to the amount of his compensation for abolition of office, appointed temporarily city engineer and surveyor for three months at a monthly salary.

By a resolution of the 9th of May, 1901, the office of surveyor of the parish of St. George, Hanover-square, was abolished, and the plaintiff was requested to send in his claim for compensation for abolition of office.

The plaintiff duly sent in his claim showing the amount received and expended by him during each of the five years preceding the 31st of May on account of the emoluments for which he claimed compensation. He included in his claim the salary which he had received from the vestry, the honorarium voted to him in 1899, the amount which he had received on account of his temporary appointment by the council, the £20 a year voted to him by the resolution of 1875, and estimated amounts representing the value of the fodder, stable-room and attendance voted to him by the same resolution. The average salary and other emoluments for the five years was thereby stated to be £841.

At a meeting of the council on the 1st of August, 1901, it was resolved that the plaintiff be granted "an annual allowance of £518 12s. 4d., being $\frac{1}{60}$ for each year of service (*i.e.*, twenty-seven years), plus $\frac{10}{60}$ for compulsory abolition of office (total $\frac{37}{60}$) of his average salary and other emoluments for the five years next before the date of the abolition of his office."

On the 6th of November, 1902, the district auditor, as a result of his audit of the accounts of the council for the year ending the 31st of March, 1902, disallowed so much of the allowance of £518 12s. 4d. as was based on the claim in respect of the horse and vehicle found by the plaintiff and the provision of the fodder, stable room and attendance.

At a meeting of the council on the 20th of November, 1902, it was resolved: "(*a*) that the resolution of the council of the 1st of August, 1901, granting Mr. Livingstone an annual allowance of £518 12s. 4d. be rescinded; (*b*) that in lieu thereof Mr. Livingstone be granted an annual allowance of £432 7s. 10d., being $\frac{37}{60}$ of the average salary and other emoluments of the office . . . which amounted to £701 12s., and that such annual allowance shall commence to be payable, subject to a proper adjustment of the same and of the amounts already paid, as from the date of such abolition."

This meeting was specially convened for the purpose of considering the report of the General Purposes Committee that the resolution of the 1st of August, 1901, should be rescinded, and there was compliance with all the requirements of the bye-laws of the council in respect of it. There was, however, no public notice of the special purpose of the meeting within section 9 of the Metropolis Management Act, 1856 (19 & 20 Vict. c. 112)—a provision relating to the proceedings of administrative vestries which is applied to those of borough councils by section 2 (5) of the London Government Act, 1899.

Subsequent payments having been made to the plaintiff on the footing that his allowance was

(*a.*) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

thenceforth £432 7s. 10d., the present action was brought.

Danckwerts, K.C., and *W. F. Craies*, for the plaintiff.—By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 57, a resolution of an administrative vestry, or now of a borough council, is not to be revoked at a subsequent meeting unless the subsequent meeting is specially convened for the purpose. By section 9 of the Metropolis Management Act, 1856, a necessary formality for the convention of such a meeting is the affixing notice thereof and of the special purpose for which the meeting is convened "on or near the door of any building where the said meeting is to be holden." That formality not having been observed in the case of the meeting of the 20th of November, 1902, the resolution passed at that meeting is invalid. Apart from the informality of the second meeting the council had no power to rescind the resolution of the 1st of August, 1901. The plaintiff was an existing officer of the council whose office was abolished by the council. The method of ascertaining the compensation to be paid to him is that contained in section 120 of the Local Government Act, 1888: see London Government Act, 1899, s. 30 (2), Local Government Act, 1894, s. 81 (4, 7). All the procedure indicated in section 120 was observed, and, there having been no appeal from the decision of the council to the Treasury within three months, the sum assessed by the council as compensation became, in the words of sub-section 6, "a speciality debt due to" the plaintiff from the council and enforceable "in like manner as if the council had entered into a bond to pay the same." In estimating the amount of compensation the council had regard to all the circumstances mentioned in section 120 (1), and the amount awarded did not exceed that prescribed by the Acts and rules relating to the civil service, to be paid to a person on abolition of office; that amount is fixed by the Superannuation Act, 1859 (22 Vict. c. 26), ss. 2, 7, as two-thirds of his salary and emoluments. It was for the council, subject to an appeal to the Treasury, to ascertain what his salary and emoluments were. Unless they refuse to exercise their jurisdiction, there is no appeal to this court: *Rex* v. *Stepney Corporation*, 50 W. R. 412, [1902], 1 K. B. 317. The plaintiff obtained a private advantage out of the allowances in respect of the horse and vehicle; and that is an emolument within *The Queen* v. *Postmaster-General*, 26 W. R. 322, 3 Q. B. D. 428, which the council could and did value for the purpose of assessing the compensation. In any event it was within their jurisdiction to find that it was an emolument, and this court will not review the decision to which they came; *Brittain* v. *Kinnaird*, 1 B & B. 432; *The Queen* v. *Bolton*, 1 Q. B. 66, 73; *Allen* v. *Sharp*, 2 Ex, 352; *In re Holborn Land Tax Assessment*, 5 Ex. 548. The council having assessed the compensation was *functus officio* and had no jurisdiction to rescind its previous resolution. Section 57 of the Metropolis Management Act, 1855, is merely restrictive of any right of rescission possessed by a council apart from that section.

Manisty, K.C., and *R. C. Glen* for the defendant council. The meeting of the 20th of November, 1902, was convened with sufficient regularity. The resolution of the 1st of August, 1901, was *ultra vires*, because it was in excess of the statutory powers of the council. In the first place, the compensation thereby assessed was based on a statement of salary and emoluments during the wrong period of five years. The words in section 120 (2) of the Local Government Act, 1888, "next before the passing of this Act," must be read into section 30 of the London Government Act, 1899. Accordingly the five years must be those next before the passing of the Act of 1899, and not those next before the abolition of the office. [BUCKLEY, J.—The council is to assess, "having regard to" the statement; it is not bound to assess over a particular period of five years]. Secondly, the council had no power to take into consideration any salary or emolument which he had received as an officer of the council. Thirdly, the advantages he obtained in respect of the horse and vehicle were not an "emolument" within the Superannuation Act, 1859. Where in awarding compensation the council has acted *ultra vires*, this court has jurisdiction to put the matter right.

They referred to *Upperton* v. *Ridley*, [1903], A. C. 281, 51 W. R. Dig. 120, and *Ashbury Railway, &c., Co.* v. *Riche*, 24 W. R. 794, 7 H. L. 653.

Danckwerts, K.C. replied.

Cur. adv. vult.

BUCKLEY, J.—When the London Government Act, 1899, came into effect, in November, 1900, the plaintiff, Mr. Livingstone, was an existing officer of the vestry of St. George's, Hanover-square, within section 30 (1) of that Act. Under a scheme made by virtue of section 30 (4) the Westminster City Council, which, by virtue of the Act, succeeded to the vestry, had power to agree with him, as an existing officer of the vestry, that his acceptance of an office under the council for a temporary period should not prejudice any right to compensation to which he would otherwise have been entitled by or under the Act of 1899. The Act having, as I have said, come into operation in November, 1900, the council passed, on the 31st of January, 1901, a resolution for his temporary employment at a certain salary, without prejudice to the amount of his compensation for abolition of office. On the 9th of May, 1901, the council resolved that the office of surveyor to the parish of St. George's, Hanover-square, be abolished as from the 31st of May, 1901, and asked him to send in his claim for compensation. He did so, with the result that, on the 1st of August, 1901, the council passed a resolution granting him an annual allowance of £518 12s. 4d. The defendants say that the plaintiff, in sending in his claim, gave the particulars of a wrong period of five years. They say that, having regard to section 120 (2) of the Local Government Act, 1888, the proper five years would have been five years next before the passing of the Act of 1899. I do not agree; but it is immaterial, for the power of the council is, by virtue of section 120 (3) of the Act of 1888, a power to assess, not in respect of any particular period, but generally. If the plaintiff did select a wrong five years the council should have asked him for another return. In fact, however, I believe it was they who named the particular five years for which he gave the particulars. At any rate, having his claim before them, the council assessed the compensation and passed the resolution of the 1st of August, 1901.

The first question for decision is whether that resolution is valid. The only ground upon which it is attacked is that, the maximum sum which could be voted as compensation being thirty-seven sixtieths of his salary and emoluments, the sum—viz., £841, of which £518 12s. 4d. is thirty-seven sixtieths, is alleged to have been in excess of his salary and emoluments. The maximum is arrived at by reference to several Acts of Parliament, of which the later in each case introduces by reference some part of a former Act. The Act of 1899, section 30 (2), brings in section 81 (7) of the Local Government Act, 1894, which in turn brings in section 120 of the Local Government Act, 1888. The concluding words of section 120 (1) of the Act of 1888 bring in section 7 of the Superannuation

Act, 1859, which in turn sends the reader back to section 2 of the Act of 1859. The result is that section 7 of the Act of 1859, coupled with section 2 of the same Act, fixes as the maximum compensation which can be given in any case forty sixtieths, or two-thirds of the officer's salary and emoluments, but having regard to the length of this officer's service, the maximum in his case is thirty-seven sixtieths of the salary and emoluments of his office. The facts which would have to be investigated in order to determine what the plaintiff's salary and emoluments were, include the following: First, what emolument within the decision of *The Queen* v. *Postmaster-General* the officer derived under a resolution of the vestry of the 19th of August, 1875, by which, in the event of his finding a horse and carriage to assist him in his outdoor work, the vestry made him an allowance of £20 a year, and provided fodder, stable-room, and attendance. Secondly, what emolument, if any, the officer received in respect of a sum of £100, which, by a resolution of the vestry of the 18th of October, 1900, was voted for certain extra services. Thirdly, what emolument or salary, if any, was to be taken into account in respect of the officer's employment under the resolution of the 31st of January, 1901 (which was passed before the resolution of the 9th of May, 1901, abolishing the office), having regard to the fact that section 120 (1) of the Act of 1888 provides that regard is to be had to (*inter alia*) any additional emolument "which he acquires by virtue of anything done in pursuance or in consequence of this Act," and there may have been other matters to which I need not refer. The defendants contend that the question of fact—viz., what was the amount of the officer's salary and emoluments?—is not one which was by the statute remitted to the council for determination, but that this court must in this action examine and determine it, and if this court finds that £841 is in excess of the salary and emoluments the resolution of August, 1901, is *ultra vires* and wholly void. In my opinion that contention is not well founded. For this purpose the salary and emoluments in question are not the average salary and emoluments for any period of five years, or any other time, but may be the ultimate salary and emoluments of the office. It was, I think, for the council to determine the question of fact what the salary and emoluments amounted to, and if they have considered and arrived at a decision upon it, it is not competent to this court to review their decision. If the decision was wrong it could have been made the subject of an appeal to the Treasury under section 120 (4) of the Act of 1888. If the council had plainly proceeded upon a wrong basis (if, for instance, they had by mistake taken the officer's salary to be £1,000 when it was only £500) I think, as presently stated, there might have been ground of defence to an action for more than the right amount; or, if they had thus plainly gone wrong, or had not fairly assessed the compensation in exercise of their powers, it may be that a *mandamus* would lie to call upon them to assess it anew. But, subject to the above, I think it is for the council, and not for this court, to say what was the amount of the salary and emoluments of the office abolished. The defendants contend that, having regard to the concluding words of section 120 (1) of the Act of 1888, I must examine what was the true amount of the salary and emoluments, and, if I find it to be less than £841, then the resolution of August, 1901, was *ultra vires*. This contention, I think, fails. Even assuming (which I think is not the case, as will presently appear) that those words could in any case give rise to a question of *ultra vires*, it is, I think, for the council, which has the jurisdiction if the question of fact be rightly determined, to determine the fact upon which its jurisdiction arises. If the council has jurisdiction within limits, it is for the council to determine the questions of fact, whose decision is necessary to determine the limits. An analogy, although not a perfect one, may be found in cases where the jurisdiction of a magistrate arises only if a particular fact be found to exist; say, for instance, jurisdiction under the Game Laws. The magistrate may convict if the bird be a partridge, but not if it be a thrush. It is for the magistrate to decide whether it was a partridge or not. If jurisdiction arises if an offence charged be true in fact, it is for the person whose jurisdiction is invoked to determine the fact. In *Cave* v. *Mountain*, 1 Man. & Gr. 257, 261, Tindal, L.C.J., said: "There can be no doubt but that if a magistrate commit a party charged before him in a case where he has no jurisdiction he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be true, in fact the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation." As instances, I refer to *Brittain* v. *Kinnaird*, and in particular to the amusing judgment of Richardson, J., and to *The Queen* v. *Bolton*. So where there was authority to assess a duty on horse-dealers, the decision of the assessor that the party was a horse-dealer, however erroneous, could not be questioned in an action: *Allen* v. *Sharp*. Here the amount of the salary and emoluments is a fact lying at the root of the decision which is by the Act remitted to the council with a right of appeal to the Treasury. By section 120 (4) of the Act of 1888, the question of the compensation being "excessive" can be brought before the Treasury, and is to be determined by them. It is for the council or the Treasury, I think, and not for this court, to determine this question of fact. Further, the concluding words of section 120 (1) of the Act of 1888 are not, I think, words whose effect is to render the action of the council *ultra vires* if they by their vote exceed the amount. They are at most words which might afford a ground of defence to an action for an amount exceeding the amount which can be given under the Act of 1859. If a statutory corporation having a capital of a certain amount issues capital in excess of that amount, the excess, but not the whole issue, is invalid. If the council having statutory power to vote an officer compensation up to, say, £500, vote him £600, the vote will be good to the extent of the £500, but bad as to the excess. The question of *ultra vires* does not, therefore, in my opinion arise, and for the reasons already assigned, I think it is for the council to determine, acting of course fairly and honestly, the question of fact as to the amount of the salary and emoluments upon which thirty-seven sixtieths is to be calculated. I think, therefore, that the resolution of the 1st of August, 1901, was valid.

But next it is said that on the 20th of November, 1902, the council rescinded that resolution. The plaintiff argues that they had no power to do so. In my opinion the plaintiff is right. So soon as the resolution of August, 1901, was validly passed, there arose an obligation which, under section 120 (6) of the Act of 1888, was a specialty debt enforceable as if the council had entered into a bond to pay the £518 12s. 4d. I find no power in the council to go back and relieve themselves from an obligation thus rendered binding upon them. The defendants refer to section 57 of the Metropolis Management Act, 1855. That section is not empowering but restrictive. It provides only that a resolution shall not be revoked unless certain forms are observed and a particular

majority obtained. It gives no power to revoke a resolution which has created rights as between the council and another person. Under these circumstances it is unnecessary to consider whether within section 9 of the Metropolis Management Act, 1856, the meeting of the 20th of November, 1902, was aptly summoned for the purpose.

In my judgment it is not for me to review the figure which the council on the 1st of August, 1901, adopted. I think that that resolution is valid, that it was not open to rescission, and is now effectual. It results that the plaintiff is entitled to recover the sums which he claims. The defendants must pay the costs of the action.

The defendant's counsel suggested that a decision such as I have arrived at would leave the members of the council exposed to a continuous surcharge similar to that made at the audit of 1902. This is not so. The result of this decision is that the surcharge was wrong.

Solicitors, *Fowler & Co.; Allen & Son.*

K. B. Div.
(Wills and Kennedy, JJ.) Feb. 7.

WARD *v.* HADDRILL. (*a.*)

County court—Costs—Money paid into court—Cross judgments in separate actions—Right of set-off—Solicitor's lien for costs—County Courts Act, 1888 (51 & 52 *Vict c.* 43), *ss.* 113, 150.

Section 150 *of the County Courts Act,* 1888, *provides that "if there shall be cross judgments between the parties and execution has been taken by that party only who shall have obtained judgment for the larger sum, and for so much only as shall remain after deducting the smaller sum, and satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum; and if both sums shall be equal, satisfaction shall be entered upon both judgments."*

Held, that this section applied to judgments in separate actions as well as to judgments upon a claim and counterclaim in the same action, and that a defendant who had obtained judgment in an action was entitled to set off the amount of the taxed costs in that action against the amount for which judgment had been given against him in another action, and which amount he had paid into court, and that the plaintiff's solicitor had no lien for his costs on the amount paid into court as against this right of set-off.

Appeal from the judge of the Wandsworth County Court.

The facts of the case are as follows: The plaintiff brought two actions in the county court against the defendant. In the first action judgment was given for him for £21. In the second action judgment was given for the defendant with costs. Those costs amounted after taxation to £5. The defendant paid the amount of the judgment in the first action into court.

The defendant then applied for an order that the sum of £21 paid into court by the defendant in the first action be not paid out to the plaintiff or her solicitor unless or until the plaintiff had paid into court the above sum of £5, the costs in the second action; or, in the alternative, that out of the above sum of £21 there be paid to the defendant or his solicitor the sum of £5.

The county court judge ordered that the sum paid into court by the defendant under the judgment in the first action should be subject to a right of set-off in respect of the amount due under the judgment in the second action, that the balance only should be paid out to the plaintiff, and that £5 should be paid out of the £21 to the defendant.

The plaintiff appealed.

Hogg, for the plaintiff.—The county court judge had no power to make the order. The amount paid into court was subject to the lien of the plaintiff's solicitor for costs. Section 150 does not apply to the case of a cross judgment action, but only where there are cross judgments on a claim and counterclaim in the same action.

Thorn Drury, for the respondent.—Section 150 of the County Courts Act, 1888, clearly applies here. The intention of the Act would be frustrated if the person had to wait for execution before getting the benefit of the smaller sum.

Hogg replied.

WILLS, J.—I am of opinion this appeal should be dismissed. The point raised is a short one and has been well argued. What in effect the Legislature has done is to establish a different system from that which prevails in the High Court with regard to a solicitor's lien for costs.

Section 150 of the County Courts Act, 1888, establishes that where there are cross judgments in the county court if the person who has obtained judgment for the smaller sum chooses to wait for execution, thereby incurring, as he must incur, further costs, he can avail himself of the right of setting off the sum of which he has obtained judgment against the larger sum for which judgment has been obtained against him. If that right exists it is quite clear that the only sum for which execution can issue is the balance, because the section provides, not only that execution shall be for the balance, but that satisfaction shall be entered both for the balance and for the smaller sum, and if both sums are equal satisfaction shall be entered on both judgments. In view of these provisions how can it be said the solicitor's lien for costs is preserved. Then comes the question, are we to look at the substance of the enactment, which is that there shall be no enforceable judgment except for the balance against the person who has recovered the smaller sum, or are we to be limited to the very words which deal with execution, and to say that if the person who has obtained judgment for the smaller sum pays into court the larger sum for which judgment has been obtained against him, so that no execution is necessary, he loses his right of set-off. I cannot think that the Legislature meant that the person who has paid the larger sum into court must incur in respect of having execution issued against him considerably more costs than he has already incurred before he can get the benefit of the statute. If he cannot have an enforceable judgment for the sum he has himself recovered, I do not think it was meant that he should have an enforceable judgment against him for anything but the balance between that sum and the larger sum which he has paid into court. I think that the decision of the county court judge was right. Although section 150 does not in precise words cover this case, its meaning is that there shall be no process except for the balance between the larger and the smaller sum. It was suggested that the section must have been passed *per incuriam*. I doubt that, because the same enactment was contained in the Act of 1846 establishing county courts. I am not sure that the Legislature did not intend to prevent by this section the multiplication of actions.

It is clear to my mind that "cross judgments"

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

must mean cross judgments in different actions, and not merely cross judgments where there is a claim and counterclaim in the same action.

KENNEDY, J.—I agree. In my opinion section 150 would be rendered inoperative if we were to give effect to the arguments for the appellant.

Appeal dismissed; leave to appeal granted.

Solicitor for appellant, *A. E. Cubison.*

Solicitors for respondent, *Corsellis, Mossop, & Berney.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) Dec. 9.

NOKES AND ANOTHER (*Appellants*) *v.* MAYOR, &c., OF ISLINGTON (*Respondents*). (*a.*)

Local government—Bye-law—Privy—Bye-law containing no provision as to notice to person complained against—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 37, 39.

A bye-law made by the London County Council under section 39 *of the Public Health (London) Act,* 1891, *and which provides that a person offending against it shall be liable to a penalty, is unreasonable and void if it does not contain a provision that notice shall be given to the person complained against before proceedings to recover the penalty are commenced against him.*

This was a case stated by E. Tennyson D'Eyncourt, Esq., metropolitan police magistrate sitting at Clerkenwell police-court.

A complaint was preferred by one J. Jordan, a sanitary inspector, on behalf of the respondents, that the appellants, being the owners (as defined by the bye-laws of the London County Council made under section 39 (1) of the Public Health (London) Act, 1891) of a certain lodging-house (as defined by the said bye-laws), being 19, Corinth-road, within the Borough of Islington, did not provide and maintain, from the 3rd of March, 1903, to the 20th of April, 1903, in connection with the said house, water-closet, earth-closet, or privy accommodation of not less than one water-closet, earth-closet, or privy for every twelve persons, contrary to the provisions of the said bye-laws and of the said Act.

At the hearing it was proved that the appellants were agents for letting and collecting, and in fact collected the rent of the aforesaid house during the above-mentioned period, and during such period the house contained nine rooms and one closet only, and no earth-closet or privy.

In July, 1902, the house was let out in tenements to members of more than one family, and the appellants collected the rents of the several tenements from the tenants thereof. In September, 1902, the whole of the tenants of the house were ejected by the appellants. From September, 1902, to January, 1903, the house was unoccupied. In January, 1903, the whole of the house was let to one tenant, G. Gates, at the rent (which was a rack-rent) of £36 per annum, payable £3 a month in advance.

On the 5th of January, 1903, three rooms only in the house were occupied by six people. On the 3rd of March, 1903, the whole of the rooms in the house were occupied, and continued to be occupied till the 20th of April, 1903, by sixteen people, who constituted four separate families.

The rooms not required by G. Gates for his own occupation were let by him to lodgers, from whom he received rent on his own account.

On the 11th of March, 1903, an intimation under the Public Health (London) Act, 1891, that a nuisance (insufficient water-closet accommodation) existed at 19, Corinth-road was left at that house and also at the appellants' office. The intimation was addressed to "the owner" of the premises, and was signed by J. Jordan, the sanitary inspector.

On the 25th of March, 1903, a letter from the medical officer of health for the borough was sent to the appellants calling their attention to the fact that they had not abated the nuisance intimated to them by the sanitary inspector, in reply to which the appellants, on the 26th of March, 1903, wrote informing the medical officer that they were not the "landlord" of the premises.

On the 26th of March, 1903, the appellants wrote to the tenant, G. Gates, informing him that the sanitary inspector stated that there were more than twelve people residing in the house, and telling him that it would be necessary for the tenant to reduce that number at once, otherwise he would be summoned at the police-court for not having sufficient water-closet accommodation.

It was objected on the part of the appellants (*a*) That the bye-law No. 26 of the London County Council, made under section 39 (1) of the Public Health (London) Act, 1891, so far as the same required the landlord or owner of any lodging-house to provide and maintain in connection with such house water-closet accommodation in the proportion of one water-closet for every twelve persons was *ultra vires* and illegal, and that the magistrate had, therefore, no jurisdiction to deal with the complaint.

(*b*) That before any offence could be committed against the said bye-law, if valid, a notice from the sanitary authority was necessary.

(*c*) That the said bye-law, if valid, did not apply to the appellants, as they were not the owners of the premises within the meaning of the the said bye-law.

The learned magistrate overruled the objections and convicted the appellants.

The question for the opinion of the court was whether the decision of the magistrate overruling the objections was right in point of law.

Woodfin (*W. S. M. Knight* with him), for the appellants.—This bye-law is unreasonable because it does not contain any provision that notice shall be given to the person against whom complaint is made before proceedings are taken against him. Sub-section 3 of section 37 clearly shows that in a case like this notice is necessary before a prosecution is instituted.

Courthope-Munroe, for the respondents.—This bye-law is not unreasonable. At the hearing of the summons it was objected that the bye-law does not apply to the appellants on the ground that they are not the owners of the premises within the meaning of the bye-law. That contention cannot be sustained. The appellants are clearly "owners" of the premises within the meaning of that bye-law.

He referred to *Salt* v. *Scott Hall*, 52 W. R. 95, [1903] 2 K. B. 245, and *Pomeroy* v. *Malvern Urban Council*, 19 Times L. R 597.

Woodfin replied.

Lord ALVERSTONE, L.C J.—I am clearly of opinion that the objection to this bye-law must be sustained. I have not the least doubt that the Public Health (London) Act, 1891, s. 39, gives the London County Council power to make bye-laws as to water-closets, and I do not think that the contention that the bye-law we are dealing with relates to lodging-houses and not to water-closets is a sound argument. In my

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

opinion the county council are quite competent, within the powers conferred upon them by section 39, to make laws for this purpose; but that does not decide the question before us arising upon the construction of section 37, sub-section 3, which enacts that if any house is not provided with sufficient water-closets the sanitary authority shall cause notice to be served upon the owner or occupier of the house requiring him forthwith to provide the same. The bye-law in question provides that a person offending against it shall be liable to a penalty. Now in this case the appellants collected the rent paid by the tenant Gates, and they may therefore be treated as standing in the place of the owner. Gates is the person who was responsible for allowing more than twelve persons to reside in the house, and therefore, in justice to the appellants, I think some notice should have been given to them before a prosecution was instituted against them. Now, this bye-law contains no provision that notice shall be given to a person before proceedings are taken against him, and I think that a bye-law that does not contain a provision that notice shall be given to a person before a penalty under the bye-law can be enforced against him is bad. I think this bye-law should contain a provision for some kind of notice as that contemplated in section 37, sub-section 3.

For this reason I think the bye-law is not reasonable, and that this appeal should be allowed.

LAWRANCE, J.—I am entirely of the same opinion.

KENNEDY, J.—I concur.

Appeal allowed; conviction quashed.

Solicitor for appellants, *A. D. Levi.*

Solicitor for respondents, *A. M. Bramall.*

K. B. Div. (Phillimore, J.) Nov. 23; Dec. 8.

HAYCOCKS (LIMITED) *v.* MULHOLLAND. (*a.*)

Practice—Costs—Summons under ord. 14, *r.* 1—*Reference to master—Costs of the action—Costs of the reference and award—Ord.* 65, *r.* 12—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

In an action brought to recover a balance of account on a tradesman's bill, the plaintiffs took out a summons under ord. 14, *r.* 1, *for leave to sign final judgment. Upon the hearing of the summons no order was made, but the action was referred to a master for trial in accordance with rule 7 of the same order. After twenty-one days from the service of the writ the master, having tried the action, made an order giving the plaintiffs leave to sign judgment for £23 15s., "with £7 costs of the action, and also with costs of the reference to the master and his award, such costs to be taxed by the taxing-master on the High Court scale." From this order the defendants appealed to Phillimore, J., sitting at chambers.*

Held, by that learned judge in court, that as regards the costs of the action, judgment not having been given within twenty-one days, and that period not having been extended by a judge under section 116 *of the County Courts Act,* 1888, *the plaintiffs were only entitled to costs on the county court scale, and the appeal should be allowed in that respect; but with regard to the costs of the reference to the master and his award, the order made was correct, as the master must be deemed an arbitrator, having the same discretion as to costs, including the power to certify for High Court costs, as an arbitrator has.*

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

This was an appeal to Phillimore, J., at chambers, from an order made by a master.

J. D. Crawford, for the plaintiffs.

H. Nield, for the defendant.

Cur. adv. vult.

The facts of the case appear in the following written judgment which was delivered in court.

Dec. 8.—PHILLIMORE, J.—In this case the summons came before me in chambers, and was argued by counsel on the 23rd of November last. I took time to consider what my order should be, and, as the matter involves some questions of importance with regard to the procedure in small debt cases, I thought it as well to have information from the masters in the King's Bench Division, and to give my judgment in court.

The action is brought on a tradesman's bill for a small balance of account representing items of dispute between the tradesman and his employer in a bill of considerable amount. The summons, taken out under order 14, was heard before a master on the 29th of October last. No order was drawn up upon this summons, but the master's note upon it is as follows: "Adjourned for trial before master." Thereafter the case was tried before the same master; witnesses were examined, and the master finally decided in favour of the plaintiffs for £23 15s., which, if I recollect rightly, was either the whole or nearly the whole of the plaintiffs' claim. The master proceeded to embody his judgment in the following terms: "It is ordered that the plaintiffs be at liberty to sign judgment for £23 15s., with £7 costs of action, and also with costs of the reference to the master and his award, such costs to be taxed by the taxing-master on the High Court scale, with the certificate that the action was a fit action to be brought in the High Court."

This is the order under appeal, and the application to me is that I should vary it by directing that the plaintiff should sign judgment with costs on the county court scale. In the first place it is, I think, inconvenient that no order of reference was drawn up. The reference to the master can only be made by consent of the parties (ord. 14, r. 7). In the case before me there was some uncertainty as to whether such consent was given. I think that consent was expressed; but there ought to be no doubt in the matter. The master should explain to the parties that he can only make such order by consent, and this equally so whether it be for a town or country case. Moreover, the word "adjournment" is not correct. There should be an order drawn up, and it should recite that it was made by consent. In the second place, I do not think that the master has power to extend the twenty-one days allowed for obtaining judgment under order 14, with High Court costs. The statutory power under section 116 of the County Courts Act, 1888, is given only to a judge: see *Cox* v. *Hill,* 67 L. T. 26, 41 W. R. Dig. 173. I find the masters are entirely in accord as to this, and it is right to say that in this case the master has not purported to extend the time. This being so, and judgment not having been got within the twenty-one days, costs of the action, as distinct from the costs of the reference, must be on the county court scale. Here the master has given a lump sum for these costs, acting under ord. 65, r. 27, sub-rule 38, and the scale given under the practice rules for High Court costs under order 14, where the sum recovered is over £20 and under £50. I am far from saying that the master was wrong in giving a fixed sum. On the contrary, it seems to me the best thing to do, and it would be absurd to make out a hypothetical county court bill of costs. But,

as the scale is to be county court, and not High Court scale, I think (as the master points out) special regard should be paid to ord. 65, r. 12, and it seems to me that the fixed sum should be less than the High Court fixed sum. I have no reason to suppose that the master was professing to arrive at probable county court costs; and though I was told that the difference would not be great, it was admitted that county court costs would be rather less. I propose in this case to save the expense of a further inquiry and reduce this £7 to £5 10s. The particular figure is not to be a precedent, and I should hope that the masters may arrive at some fixed sum for future occasions.

Then, as to the costs of the reference. Treating this, as I must, as a reference by consent, I think the case is governed by the decision of the Court of Appeal in *Street* v. *Street*, 48 W. R. 450, [1900] 2 Q. B. 57. The master is to be deemed an arbitrator, and he has the same discretion as to costs, including the power to certify for High Court costs, as an arbitrator has. The judgment, therefore, in this respect must stand.

I have made a slight variation in favour of the appellant, and I think, as I have pointed out, that he may have been somewhat prejudiced by the informal mode in which the case was remitted to the master. In the main, however, the respondents hold what they have got. There should be no costs of the appeal.

Order accordingly.

Solicitors for plaintiffs, *J. J. Edwards & Co.*

Solicitors for defendant, *J. Moverley Sharp.*

House of Lords.

From C. A. (England). Dec. 14.

KENT WATERWORKS, COMPANY OF PROPRIETORS OF v. LAMPLOUGH. (*a.*)

Water—Waterworks company—Dividend—Prescribed rate—Profits—Deficiencies in previous years—Incorporation of Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 75.

The appellant company was incorporated in 1809, *and for some years paid dividends of less than* 10 *per cent. per annum, though there was no limit to the amount they might pay. In* 1864 *it obtained an Act of Parliament, which incorporated the Waterworks Clauses Act,* 1847, *by section* 75 *of which Act no larger dividend than* 10 *per cent. in any year was permissible "unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate."*

Held, that the company were not entitled to pay a larger dividend than 10 *per cent. per annum in order to make up any deficiencies which fell short of that rate prior to the year* 1864, *when the Waterworks Clauses Act was first incorporated.*

Decision of the Court of Appeal (51 *W. R.* 535, [1903] 1 *Ch.* 575) *affirmed.*

Appeal from Court of Appeal (Collins, M.R., and Romer and Cozens-Hardy, L.JJ.) (51 W. R. 535, [1903] 1 Ch. 675), affirming Joyce, J.

The facts are given at length in the court below; it will suffice here to state the following:

The appellant company was incorporated by an Act passed in 1809, which empowered it to raise capital in shares of £100 each, the holders of which were to be entitled to receive the profits that shall arise thereunder.

In 1864 an Act was obtained for the purpose of amalgamation with another company. This Act provided that from and after the passing of the Act the Waterworks Clauses Act, 1847, should apply to the whole of the undertaking and waterworks of the company. Before the passing of the Act of 1864 there was no limitation upon the rate of dividend which the company might pay, but after that date, by virtue of section 75 of the Waterworks Clauses Act, 1847, no larger dividend upon the paid-up capital than 10 per cent. in any year was permissible "unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of" 10 per cent., and by section 76 of the same Act any excess of the amount limited was to be invested and form a reserve fund.

The company had for some years past been paying dividends in excess of 10 per cent. and had thereby made good all deficiencies or arrears which had arisen on the years from 1864 onwards. It was proposed to pay dividends in excess of 10 per cent. per annum in order to make up deficiences which had arisen prior to 1864. The present respondent applied for an injunction to restrain the company from so doing, and Joyce, J., considered such payment as outside the powers of the company and granted an injunction accordingly. The Court of Appeal affirmed this decision.

Cripps, K.C., and *Haldane, K.C.* (*R. J. Parker* with them), for the appellants.—By section 75 of the Waterworks Clauses Act, 1847, there is no limit of time, and the words "any previous dividend" can only mean "any dividend previously declared by the company." The question is one of divisible profit, to be calculated on all the stock of the company; and the amount is not to exceed 10 per cent.

Moulton, K.C., Younger, K.C., and *Ashworth James*, for the respondent, were not heard.

Earl of HALSBURY, L.C.—This is a case that may be treated very shortly. It depends upon one section, and it exhibits the ingenuity of the learned counsel that a matter depending upon such a very small number of words could be protracted through three courts and argued with the ability and pertinacity with which this case has been argued. For my own part, it seems to me to be absolutely clear, without the faintest shadow of doubt.

The Waterworks Clauses Act, 1847, which imposed for the first time a limit upon the amount of the dividend that might be distributed among the shareholders, contains also a provision that if that dividend which was to be limited for the future had not been arrived at, then in distributing the future profits of the company that which had fallen short of the prescribed amount, which for the first time was then imposed, might be made up if the company had made a profit sufficient to supply it. The whole language is very intelligible, and, upon the hypothesis that the true view of it is that at which both courts have already arrived, it is very simple.

If the gloss which has been put upon it by the learned counsel who argued the appeal were true, I think that it would be extremely difficult to reconcile the language with any intelligible meaning, because what is to be made up under section 75 is a "deficiency." A deficiency of what? There is no deficiency at all in any of the years previous to 1864; you can only get a deficiency by bringing in that limit which was for the first time prescribed in 1864. It is an impossible hypothesis: you cannot get a

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

deficiency—there is nothing from which it is a deficiency—unless you import that limitation, a dividend which comes to 10 per cent. Then, if that is the only thing that is to be made up, that deficiency can only arise after 1864; and, according to the plainest rules of construction, you cannot get behind that which for the first time imposed the limit to which the deficiency is to be made up.

Under these circumstances, it appears to me abundantly plain and I move that this appeal be dismissed.

Lord MACNAGHTEN.—I am of the same opinion. I think the case perfectly clear. I am of opinion that, for the purpose of adjusting any dividend and availing itself of the statutory provisions for compensation, the company cannot go further back than the time when the Act of 1864 came into operation. The Kent Waterworks Co. made a fresh start then, with fresh limitations and under new conditions. Before that time there was no prescribed rate of dividend, nor could there be any deficiency of dividend within the meaning of that word in the Waterworks Clauses Act.

Lord SHAND.—I am of the same opinion. I have only to add that I am not surprised that Joyce, J., when he called for no argument from counsel for the respondents, stated that he did not feel any doubt about it. I agree in his judgment, in the unanimous judgment of the Court of Appeal, and in that which your lordships have delivered.

Lord DAVEY.—I think that there can be no doubt about this case. I am quite satisfied with the reasons which have been given by Joyce, J., and the learned judges in the Court of Appeal.

Lords ROBERTSON and LINDLEY concurred.

Appeal dismissed.

Solicitors, *Hollams, Sons, Coward, & Hawksley; Waltons, Bubb, Johnson, & Whatton.*

Court of Appeal.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) April 12.

NORMAN & BURT *v.* WALDER. (*a.*)

Master and servant—Employers' liability—Accident—Compensation—Reviewing award—Earnings—Business set up since accident—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., cl.* 2, 12.

Upon an application by employers under clause 12 *of Schedule I. to the Workmen's Compensation Act,* 1897, *to review a weekly payment awarded to the injured workman under the Act, the arbitrator must take into consideration the fact that the workman is earning profits from a business which he set up after the accident, and which he carries on for himself.*

Appeal from the decision of the late Judge Martineau, sitting at the Hayward's Heath County Court, under the Workman's Compensation Act, 1897.

The respondent, Charles Walder, was a machinist in the employment of the appellants, Messrs. Norman & Burt, who were builders and contractors. He was at the time of the accident receiving wages of 37s. a week, out of which he kept himself, his wife, his son, and his daughter. On the 22nd of May, 1901, he met with an accident arising out of and in the course of his employment, whereby he lost the top joint of a finger of his left hand and injured another finger. On the 22nd of August, 1901, an award was made under the Workmen's Compensation Act, 1897, for a weekly payment to him of 18s. 6d. In May, 1903, the employers applied to the county court judge, under clause 12 of Schedule I. to the Workmen's Compensation Act, 1897, to terminate or diminish the weekly payments, upon the ground that since the date of the accident the respondent had set up in business for himself as a baker and confectioner, at which it was alleged that he was now earning money. Evidence having been given as to the business carried on by the respondent and as to the amount of the profits made by him in the business (the result of which is stated in the judgment of the county court judge given hereunder), the county court judge reserved his judgment, which he delivered as follows: "This is an application by an insurance office asking me as arbitrator to suspend or reduce the compensation awarded to the respondent by the award. The ground of the application is that since the award was made the respondent's earnings have increased to such an extent that he is no longer entitled to any compensation. The earnings are not wage earnings nor anything in the nature of wage earnings, but the profits of a trade business carried on by the respondent at Dane-hill. I reserved judgment to consider whether the earnings of a trade business can be treated as 'earnings' within the meaning of Schedule I., clause 2, of the Act. The word in the Act no doubt is 'earnings,' but I am clear that, according to the true construction of the schedule, wage-earning capacity alone is to be taken into account. I may mention here that the earnings of the business carried on by the respondent are obtained in a peculiar manner. The respondent carries on the business in question with the labour and assistance of his wife, who has the principal share in the work, his daughter, who serves in the shop, and his son, who goes out with the horse and cart. He himself goes out with the horse and cart and has a general control of the business. As head of the family he appropriates the labour and assistance of his wife, son, and daughter, and takes the whole of the profits and maintains them. He does not receive any wages, nor is he in the service of any employer. It would be difficult to say what proportion of the total earnings in the business ought to be attributed to the respondent's own labour. I have had some difficulty in arriving at the total earnings in the business, but I estimate them at £2 a week. In the view I take of the case it is immaterial. It is to be observed that the compensation to the workman for personal injury is, in my opinion, clearly assessable with reference to weekly wages or earnings earned before the injury and weekly earnings or wages earned after the injury, and, in my opinion, trade profits in a business are no more to be taken into account than income of real estate. It may well be that the work in respect of which wages were earned after the accident need not be *ejusdem generis* with the work in respect of which wages were earned before the accident, and there is authority in the Court of Appeal for that view, but, in my opinion, earnings in trade are not earnings within the meaning of Schedule I., clause 2, of the Act. The application fails and must be refused with costs."

The employers appealed.

Arthur Powell, K.C. (*W. Addington Willis* with him), for the employers.—The question turns upon the meaning of the words in clause 2 of Schedule I.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

to the Workmen's Compensation Act, 1897, "regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." The average weekly earnings before the accident mean wages earned by the workman in his employment. But "the average amount which he is able to earn after the accident" is not limited to wages received from an employer. Those words include all earnings of any kind, whether in a business carried on by the workman or otherwise. The county court judge was wrong in ignoring the fact that the respondent was now earning money in his own business. He should have ascertained how much the respondent was earning for himself in his business, and taken that fact into consideration in determining whether the weekly payment ought or ought not to be ended or diminished. The case ought, therefore, to go back to the county court.

He referred to *Irons* v. *Davis & Timmins (Limited)*, 47 W. R. 616, [1899] 2 Q. B. 330; *Chandler* v. *Smith*, 47 W. R. 677, [1899] 2 Q. B. 506; and *Pomphrey* v. *Southwark Press*, [1901] 1 K. B. 86, 49 W. R. Dig. 114.

Stuart Bevan, for the respondent.—Clauses 1 (*b*) and 2 of Schedule I. refer solely to wages earned by service with an employer. There must be an employer. The sole test to apply is the wage-earning capacity of the workman. If the earnings of a workman in his own business can be considered a wide field of inquiry will be opened up. For instance, the medical examination under clause 2 of Schedule I. must go beyond the injured workman's wage-earning capacity.

He referred to *Crossfield & Sons* v. *Tanian*, 48 W. R. 609, [1900] 2 Q. B. 629.

COLLINS, M.R.—This is an appeal by the employers from the decision of the late Judge Martineau, and the question is whether, upon an application under clause 12 of Schedule I. to the Workmen's Compensation Act, 1897, to review a weekly payment for the purpose of ending or diminishing it, the fact that the workman is making money by means of a business carried on by him ought or ought not to be taken into consideration. The learned county court judge held that it was not an element to be taken into consideration, and that, however prosperous the workman had become as a tradesman, it was no ground for reducing the amount of the weekly payment awarded in the first instance as compensation. The county court judge arrived at the conclusion by reason of the construction which he placed upon the Act. The question really turns upon the meaning of one clause in Schedule I. to the Act, though it is necessary to refer to another clause as well. Clause 1 (*b*) provides that the amount of compensation shall be, "where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound." As I pointed out during the argument, that clause assumes that, in dealing with that stage of the proceedings, the workman has been earning wages from an employer. Then comes paragraph 2 of the schedule, which raises the present question: "In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity." In the present case the respondent was at the time of the accident earning wages of 37*s.* a week. The award was for a weekly payment of 18*s.* 6*d.* It now appears that the respondent since the accident started a small business as a baker, out of which apparently a return comes to him of £2 a week. He is assisted in that business by his wife, his son, and his daughter. The county court judge does not purport to tell us with any exactness the portion of the profits attributable to the respondent as the earnings arising from his exertions, as he held that, whether it was great or small, it had nothing to do with the discussion of the matter before him, and that, unless the employers could show that that which the workman received after the accident was "wages" paid by an employer, the amount of any such earnings had no relevancy to the discussion. In my opinion that is much too narrow a view of the Act to take. Clause 2 does not in terms exclude earnings other than those earned from an employer. The average weekly earnings before the accident specified in the first part of clause 2 clearly mean wages earned from an employer. When one considers the object which the Legislature had in view, it is obvious that the later words ought not to be limited to that which the workman earns in the employment of an employer after the accident. It must be kept in mind that the Act is seeking to adjust compensation for loss of the workman's earning power. The most that the Act allows as compensation is one-half of the workman's average weekly earnings, showing that the compensation is not intended to be complete compensation. An application may subsequently be made to review the weekly payment under clause 12, and then the whole situation must be looked at, and the arbitrator has then to say how far the money-earning capacity of the workman has been altered, and if it is as good as it was before the accident, that is a fact which is not to be ignored, though the source of income may not be wages earned from an employer. The county court judge ought not to have excluded it from his consideration. The appeal must therefore be allowed, and the case must go back to the county court to be considered upon all its merits.

ROMER, L.J.—I am of the same opinion. It appears upon the evidence here that the respondent is earning something by carrying on the business. How much is to be attributable to him as his earnings in that business should be inquired into, and the matter must be referred back to the county court for the judge to consider the whole position of affairs. Where clause 2 of the schedule to the Act speaks of "the average amount which he is able to earn after the accident," it does not limit the earnings to wages earned from an employer. The man may be his own master.

MATHEW, L.J.—I am of the same opinion. Here the respondent employed himself as a workman in his own business, and his earnings therefrom must be taken into consideration by the county court judge.

Appeal allowed.

Solicitors for the appellants, *Treadwell & Aylwin.*

Solicitors for the respondent, *J. K. Nye & Treacher*, Brighton.

From K. B. Div. (Collins, M.R., and Mathew, L.J.) March 14.

SOCIÉTÉ GÉNÉRALE, &c., DU COMMERCE ET DE L'INDUSTRIE EN FRANCE *v.* JOHANN MARIA FARINA & CO. (*a.*)

Practice—Execution—Judgment against corporation—Examination of officer—Past officer—Ord. 42, *r.* 32.

An order may be made, under ord. 42, *r.* 32, *where judgment has been recovered against a corporation, for the examination of a past as well as of a present officer of the corporation.*

Appeal from an order of Phillimore, J., at chambers.

On the 9th of October, 1902, the plaintiffs, who were a French société anonyme, brought an action against the defendants as acceptors of a bill of exchange for 5,000 francs. On the 18th of October, 1902, an appearance was entered by the defendants as follows: "Enter an appearance for Compagnie d'Installation pour l'eclairage et le chauffage par le gaz à Bale, a société anonyme trading as Johann Maria Farina et Cie., Gegenhuber dem Josephsplatz, and sued as Johann Maria Farina & Co. in this action."

Upon an application by the plaintiffs for judgment under order 14 an affidavit was made by one Staenglen on behalf of the defendants wherein he described himself as a director of the above-named Compagnie d'Installation pour d'eclairage, &c., and as being authorized by the company to make an affidavit on their behalf. Unconditional leave to defend was given, but on the 24th of April, 1903, the defendants withdrew their defence, and judgment was signed by the plaintiffs for the amount claimed and costs. The judgment remaining unsatisfied, the plaintiffs on the 5th of November, 1903, obtained an order, under ord. 42, r. 32, for the examination of Staenglen as a director of the defendant company as to what debts were owing to the company, and whether they had any and what property or means of satisfying the judgment. This order was served on Staenglen who did not appeal from it. On the 5th of February, 1904, Staenglen attended before the master, who was appointed examiner, when he admitted that he was a director of the Compagnie d'Installation at the time when judgment was signed, but he said that on the 30th of June, 1903, he ceased to be a director of the company, and upon the advice of his solicitor he refused to answer any further questions or to give any information as to the debts due to or property of the company on the ground that he had ceased to be a director of the company. The master ruled that Staenglen was bound to answer the questions, and upon his still refusing to do so he adjourned the examination to enable an application to be made to the judge. The plaintiffs thereupon applied to Phillimore, J., at chambers, for an order of commitment against Staenglen for contempt of court. Phillimore, J., ordered Staenglen to attend at his own expense before the master to be examined.

Staenglen appealed.

By order 42, rule 32, "when a judgment or order is for the recovery of money, the party entitled to enforce it may apply to the court or a judge for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the court as the court or judge shall appoint; and the court or judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents."

C. F. Hohler, for the appellant.—Ord. 42, r. 32, gives no power to examine a past officer of the company. It has been held that the words at the end of the rule, "any other person," mean in the case of a corporation an officer of the corporation: *Irwell* v. *Eden*, 35 W. R. 511, 18 Q. B. D. 588. When the rule speaks of "any officer thereof," it means an existing officer. Otherwise an order might be made for the examination of an officer of a corporation who had ceased to be an officer many years before. When the Legislature intended to include persons other than present officers of the corporation they expressly said so: see section 115 of the Companies Act, 1862. There was, therefore, no jurisdiction to make the order.

He also referred to *Republic of Costa Rica* v. *Strousberg*, 29 W. R. 179, 16 Ch. D. 8; and *Hood-Barrs* v. *Heriot*, 45 W. R. 1, [1896] 2 Q. B. 338.

F. M. Abrahams, for the plaintiffs.—"Any officer thereof" includes past as well as present officers of a corporation. A past officer may have assets or books of the corporation in his possession, and the rule will be rendered almost useless if a director, hearing that an application for his examination is going to be made, can resign his directorship and thus escape examination. The order for examination is discretionary, and the court will only make the order in a proper case. Secondly, it does not appear whether the appellant has taken all necessary steps to complete his resignation as a director.

Hohler replied.

COLLINS, M.R.—This is an appeal from an order made by Phillimore, J., at chambers, who directed the appellant to attend before the master for examination at his own expense. The action was brought against a company, and an appearance was entered by the Compagnie d'Installation, a société anonyme, trading as Johann Maria Farina et Cie, and sued as Johann Maria Farina & Co. That appearance had the effect of substituting the Compagnie d'Installation for Johann Maria Farina & Co., which was merely a name under which they traded, as defendants in the action. On the 24th of April, 1903, judgment was recovered against the defendant company, and on the 5th of November, 1903, the plaintiffs obtained an order for the examination of the appellant as a director of the defendant company under ord. 42, r. 32. The appellant had in an affidavit which he made upon an application for judgment under order 14, stated that he was a director of the Compagnie d'Installation and that he was authorized by the company to make the affidavit on their behalf. The appellant attended before the master, who was appointed examiner, but when the examination came to the critical point he refused to answer any questions or to give any information as to what debts were owing to the company or whether it had any and what other property or means of satisfying the judgment, upon the ground that he had ceased to be a director on the 30th of June, 1903, since the date of the judgment. An application was thereupon made to Phillimore, J., who made the order now under appeal.

It is said that there is no power under ord. 42, r. 32, to order the examination of a person who at the time is not an officer of the defendant company. In my opinion that is too narrow a view of the rule. There is nothing in the rule which says that the officer must be a present officer of the company. The

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

examination is for the purpose of finding out whether any and what debts are owing to the company, and whether the company has any and what other property or means of satisfying the judgment, and for that purpose the court may make an order for the examination of "any officer" of the company. There is nothing in that rule to limit the examination to an existing officer of the company. If it were so limited, an officer might conceivably, hearing that an application was about to be made for his examination, resign his position as officer and then claim to be free from examination. Further, in the present case we do not know whether there has been a complete resignation of the appellant's position as director. However that may be, it is too narrow a construction of the rule to limit it to persons who at the time of the order are officers of the company. The somewhat analogous section 115 of the Companies Act, 1862, is not so limited. An officer of a company, who has ceased to be an officer because the company is being wound up, can be examined under that section. Rule 32 when speaking of "any officer thereof" is not referring to a period of time but to the character of the person to be examined. Upon the fair construction of that rule there is, in my opinion, power to order the examination of a person who has ceased to be an officer of the company, and such examination may be useful to see if he has in his power and control any property or assets belonging to the company.

MATHEW, L.J.—I am of the same opinion. At the time of the judgment the appellant was a director of the defendant company, but he alleges that he ceased to be a director at the time when the order for examination was made. Without taking any steps to set aside the order for examination be attended before the master, when he refused to answer certain questions which were put to him. I prefer not to take a technical view of the matter, but to look at the question on its merits, and I therefore ask myself whether the appellant could have succeeded in setting aside the order for examination. The object of ord. 42, r. 32, is to enable persons connected with the company to be examined as to its property and assets. I can see no reason why the company should escape this investigation by means of the resignation of a director. I should be sorry to place such a construction on the rule. The order for examination was, in my opinion, rightly made.

Appeal dismissed

Solicitor for the appellant, *J. Carnegie.*

Solicitor for the respondents, *Michael Abrahams, Sons, & Co.*

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) March 9.

WARR & CO. (LIMITED) *v.* LONDON COUNTY COUNCIL. (*a.*)

Lands Clauses Acts—Compensation—Interest in land—Right to sell refreshments at theatre—Use of premises—Right to affix advertisements—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 68.

The lessees of a theatre, by an agreement in writing, granted to the plaintiffs for the term of their lease the free and exclusive right to sell refreshments at the theatre, with the necessary use of the refreshment-rooms and bars and cloak-rooms and wine cellars, together with the free right of access to all parts of the house as might be necessary, and also the free and exclusive right during the term of supplying to the visitors and other people attending the theatre wines, spirits, cigars, and refreshments of all kinds, programmes and all other articles, and of providing cloak-rooms and other accommodation, and also the sole and exclusive privilege of advertising and letting spaces for advertisements in the refreshment and cloak-rooms and on programmes. The defendant county council having taken the theatre under their statutory powers,

Held, that the plaintiffs had not acquired an interest in land within the meaning of section 68 *of the Lands Clauses Act,* 1845, *and were therefore not entitled to compensation under that section.*

Appeal from the judgment of Wright, J., at the trial of an action without a jury.

The action was to recover the sum of £2,568 9s. payable under an award and interest thereon.

In May, 1900, the Countess of Kilmorey let the Globe Theatre, Strand, to William Greet and E. C. Engelbach for twenty-one years.

By an agreement in writing dated the 16th of June, 1900, and made between Greet and Englebach, therein described as the landlords, and Frank Warr & Co. (Limited), the plaintiffs, therein described as the tenants, it was provided as follows: "The landlords hereby grant and let, and the tenants hereby take for the term of the landlords' lease commencing the 1st day of September, 1900, the free and exclusive right to sell refreshments at the Globe Theatre . . . with the necessary use of the refreshment-rooms and bars and cloak-rooms and wine cellars of the said theatre, together with the free right during the usual hours of the tenants, their servants and agents, of free access to and from all parts of the house, including the front of the theatre and premises, as may be necessary and is usual and proper according to the custom of the theatres, for the purpose of exercising the rights granted by this agreement, and also the free and exclusive right during the aforesaid term of supplying to the visitors and other people attending the theatre wines, spirits, liqueurs, cigars, cigarettes, flowers, scent, and refreshments of all kinds, programmes, books of words, books of music, opera glasses, and all other articles, and of providing cloak-rooms and other accommodation, and also the sole and exclusive privilege during the aforesaid term of advertising and letting spaces for advertisements, which shall be confined to the refreshment and cloak-rooms and on all programmes used and offered for sale at the said theatre." The rent was to be £35 per week and £2 for each matinée, subject to deductions in cases when there was no performance. The tenants were to supply at their own expense suitable programmes to be approved by the landlords, and the advertisements were to be confined to the refreshment bars and rooms and cloak-rooms, and were to be of such a nature as would not injure the character of the theatre and as were usually found in first-class theatres. The tenants were to provide and maintain a proper and sufficient staff of attendants for the service of the refreshment bars and rooms and cloak-rooms and for the sale of programmes, &c. If from any cause whatever no performance should be given in the theatre on any day or days other than a Sunday in any week, the tenants were to be entitled in respect of each such day or days on which no performance should be given to a remittance of one-sixth part of the week's rent, such remittance to be deducted and allowed from the next payment of rent.

The plaintiffs acted on this agreement from the 1st of September, 1900.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

By a notice dated the 17th of February, 1902, the defendants gave notice to the plaintiffs that, under powers conferred upon them by the London County Council (Improvements) Act, 1899, they required to take the premises for the purposes of works authorized by that Act, and required particulars of the plaintiffs' estate and interest in the premises. On the 4th of March, 1902, the plaintiffs served notice claiming compensation in respect of their exclusive right to sell refreshments, with the necessary use of the refreshment-rooms, &c., and they also claimed compensation on account of the fittings, &c.

On the 1st of April, 1902, the defendants took possession of the premises. On the 16th of April an arbitrator was appointed to determine the amount of purchase-money and compensation to be paid to the plaintiffs for the interest (if any) of the plaintiffs in the lands and hereditaments or the interest (if any) therein which the plaintiffs were enabled to sell under the London County Council (Improvements) Act, 1899, and the Acts incorporated therewith, and also the amount of damage (if any) for disturbance or loss of value in furniture and fixtures or expenses of removal or other loss incidental to the taking of the land.

The defendants did not admit that the plaintiffs had any interest in the lands and hereditaments, but concurred in the appointment of the arbitrator without prejudice to their right to dispute their liability to pay any compensation awarded.

The arbitrator awarded the sum of £2,568 9*s.* as purchase-money and compensation for the plaintiffs' interest (if any) in the lands and hereditaments.

The plaintiffs having brought this action on the award, the defendants pleaded that no purchase-money or compensation was payable, on the ground that the plaintiffs had no interest in the lands and hereditaments within the meaning of section 68 of the Lands Clauses Act, 1845.

Wright, J., held that the agreement created merely a licence and not an interest in land within section 68 of the Lands Clauses Act, and that the action therefore failed. He accordingly gave judgment for the defendants.

The plaintiffs appealed.

Witt, K.C., and *J. D. Crawford*, for the plaintiffs.—The plaintiffs acquired an interest in land by this agreement. They had the actual user of the premises themselves. The agreement gave them "the necessary use of the refreshment-rooms and bars and cloak-rooms and wine cellars of the said theatre." That is a user of land and amounts to an interest in land: *Temple Pier Co.* v. *Metropolitan Board of Works*, 12 L. T. 369, and *Bird* v. *Great Eastern Railway Co*, 19 C. B. N. S. 268. The sole right to affix advertisements to the walls was an interest in land. The right to carry on trade on the premises and make a profit therefrom was an interest in land. In *Webber* v. *Lee*, 30 W. R. 866, 9 Q. B. D. 315, it was held that the right to shoot over land and take away the game killed was an interest in land and a *profit à prendre*. The case of *Edwardes* v. *Barrington*, 85 L. T. 650, is distinguishable from this case. The agreement there was similar to the present agreement, but the question was whether the lessee of the theatre had, by granting that agreement, committed a breach of a covenant not to assign or demise without consent. The decision was that there had been no breach of that covenant because the lessee had not parted with the possession.

Dickens, K.C., E. Morten, and *H. M. Sturges*, for the defendants, were not called upon to argue.

COLLINS, M.R.—This is an action on an award which has been made in favour of the plaintiffs. The plaintiffs claimed to be entitled to compensation, under section 68 of the Lands Clauses Act, 1845, in respect of lands, or an interest therein, which had been taken for, or injuriously affected by, the execution of certain works by the London County Council. The question is whether, having regard to an agreement whereby the plaintiffs acquired the right to supply refreshments at the Globe Theatre, the result of that agreement was to confer on them an interest in land or not. It was argued on the part of the plaintiffs that they took more than a mere licence by the agreement, that they took an interest in land within the meaning of the Lands Clauses Act. But there is a decision of the House of Lords in the case of *Edwardes* v. *Barrington*, 50 W. R. 358, 85 L T. 650, which the learned judge at the trial thought bound him to give judgment against the plaintiffs. I see no escape from this conclusion. The decision in that case was on a similar agreement, and is, in my opinion, conclusive of this case. The point to be determined there was whether there had been a breach of a covenant not to assign or demise without consent, but the only question was whether the refreshment contractor, who was described in the agreement as the tenant, took an interest in land. The only substantial difference between the agreement in that case and the agreement in this case is that this is more artificially drawn than the other and shows more clearly an absence of any intention to grant a demise. The House of Lords came to the conclusion that in that case no interest in land had been transferred to the so-called tenant. Taking the whole of this agreement together, I am of opinion that it shows an intention to confer a licence only, and not an interest in land; and I think this case is concluded by the authority of the House of Lords decision. I desire to point out the distinction between a *profit à prendre* and an ordinary licence such as we are dealing with in this case. It was contended that a right to trade on land and make a profit amounted to a *profit à prendre*. I do not think that is so. A *profit à prendre* means a right to take something out of the land itself.

ROMER and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Hannay & Reynolds.*

Solicitor for the defendants, *W. A. Blaxland.*

From K. B. Div. (Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Dec. 10.

BELL (SURVEYOR OF TAXES) v. NATIONAL PROVINCIAL BANK OF ENGLAND. (*a.*)

Inland revenue—Income tax—Business of bank—Purchase by another bank—Succeeding to business—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D, cases* 1 *and* 2, *r.* 4.

The National Provincial Bank of England, whose head office was in London, acquired by purchase the premises and business of the County of Stafford Bank, which was carried on at Wolverhampton. After the purchase the business of the Stafford Bank was carried on as usual, but for the benefit and at the expense of the purchasing bank until a certain date, when the premises were opened as the Wolverhampton branch of the purchasing bank, who had never previously carried on any business at

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Wolverhampton. The manager and the staff of the Stafford bank were taken over by the purchasing bank, but none of the books of the Stafford bank were taken over except that the ledgers were continued in use until the end of the current year. All new cheque-books and new pass-books were issued in the name of the purchasing bank. From the date of the purchase the profits, if any, of the Wolverhampton branch of the purchasing bank were merged in and formed part of the general profits of the bank, without any distinction as to source or origin of profit, and there were no means of ascertaining whether there were any profits or the proportion of increase or decrease in the profits, if any, of the bank which had arisen from the business purchased. Assessments to income tax were made on the purchasing bank's returns for the three years following the date of the purchase, based on the average of the profits of the whole business for the three preceding years respectively, and an additional assessment was made upon them, based upon the assumed profits of the Stafford bank during those three years, under section 100, *Schedule D, cases* 1 *and* 2, *r.* 4, *of the Income Tax Act*, 1842.

Held, that the purchasing bank had succeeded to the business of the Stafford bank, and that the additional assessment was rightly made.

Judgment of Ridley, J. ([1903] 2 *K. B.* 249, 51 *W. R. Dig.* 67), *reversed.*

Appeal from the judgment of Ridley, J., on a case stated by the Commissioners of Income Tax (reported in 1903, 2 K. B. 249).

At a meeting of the commissioners for the general purposes of the Income Tax Acts and for executing the Acts relating to the Inhabited House Duties for the City of London, the National Provincial Bank of England (Limited) appealed against an assessment of £4 818 beyond their assessment on their own return of £228,493 for the year ended the 5th of April, 1900, against an assessment of £3,218 beyond their assessment on their own return of £299,768 for the year ended the 5th of April, 1901, and against an assessment of £1,634 beyond their assessment on their own return of £300,253 for the year ended the 5th of April, 1902, under Schedule D to the Act 16 & 17 Vict. c. 34, in the following circumstances:

The National Provincial Bank of England (Limited), which was established in the year 1833, and is now registered under the Companies Acts with a nominal authorized capital of £15,900,000, on which £3,000,000 has been paid, has since its foundation transacted and transacts banking business at the head office in Bishopsgate-street, in the City of London, and at a large number of branch establishments in London and various parts of England and Wales, such branch establishments now numbering 199. The County of Stafford Bank (Limited) was established in the year 1836 under the name of the Bilston District Banking Co., with a deed of settlement. In 1873 the company was registered under the Companies Act, 1862, as a company with unlimited liability, and the name of the company was changed to that of the County of Stafford Bank. In 1882 the company was incorporated as a company with limited liability under the name of the County of Stafford Bank (Limited), the registered capital being £800,000, divided into 20,000 shares of £40 each. The head office and banking house of the company was at Wolverhampton, and under the regulations registered as the articles of association the business of the company was to be carried on there and at such other places as the board might from time to time appoint. The company was also empowered to establish such branch banks, agencies, and local boards in the United Kingdom as the directors thought proper. As a matter of fact, however, the business was only carried on at Wolverhampton, and the powers conferred on the company under these regulations of establishing other business branch banks, agencies, and local boards were not exercised.

By agreements made respectively in February, 1899, and March, 1899, the whole of the business of the County of Stafford Bank (Limited), which had carried on business for some sixty-two years previously on the same premises and without any branches, its business premises, furniture, and fixtures, and such of its assets and liabilities as were and are provided by the agreements and shown in the balance-sheet annexed to the latter of the said agreements, was and were, as from the close of business on the 31st of December, 1898, purchased by the National Provincial Bank of England for the sum of £225,000 under and upon the terms of the agreements.

By clause 9 of the agreement of February, 1899, the directors and the general manager of the County of Stafford Bank, on behalf of themselves and also on behalf of the bank, and of any liquidator who might be thereafter appointed, covenanted with the National Provincial Bank that if the said business of the County of Stafford Bank should be sold and transferred to the purchasing bank in pursuance of the aforesaid or any other agreement, they would not at any time or times thereafter hinder or interrupt the person or persons who on the part of the purchasing bank should conduct the said banking business at Wolverhampton in the management and carrying on of the same, and would not at any time or times before the 1st of January, 1910, directly or indirectly, either by themselves or himself, or with any other person or persons, without the permission of the purchasing bank, carry on or be engaged in carrying on the business of a banker in Wolverhampton or within seven miles thereof, nor become a director or directors of any joint stock bank carrying on business at Wolverhampton or within seven miles thereof, but would use their best endeavours to secure the business of the County of Stafford Bank to the purchasing bank, and to promote the interests of the banking business carried on by them. The business of the County of Stafford Bank was carried on as usual, but for the benefit and at the expense of the National Provincial Bank, until the close of the business at 4 p.m. on the 5th of March, 1899, when the premises were closed. On the following morning—viz., the 6th of March—the same premises were opened as their Wolverhampton branch by the National Provincial Bank, who had never previously had any branch or carried on any business at Wolverhampton. The manager and the whole of the former staff were taken over by, and have, subject to necessary and ordinary changes, since continued to remain there in the employ of the National Provincial Bank of England (Limited). Business has since been carried on by that bank at the same premises; none of the books of the County of Stafford Bank (Limited) were taken over or continued in use by the National Provincial Bank, except that the ledgers, being found to be in the same form as those used by the bank, were continued in use by them to the end of the current year. In such of the pass-books as were continued in use a notice was inserted by means of a rubber stamp to the effect that as from the 1st of January, 1899, the account was with the National Provincial Bank of England (Limited), but all new cheque-books and pass-books were issued in the name of the National Provincial Bank of England (Limited). From the 31st of December, 1898, the profits, if any, earned at and by the National Provincial Bank's Wolverhampton branch merged in and formed part of the general profits of National Provincial Bank of England

(Limited) without any distinction as to source or origin of profit, and there are no means for ascertaining whether there were any profits or the proportion of increase or decrease, if any, in the profits of the bank which has arisen from the business, &c., so purchased as aforesaid. The ultimate profits divisible among the shareholders of the National Provincial Bank of England (Limited) are the result of the trading of the company as a whole, including the head office and all the branches, irrespective of the profit and loss arising from he business done at the head office or any particular branch. At and from the head office of the bank the general affairs of the company are transacted, and the working of the branches is regulated and supervised by the board of directors and general manager through various departments. All profits are received and dealt with by the head office. There are many classes of expenditure which are not and cannot be definitely allocated in any way, such as general management and departmental and establishment expenses which cannot be definitely attributed to any particular branch.

The general assessments of the National Provincial Bank for the years ended the 5th of April, 1901, and the 5th of April, 1902, include some portion of the profits made by the Wolverhampton branch of the bank, if any were made—viz., the assessment for the year ended the 5th of April, 1901, the profits on average for the preceding year 1899, and the assessment for the year ended the 5th of April, 1902, the profits on average for the preceding years 1899 and 1900; but as the accounts were merged in the general accounts of the bank it is impossible to differentiate between the profits made by the Wolverhampton branch of the bank and the general profits of such bank from the time the County of Stafford Bank was taken over. There are no means or accounts which would enable the bank to make a return under the Income Tax Acts of the profits of the said Wolverhampton branch (if any), or apply for the benefit of section 133 of 5 & 6 Vict. c. 35, in respect of such profits if less than the estimate.

Profits were made by the County of Stafford Bank (Limited) from the business at Wolverhampton for each of the three years ended the 31st of December, 1896, 1897, and 1898 respectively, when the accounts were made up as follows: 1896, £4,801; 1897, £4,750; 1898, £4,904; and the present assessments of £4,818, £3,218, and £1,634 respectively for the years ended the 5th of April, 1900, the 5th of April, 1901, and the 5th of April, 1902, appealed against, are assumed profits made by the National Provincial Bank, based on an estimate for the first year on the average of the profits of the County of Stafford Bank of the three preceding years—viz., 1896, 1897, and 1898—after the usual allowances for dividends, rents, &c., on which income tax had been paid by way of deduction, based for the second of the said years on one-third of the profits of the years 1897 and 1898, and based for the third of the said years on one-third of the profits of the year 1898. An assessment was made on the County of Stafford Bank (Limited) for the year ended the 5th of April, 1899, based on the average profits of the three preceding years ended the 31st of December, 1897, and the duty was paid by the said company. There was no assessment for any one of the years ended the 5th of April, 1900, the 5th of April, 1901, or the 5th of April, 1902, on the County of Stafford Bank (Limited). Assessments on their own returns had also been made for the year ended the 5th of of April, 1900, the 5th of April, 1901, the 5th of April, 1902, respectively, on the National Provincial Bank at its head office in London, on amounts based on the average of the profits of its whole business for the three years ended respectively on the 31st of December, 1898, on the 31st of December, 1899, and on the 31st of December, 1900, as shown by the published accounts and balance-sheets for each period of three years respectively, and the duty on such assessments was duly paid by the bank.

The National Provincial Bank of England (Limited) duly appealed against such assessments to the Commissioners of Income Tax for the City of London. On the hearing of such appeals the surveyor of taxes contended that the National Provincial Bank were liable to the additional assessments in order to cover such estimated profits, and further contended that there was a succession on the part of the bank to the business of the County of Stafford Bank (Limited) according to the terms of the fourth rule of the first and second cases, Schedule D, of section 100 of 5 & 6 Vict. c. 35, and that consequently the bank should be assessed to include the estimated profits of the business purchased from the County of Stafford Bank (Limited), estimated upon the average of the profits of the said periods of three years respectively of the said County of Stafford Bank (Limited). The National Provincial Bank contended that the profits, if any, of the business carried on at Wolverhampton during the period covered by such additional assessments could not be made or included in the basis of any assessment against the bank for that period, which was by the Act limited to the years 1896, 1897, and 1898, during none of which did the National Provincial Bank carry on any business at Wolverhampton; that such profits, if any, were merged in the general profits of the bank and were liable to be extinguished or diminished by reason of losses elsewhere or general expenses; and in any event would, in due course, form part of the basis of assessment. Further, that if the additional assessment was to be allowed the bank would be doubly assessed on such portion of their profits, if any, as arose from the business purchased from the County of Stafford Bank. Further, in reply to the contention of the surveyor, they contended that the acquirement by purchase of the business of the County of Stafford Bank was not a succession or such a succession as was contemplated by the Income Tax Acts.

The commissioners were of opinion that there was no succession within the meaning of the said fourth rule, also that the said business when purchased was not sufficiently, generally or separately, identified after merger in the National Provincial Bank's business to render the profits, if any, properly subject to separate assessment, and that the bank were or would be charged with a fair proportion of the profits and were not liable to be additionally assessed over and above the ordinary assessments on the profits of the National Provincial Bank, and they discharged the assessments accordingly.

Ridley, J., affirmed the decision of the commissioners.

The surveyor of taxes appealed to the Court of Appeal.

Sir Robert Finlay, A.G., Sir Edward Carson, S.G., and *S. A. T. Rowlatt*, for the Crown.

Danckwerts, K.C., and *Sir John Paget, K.C.*, for the National Provincial Bank.

COLLINS, M.R.—This is an appeal from the judgment of Ridley, J., upon a question under the Income Tax Acts, and the facts are shortly these: In 1899 the National Provincial Bank of England acquired by purchase the business of the County of Stafford Bank as from the beginning of the 1st of January, 1899, and the question we have to determine is whether, for the purpose of assessment to income tax, there has been a succession within section 100, Schedule D, r.

4, applicable to the first and second cases, of the Income Tax Act, 1842. The first case deals with "duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act." Rule 1, applicable to that case, provides that "the duties to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years ending on" the 5th of April preceding the year of assessment. By rule 4, applicable to both the first and second cases, "if amongst any persons in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in any such partnership, either by death, or dissolution of partnership as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment, or within the period for which the assessment ought to be made under this Act"—now comes the part of the rule that is material to the present case—"or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein mentioned, notwithstanding such change therein or succession to such business as aforesaid, unless such partners shall prove to the satisfaction of the respective commissioners that the profits and gains of such business have fallen short or will fall short from some specific cause, to be alleged by them, since such change or succession took place, or by reason thereof." That means that in the case of a succession the ordinary rule as to three years' average prescribed by rule 1 of the first case is to be applied. That raises the important question upon the facts here, because if there is a succession the profits of the old County of Stafford Bank would have to be assessed in the manner described in rule 1 on the average of the three preceding years. Upon the other hand, if there has been no succession, the National Provincial Bank have the right to treat the acquisition of the old County of Stafford Bank as the opening by them of a new branch at Wolverhampton, and to treat it as part of the National Provincial Bank; and as no profits were made by the National Provincial Bank at the bank at Wolverhampton in the three preceding years, no such profits could come into the calculation, and the amount to be assessed would be smaller than if the average of the profits of the County of Stafford Bank for the three preceding years were brought into account. The question is whether there has been a succession. If there has, the judgment of the learned judge is wrong. If, however, there has not been a succession, it does not follow that some other rule does not apply. The learned judge has held that there has been no succession, and that the profits of the County of Stafford Bank in the three previous years do not come into the calculation. It seems to me that the language of rule 4 which I have read is plain. If the National Provincial Bank had not been in existence prior to the acquisition of the County of Stafford Bank, but was a new company formed to take over the County of Stafford Bank, the case would have come directly within rule 4. A new company formed for the first time and acquiring the County of Stafford Bank would clearly succeed to the concern which it had acquired. What difference can it possibly make that the company was then already in existence and carrying on business? The company has none the less succeeded to the business because it already has another business. A person might buy an existent business for the purpose of annihilating it because he desired to get rid of the competition and to carry on his own business more successfully. Nothing of that kind took place here. The business of the County of Stafford Bank is carried on by the National Provincial Bank pretty much as before, except that the profits are merged in the profits of the National Provincial Bank. The commissioners have found that there was no succession within the meaning of rule 4. That is not a finding of fact, but a statement of a proposition of law that in such a case as the present there is no succession within the meaning of the rule. It is not like the case of an old bank opening a new branch in Wolverhampton. Here we have the acquisition of an existing business which has become part of the business of the National Provincial Bank. Mr. Danckwerts contended that the question of succession or no succession was a question of fact, and that the commissioners had found the fact, and for that he relied upon the case in Scotland of *Ferguson* v. *Aikin*, 4 Tax. Cas. 36. In some cases, no doubt, it may be a question of fact. In the present case, if it is a question of fact for the commissioners they have not decided it. They have given us the benefit of a problem of law, and have asked us whether their decision is right. I think that their decision is wrong. I need not go into other cases where, the commissioners having found that there was no succession in fact, the court refused to go behind the finding. In *Prescott, Dimsdale, & Co.* v. *Bank of England*, [1894] 1 Q. B. 351, which was relied upon by the respondents, the only question was whether certain banks which were amalgamated continued respectively to carry on their business, and it was held that they did not. That case is no authority inconsistent in any way with our decision in the present case. The appeal must therefore be allowed.

MATHEW, L.J.—I am of the same opinion. It is suggested that upon our decision the National Provincial Bank will be taxed twice over in respect of these sums. I cannot accept that in face of the facts stated in the case. It seems to me that there is a succession within rule 4 referred to by the Master of the Rolls. The goodwill and the whole concern of the County of Stafford Bank were acquired by the National Provincial Bank. It seems to me to be clear that the case comes within the terms of this rule. There is no difficulty in ascertaining the profits of the County of Stafford Bank for the last three years. The commissioners say that there is no succession within the meaning of rule 4. That seems to me to be a decision upon a question of law, and I am unable to agree with it.

COZENS-HARDY, L.J.—I agree. When one looks at the agreement of February, 1899, it seems clear that the National Provincial Bank were to pay a large sum of money for the whole of the business premises belonging to, and the business carried on by, the County of Stafford Bank at Wolverhampton, and by clause 9 of the agreement, the directors and general manager covenanted that if the said business of the County of Stafford Bank should be sold and transferred to the purchasing bank they would not hinder or interrupt the purchasing bank in the management and carrying on of the same, and would not carry on a banking business within a certain distance of Wolverhampton for ten years, but would use their best endeavours to secure the business of the County of Stafford Bank to the purchasing bank. That is what has been done. The National Provincial Bank have conducted the same business with the same

staff of clerks. It is, to my mind, impossible to say that there has not been a succession within the meaning of the fourth rule of cases 1 and 2 in Schedule D, section 100, of the Income Tax Act, 1842, unless we can say that that rule does not apply where the successor carries on another similar business as well, or only applies where the business which is acquired is kept separate and distinct from the rest of the business. I see no reason for so holding. In my opinion the National Provincial Bank are the successors to the business of the County of Stafford Bank within the meaning of rule 4.

Appeal allowed.

Solicitors for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the bank, *Wilde, Moore, & Wigston.*

High Court of Justice.

Chan. Div. Kekewich, J. — Feb. 17.

PLEWS *v.* SAMUEL. (*a.*)

Vendor and purchaser—Vendor receiving rents while in possession after time for completion—Arrears of rent—Trusteeship.

A vendor remaining in possession after the day fixed for completion of the sale by no default of the purchaser, and receiving the rents of the property after electing to take interest in lieu of rents, is not at liberty as against the purchaser to allocate any part of such rents to arrears of rent due to himself from tenants either at the date of the contract or subsequently before the day fixed for completion.

This was in form an action for specific performance, but the only question calling for a report was whether the vendors, who had remained in possession of the property after the day fixed for completion and received the rents, were under the circumstances mentioned below entitled to deduct any part of such rents before handing them to the purchaser.

The case came on for hearing on admitted facts which so far as material were as follows: By an agreement dated the 24th of February, 1902, the plaintiffs agreed to sell and the defendant to purchase certain leasehold houses in Cardiff, including Nos. 172 and 174, Bute-street, subject to certain conditions of sale modified so as to apply to private contract. The premises Nos. 172 and 174, Bute-street were stated to be then let to weekly tenants at £1 2s. 6d. and £1 7s. 6d. weekly respectively, the landlord paying all outgoings.

The day fixed for completion was the 18th of March, 1902, and the conditions provided that if the purchaser then failed to complete he should pay interest on the unpaid purchase-money at 6 per cent. till payment, or the vendors might at their option take the rents during the like period.

Owing to a question being raised by the defendant shortly after the date of the agreement a vendor and purchaser summons was taken out, upon which the defendant's contention was not sustained, but it was not suggested that the point was not properly raisable.

Pending the hearing of the summons completion of the purchase stood over and the plaintiffs accordingly remained in possession, having elected to receive interest and not rents, and their title having been accepted.

At the date of the agreement sums amounting to £31 1s., which by the 18th of March, 1902, had increased to £34, were owing by tenants for arrears of rent. The defendant made no inquiries as to this and did not in fact learn it until long afterwards.

Just before completion in March, 1903, the plaintiffs rendered an account of the rents they had received, drawn upon the footing that they were entitled to retain the £34 for themselves in respect of the arrears due as aforesaid.

This claim being resisted, the plaintiffs brought this action, and shortly afterwards they informed the defendant for the first time that £2 9s., part of the £34, grew due between the date of the agreement and the 18th of March, 1902.

The question raised for decision was whether the plaintiffs could retain out of the rents received by them the sum of £34, or alternatively that sum less the sum of £2 19s.

McSwinney, for the plaintiffs.—The vendor having taken care of the property is entitled to appropriate these rents to the arrears; this is clear as between himself and the tenants; it is also right as between himself and the purchaser. This is not a matter affecting what may be called the *corpus* of the property to which his fiduciary character is limited. There is no breach of duty to a purchaser who does not prove wilful default. The vendor may be a *quasi*-trustee for the purchaser, but if so, he has taken all proper care within the rule mentioned in Fry on Specific Performance (4th ed.), p. 590, s. 1394, and by not distraining for rents he has saved the purchaser from entering on a vacant property; at any rate if there was an "appropriation" of rents amounting to wilful default, that could only apply to the £2 19s. which grew due between the date of the contract and the day fixed for completion.

He cited *Lysaght* v. *Edwards*, 24 W. R. 778, 2 Ch. D. 499; *Foster* v. *Deacon*, 3 Madd. 394; and *Sherwin* v. *Shakespear*, 5 De G. M. & G. 517.

P. O. Lawrence, K.C. (with him *Ashton Cross*), for the purchaser.—If the vendor elects, as he did elect, to take interest in lieu of rents and profits, he thenceforward becomes a trustee for the purchaser of every item of income from the property. Up to the day fixed for completion the vendor of course takes everything, and he can manipulate the incomings as he pleases. If he had elected to take the rents and profits after that date in lieu of interest, he could have continued the manipulation and have allocated any receipts to any portion of rent which might be in arrear, but having elected for interest his position is changed, and henceforward he is a trustee not merely of the *corpus* of the property so as to keep that intact, but also of the rents and profits.

He cited *Phillips* v. *Silvester*, 21 W. R. 179, 8 Ch. 173; *Royal Bristol Permanent Building Society* v. *Bomash*, 35 Ch. D. 390, 35 W. R. Dig. 69.

KEKEWICH, J.—The statement of facts in this case raises a nice point which is not covered by authority. Several modern cases lay down rules as to the relation of vendor and purchaser as to land agreed to be sold. Perhaps *Lysaght* v. *Edwards* is one of the most instructive: there the question was whether land included in a contract for sale passed under a devise by the vendor of trust estates, and it was held that it did so pass, as the vendor was a trustee for the purchaser; the relation was further illustrated by *Phillips* v. *Silvester*, showing that a vendor may be made liable for neglect to take care of the property; and there are other cases showing that he may be charged with wilful default. But all those cases

(*a.*) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

dealt with the contract of sale and the relations arising therefrom, and in them everything was laid down subject to the contract being performed; of course if the contract were not performed the relationship would be dissolved, and nothing could then be said against the vendor on the score of neglect, misfeasance, or otherwise, for he would be and remain owner of the estate; that shows how peculiar is the position of a vendor in such a case; he is no doubt a trustee, but only so in a modified sense.

The present case, however, raises a new question, and I have to deal with relations arising from and the position subsisting after the expiration of the time or the day "fixed for completion," after which day the purchaser was to be entitled to the rents and profits. Of course any other day might have been chosen to limit or mark the time from which the purchaser was to take the rents and profits; but here, as in very many cases, the day taken was the day fixed for completion—viz., the 18th of March, 1902. Completion did not take place on that day and the vendor remained in possession—not that there was any default in him or the purchaser, for the point the purchaser raised was a proper one to take. The vendor also elected to take interest in lieu of rents and profits, as he was entitled to do, but continuing in possession, he continued to receive the rents and profits. The property was let to weekly tenants, and after the 18th of March, 1902, the vendor received rents which he now wishes to appropriate or allocate to arrears of rent due in respect of weeks prior to the contract of sale, and as a result to put into his own pocket the rents so received as being moneys belonging to himself. If there were nothing else in it, it would seem that the vendor could properly say, as against the tenants, "I can appropriate these moneys to answer any rents due to me. I choose the period prior to the 18th of March." But then his relation to the purchaser comes in, and the question arises whether he can do that as against the purchaser; it is clear he still owed a duty to the purchaser—viz., the duty of getting in the rents and holding them for the purchaser, although he also had an interest in the rents as vendor in case the purchaser failed to complete; his duty lay one way and his interest another; there was a conflict. But when there is a conflict of duty and interest arising out of a fiduciary position, duty must prevail, and if it has not in fact prevailed the court must insist upon it.

The vendor cannot set up his interest as against his duty, and although he may have received these rents in respect of the earlier period, I feel bound to hold that, as against the purchaser, he must bring them into account. The vendor must pay the costs.

Solicitors, *Bower, Cotton, & Bower*, for *Stephens, David, & Co.*, Cardiff; *Windybank, Samuell, & Lawrence*, for *Lewis, Morgan, & Box*, Cardiff.

Chan. Div.
Kekewich, J. } Aug. 5, 1903.

In re COTGRAVE.
MYNORS *v.* COTGRAVE. (*a.*)

Will — Forfeiture — "Alienate or incumber"—Bankruptcy—Petition by debtor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52).

Property was given under a will to life tenants with a gift over in the event of any of them "alienating or incumbering, or agreeing to alienate or incumber," their shares or interests. One of the life tenants presented a petition in bankruptcy, which was followed by adjudication on his own application.

Held, that this constituted an alienation, and that the gift over took effect.

In re Amherst, 20 *W. R.* 290, 13 *Eq.* 464, *followed.*

Adjourned summons.

By his will, dated the 17th of July, 1866, Edward Stone Cotgrave directed his trustees to set apart a sum of £15,000 to hold upon trust for his grandson, Richard de Malpas Cotgrave Farmar, for his life, and after his decease upon trust as to the principal for his children, and after bequests to other grandchildren of his own, the testator declared that in the event of any of his grandchildren on coming of age or at any subsequent time "alienating or incumbering or agreeing to alienate or incumber" their shares or interests in either capital or income of the trust funds to which they became entitled, such grandchild should from thenceforth for themselves or their issue absolutely forfeit all benefit to which he or they would otherwise be entitled, and that the money should go to the eldest son of the testator's brother.

The testator died in 1868, and his will was duly proved by his executors.

Richard de Malpas Cotgrave Farmar, pursuant to a direction in the will, assumed the name of Richard de Malpas Cotgrave only.

In 1877 R. de M. Cotgrave married Amelia Farmar Cotgrave, and by her had eight children, of whom seven were living and were infants.

By an order of the court, dated the 8th of April, 1902, made in an action of *In re Cotgrave, Cotgrave* v. *Whitehead*, the forfeiture clause relating to alienation in the will was declared to include the interest in remainder of the child or children of the testator's grandchildren.

By an indenture dated the 16th of March, 1903, Thomas Manson Cotgrave absolutely assigned to A. Cotgrave, the wife of R. de M. Cotgrave, his contingent interest in this sum of £15,000.

On the 16th of March, 1903, R. de M. Cotgrave filed his own petition in bankruptcy, and a receiving order was made against him on that day, and on his application he was adjudged bankrupt and the court subsequently ordered his estate to be administered in a summary manner.

This was a summons taken out by the trustees of the testator's will to determine whether the defendant R. de M. Cotgrave had forfeited his interest in this sum of £15,000 by his bankruptcy.

A. Adams, for the trustees.

Stewart Smith, K.C., and *Rooth*, for parties claiming under the gift over.—The presentation of his own petition by the beneficiary amounts to alienation: Theobald on Wills (5th ed.), p. 552. *In re Amherst's Trusts*, 20 W. R. 290, 13 Eq. 464. *Ex parte Dawes, In re Moon*, 34 W. R. 752, 17 Q. B. D. 275, is distinguishable, as there the clause ran "do or suffer anything whereby the income, if payable to him absolutely, would become vested in any other person," and no adjudication was made in that case, but a composition was entered into, but here an adjudication has taken place.

Tyrrell, for the children of the bankrupt.

Roscoe, for other parties interested.

J. G. Wood, for the official receiver.—There has been no forfeiture. The clause relating to forfeiture must be strictly construed. Here the words are "alienate or incumber," not "part with," as in *In re Amherst's Trusts*. The alienation in bankruptcy is by operation of law, and is not the act of the bankrupt, as bank-

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

ruptcy is not the necessary result of a petition: *Graham* v. *Lee*, 23 Beav. 388, and *Croft* v. *Lumley*, 6 H. L. C. 672, 743.

KEKEWICH, J.—I do not think it is necessary to go into the case of *Croft* v. *Lumley*, for we have the distinct authority of Bacon, V.C., in *In re Amherst's Trusts* that under the provisions of the Bankruptcy Act, 1869, the presentation of his own petition by a debtor was sufficient to work a forfeiture. True, the words of the forfeiture clause were not exactly the same in that case as in this. They were "assign over, assure, mortgage, or in any manner incumber, or by any instrument in writing, parol agreement, or otherwise howsoever, part from" the income; here what is contemplated is "alienate or incumber or agree to alienate or incumber"; here it is alienation, there it was assigning over; but there is no real distinction between the two cases, and Bacon, V.C., a judge of great experience, as chief judge in bankruptcy, in his judgment in *In re Amherst's Trusts*, says: "The presentation of the petition is undoubetdly an act of bankruptcy, although it is uncertain when the petition is presented whether bankruptcy will ensue or not. Presentation of the petition may be followed by a liquidation by arrangement, and, if it be so followed, then, upon the appointment of a trustee, the whole of the debtor's estate vests in the trustee; and the title of the trustee to the debtor's property relates back if and when necessary to the date of the presentation of the petition." So that under that Act in either event, whether bankruptcy ensues or liquidation by arrangement, there would be a vesting of the bankrupt's property in some person other than himself. There would be no occasion to go further, were it not that that case was decided under the Act of 1869, whereas this case arises under the Bankruptcy Act of 1883, and the two Acts are somewhat different. As is pointed out by Wright, J., in *Ex parte Lovell*, [1901] 2 K. B. 16, 22, where after distinguishing *In re Amherst's Trusts* on the ground that in *In re Amherst's Trusts* the words of the forfeiture clause were more comprehensive than in the case before him, the learned judge goes on to say: "Moreover, all those cases, except *In re Amherst's Trusts*, were determined upon statutes under which the debtor's petition, *ipso facto*, effected an assignment of the debtor's property for the benefit of creditors, but under the Act of 1883, even upon a debtor's petition asking for adjudication, it does not follow automatically. The court has a discretion in the matter, and, unless the court in its discretion adjudicates, the creditors may prefer to accept a composition. Therefore Cave, J., in *In re Dawes, Ex parte Moon*, held that a debtor's petition under the Act of 1883 did not of itself amount to an assignment. In that case the creditors accepted a composition, so that there was no adjudication and no vesting of the debtor's property in a trustee; but the case seems to be an authority that the mere filing of a petition by a debtor is not of itself an assignment. And, if so, there is in any view no assignment until adjudication." The learned judge therefore thought that the presentation of his own petition by a debtor did not amount to assignment unless followed by adjudication; but, however that may be, that distinction is not applicable here, because this petition has been followed by adjudication, and, although adjudication is not the necessary or automatic consequence of filing a petition, nevertheless it is the natural consequence contemplated by the bankrupt, and in this case it has been the actual consequence. Moreover, in *In re Riggs, Ex parte Lovell*, the prohibition was against assignment only, whereas here it is against alienation or incumbering. I must therefore hold that the principle of *In re Amherst's Trusts* applies, and that the bankrupt has alienated his interest within the meaning of the forfeiture clause, and has consequently forfeited it.

Solicitors, *Burch, Whitehead, & Davidsons; Ravenscroft, Woodward, & Co.*, for *Crompton & Co.*, Exeter; *Coode, Kingdon, & Cotton; Field, Roscoe, & Co.*

Chan. Div.
Byrne, J. } Feb. 11, 27.

In re BROWN & GREGORY (LIMITED).
ANDREWS *v.* BROWN & GREGORY (LIMITED). (*a.*)

Company—Debenture-holders' action—Debentures held by a trustee for creditors of lenders—Debt owed by lenders to company—Right of participation in fund available for debenture-holders.

P. was general assignee of the property of a firm, S., for the benefit of its creditors. As such assignee P. was entitled to certain debentures issued by a company, and was registered as holder thereof. The firm S. was indebted to the company in a sum which formed part of the property secured by the debentures. The debentures were indorsed with a condition that the moneys secured should be paid without regard to any equities between the company and the original or any intermediate holder. A debenture-holders' action having been brought against the company, and the usual judgment given, there was a fund in court in the action available for distribution among the debenture-holders.

Held, that P., not being a bonâ fide *purchaser for value of the debentures, could not claim to share in the fund until the debt due from the firm to the company had been paid or brought into account, notwithstanding that he was the registered holder.*

In re Goy & Co. (Limited), 48 *W. R.* 425, [1900] 2 *Ch.* 149, *distinguished.*

Further consideration.

This was the further consideration of a debenture-holders' action upon which a question arose as to the right of a debenture-holder who was the assignee of the property of a firm to participate in the assets of a company which consisted partly of a debt owed by the firm to the company.

The above action was commenced in January, 1902, by the plaintiff on behalf of himself and all other debenture-holders of the above company for the usual accounts, for the sale of the property of the company, and for division of the proceeds.

In 1898 the company had issued debentures of £100 each to one Samuel Smith by which the company bound themselves to pay the moneys secured to Smith, or the registered holder for the time being, and charged all its property with such payments, subject to the conditions indorsed thereon. The following were among the conditions:

"2. The principal moneys, bonus, and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder of this debenture.

"3. The receipt of the registered holder of this debenture, his executors or administrators, shall alone be a good discharge for the principal moneys and bonus hereby secured, and the interest payable from time to time on the £100 secured by the debenture.

"11. The registered holder hereof will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly, and the company shall not be bound to enter on the register notice of

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

any trust, or to recognize any right in any other person, save as therein provided."

These debentures, or the thirty of them about which the question arose, belonged beneficially to the firm of Samuel Smith & Co., and were on the 3rd of February, 1902, assigned by the firm to one A. C. Palmer by a deed whereby, except onerous property, and the separate property of Samuel Smith, all the joint and several property of the firm of Samuel Smith & Co. and its members was assigned to Palmer as trustee for the creditors of the firm. Palmer was subsequently registered as the holder of these debentures. On the 22nd of February, 1902, the usual judgment in the action was given. In July, 1902, the master certified that the sum of £1,666 8s. 11d. was due from Samuel Smith or his firm to the defendant company, and that this was part of the property subject to the debentures in question. The above sum was (as his lordship found) in fact due from the firm to the company. There was a fund in court in the action which was available for distribution in payment of a dividend in respect of the amounts due to the debenture-holders under their debentures. Palmer claimed to be entitled to receive dividend in respect of the debentures assigned to him and of which he was the registered holder. The other debenture-holders contended that he could not share in the dividends until the whole debt of £1,666 8s. 11d. due to the company as aforesaid had been paid. It was stated in the course of the argument that the company was being wound up voluntarily.

Rowden, K.C., and *Hon. T. H. Watson*, for the plaintiffs.—Palmer is not an independent transferee. He is really none other than the firm of Samuel Smith & Co. Hence he cannot upon settled principles participate in the fund until he has paid into the fund everything which he owes to it: *In re Akerman*, 40 W. R. 12, [1891] 3 Ch. 212; *In re Watson*, 44 W. R. 571, [1896] 1 Ch. 925; *In re Auriferous Properties (Limited)*, 47 W. R. 75, [1898] 2 Ch. 428; and see the observations of Stirling, J., in *In re Goy & Co. (Limited)*, [1900] 2 Ch. 149, 48 W. R. 425.

Norton, K.C., and *Hon. M. Macnaghten*, for Palmer.—Mr. Palmer being the registered holder of the debentures, is entitled to his dividends out of the fund without regard to the debt owed by his assignors, the firm of Samuel Smith & Co., to the defendant company, as under the conditions indorsed on the debentures no notice is to be taken by the company of any trusts, and no regard is to be paid to any equities existing between the original holders and the company: *In re Goy & Co. (Limited)*. Even if the company did take notice of the trust these dividends could not be set off against the debt due from the firm. The other debenture-holders cannot sue for the debt. The only person to sue is the company by its liquidator, and when they do that the firm can set off its debentures against the debt. *In re Akerman* was only a case of retainer by executors in respect of a statute-barred debt. *In re Auriferous Properties (Limited)* was a case where the debt was due by and not to the company.

Cur. adv. vult.

Feb. 27.—BYRNE, J.—There is no question of set-off arising, and I do not see that there is any difference in point of principle because the item of property charged happens to be a debt rather than some other item, as, for instance, a sum of Consols in the name of Palmer as trustee by virtue of the assignment. The contention on the part of the other debenture-holders is that Palmer cannot, as assignee, share in the dividend without paying or bringing into account the whole amount of the debt. There is no doubt as to the general principle applicable. It is stated by Stirling, J., in the case of *In re Goy & Co.*: "It has repeatedly been held inequitable that a person entitled to a share of a fund should receive anything in respect of that share without paying what he may be bound to contribute to the same fund. Under such circumstances the court in effect says to the person claiming to be paid, 'You have in your own hands that which is applicable to the payment—pay yourself out of that!'" But it has been argued on behalf of Palmer that he is in the position of holder of the debentures, that he owes nothing to the company, and that therefore the doctrine to which I have referred does not apply. When the facts are arrived at, the real question resolves itself into this—namely, whether or not Palmer, as assignee of the firm's assets, can be in a better position than the firm would have been if they had never assigned, and had been the registered owners of the debentures. Now, Palmer is entitled to be registered as owner of the debentures, and is so by virtue of the assignment by Smith and his co-partners as trustee for them subject to satisfying creditors who may execute the deed, and Smith and his co-partners are liable to pay the debt. In my opinion Palmer, as assignee, is in no better position than his assignors, being simply a general assignee in trust for creditors—neither the company nor the debenture-holders having come in under it—and he can only be entitled subject to the same equities as his assignors were subject to. He is not in the position of a *bonâ fide* purchaser for value, as was the assignee in *In re Goy & Co.* The debentures are issued with the following conditions: [His lordship read conditions 2 and 11.] These conditions do not, in my opinion, prevent the company or the debenture-holders from insisting upon their right as against Palmer, just as they would have been entitled to do against his assignors. He only holds, under the deed of the 3rd of February, 1902, as trustee for them as against those creditors who have not come in under the deed. I think that Palmer must bring into account the £1,666 8s. 11d. before he can claim to share in any dividend, which means that he cannot share in the amount now to be divided. The right method of division appears to me to be to add £1,666 8s. 11d. for the purposes of computation to the amount available for division, and then to pay the other debenture-holders all they are entitled to upon that footing, so far as the actual fund will extend. If there should be any future distribution the payment now made will be brought into account, regard being had to the then state of circumstances. I can easily imagine the rights being altered by other events, as, for instance, by the company or the debenture-holders receiving some payment under the deed, there being a release contained in it by assenting creditors.

Solicitors, *Collyer-Bristow, Hill, Dods, & Booth*, for *Stone, Simpson, & Mason*, Tunbridge Wells; *James & Mellor*.

Chan. Div. } Feb. 22.
Farwell, J. }

CARL BROTHERS (LIMITED) v. WEBSTER. (a.)

Goodwill—Sale of business—Soliciting old customers.

The goodwill of a business was sold to the C. Co. W., one of the vendors, who had been a partner in the business, subsequently formed the N. Co., which competed with the C. Co. W., on behalf of the N. Co., solicited

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

custom from persons who had been customers of the original business.

Held, that the rule which prohibits the vendor from soliciting customers applies when the customers, although remaining customers of the purchaser, have in fact become customers of the new firm started by the vendor. It is immaterial whether a particular individual who is solicited has also of his own accord done business with the vendor.

In May, 1899, the firm of Carl Brothers sold the business of wholesale drapers and warehousemen carried on by them at Norwich, and the goodwill thereof, to the plaintiff company, Carl Brothers (Limited). The defendant Webster was a partner in the firm of Carl Brothers.

The defendant in accordance with the agreement for sale acted as managing director of this company until the 3rd of January, 1903. Subsequently he formed a company called the Norwich Warehouse Co. (Limited), which carried on business in competition with the plaintiffs. The defendant was interested in this company and on its behalf he solicited custom from persons who had been customers of the original firm of Carl Brothers.

This action was brought by the plaintiff company to restrain the defendant from soliciting custom from persons who had been customers of the original firm of Carl Brothers.

It was contended that the persons solicited by the defendant had, before such solicitation, become customers of the Norwich Warehouse Co. (Limited) of their own accord, although they were also customers of the plaintiffs.

Eldon Bankes, K.C., and *R. J. Parker*, for the plaintiffs.

Upjohn, K.C., and *Jessel*, for the defendant.

FARWELL, J., in giving judgment, said: The only question on which I propose to express an opinion is the general question, without condescending to particular instances, which may be put in this way: Does the rule which prohibits the vendor of a business from soliciting customers disappear when those customers, although remaining customers of the old firm—*i.e.*, the purchaser, have in fact dealt with the new firm started by the vendor, so that they have become also customers of the new firm—*i.e.*, the vendor? In my opinion it would make no difference.

The test, to my mind, is whether they are properly to be called customers of the old firm, the goodwill of which has been bought by the purchaser.

The principle which governs this class of cases is unfortunately so wide that it is difficult to apply by reason of its generality. I suppose it really is the old principle that a man cannot derogate from his own grant, but it is complicated by the fact that it is now well settled, notwithstanding that principle, that it is competent for a man who has sold his business to set up a similar business next door the next day and do the best he can—short of representing that he is still carrying on the old business or soliciting the customers of the old business—to attract away all the business he has already sold. I take the law as I find it, but as Lord Davey puts it in *Trego* v. *Hunt*, 44 W. R. 225 [1896] A. C. 7, the difficulty of doing complete justice ought not to prevent me meting out such scanty measure of protection to the purchaser as I can manage to do. It seems to me that this is the very smallest measure of protection that the unfortunate purchaser is entitled to get. It is unfortunate that he cannot get more, but he is entitled on the authorities to say: "You have sold me this business and you shall not actively solicit the customers who made that business, who formed the value of it, to leave me and come to you." That being the principle, it appears to me it is really a matter of indifference whether a particular individual who is solicited has also of his own accord done business with the vendor. Assuming, he has, if a customer has still remained the customer—as in the instance before me is the case with every witness—if the customer has remained throughout and still is a customer of the old firm, the mischief done by the solicitation is the same whether he has also dealt with the firm of his own free will or whether he has not. What the purchaser is entitled to say is "You shall not actively solicit your old customers, who became mine, so long as these are my customers, to come to you, whether they have or have not of their own accord come to buy goods from your new firm."

I think I should be wrong to limit the small amount of protection which the purchaser of a business can get by any such restriction as is suggested.

The injunction will go without any qualification as to Mr. Webster and his agents. I cannot grant an injunction against the company, but the injunction against Mr. Webster must restrain him from directing or suggesting solicitation by travellers or other agents of the company.

Solicitors, *Sharpe, Parker, Pritchards, & Co.*, for *Stevens, Miller, & Jones*, Norwich; *Christorer & Roney*.

Chan. Div. } Jan. 19, 20, 21, 22; Feb. 2.
Joyce, J. }

CHRISTY & CO. v. TIPPER & SON. (*a.*)

Trade-mark—Invented word—Passing off—Infringement.

No word can be said to be an invented word if it is like any known word; it must be one coined for the first time, and must not be descriptive. But if it is an English word with merely the suffix "ine" added it is not an invented word.

The plaintiffs, Christy & Co., were the agents in this country of Wilbur F. Young, also a plaintiff in the action, who carried on business in America, and as such agents sold under the name "Absorbine" a medicinal preparation used for curing certain complaints of horses and cattle.

The defendants were also manufacturers and vendors in the United Kingdom and abroad of horse and cattle medicines. At a date almost contemporaneous with the application by the plaintiffs for registration of their trade-mark "Absorbine," the defendants adopted, without any knowledge of the plaintiffs' user, the same word "Absorbine."

The present action asked for an injunction restraining defendants from offering for sale any veterinary preparation under the name "Absorbine," and to restrain the defendants from infringing the rights of the plaintiffs in their registered trade-mark. Plaintiffs also claimed an injunction to restrain defendants from passing off their goods as and for those of the plaintiffs.

Defendants applied to have the trade-mark "Absorbine" struck off the register as its registration as a trade-mark was improper.

The question for the court was whether the word "Absorbine" was an invented word so as to be capable of being registered under section 10 of the Patents, Designs, and Trade-Marks Act, 1888, which provides that "a trade-mark must consist of or

(*a.*) Reported by ALFRED C. THOMAS, Esq., Barrister-at-Law.

contain one at least of the following essential particulars . . . (*d*) an invented word or invented words; (*e*) a word or words having no reference to the character or quality of the goods, and not being a geographical name."

Hughes, K.C., and *Sebastian*, for the plaintiffs.—The question was whether the registered trade-mark is good or not. Before "*Solio*" *case*, [1898] A. C. 571, it was assumed that Patents, &c., Act, 1888, s. 10, sub-sections (*d*) and (*e*) were to be read together, but this assumption was negatived in the above case; the result of this is, that if it is an invented word it matters not whether it has reference to the character or quality of the goods: see p. 576 of the "*Solio*" *case* (Lord Halsbury). And sub-section (*d*) of section 10 can be read by itself: "*Pirle*" *case*, *In re Ripley*, 15 Pat. Rep. 151, and see the "*Savonol*" *case*, *Field* v. *Wagel Syndicate* (*Limited*), 17 Pat. Rep. 266. "Ine" in this case has no more meaning than "ol" in the "*Savonol*" *case*: *Linotype Trade-Mark*, [1900] 2 Ch. 238, 48 W. R. Dig. 188; *Paine* v. *Daniels & Sons' Breweries*, [1893] 2 Ch. 567, 41 W. R. Dig. 253. In the "*Yorkshire Relish*" *case*, *In re Powell*, [1894] A. C. 8, the name was taken off the register. After 1883 the judges at first decided to let all fancy words through, but now the rule laid down by Lord Herschell in the "*Solio*" *case* must be followed.

Younger, K.C., and *Hewitt*, for the defendants.—For the law prior to the "*Solio*" *case*, see "*Satinine*" *case*, *In re Meyerstein*, 38 W. R. 440, 43 Ch. D. 604; "*Eboline*" *case*, *In re Salt*, 42 W. R. 666, [1894] 3 Ch. 166; and "*Somatose*" *case*, *In re Farbenfabriken*, 42 W. R. 488, [1894] 1 Ch. 645. These sub-sections (*d*) and (*e*) of section 10 of the Patents and Trade-Marks Act, 1888, are independent of each other. The word cannot be said to be an invented word if it is like any known word; it must be one coined for the first time, and must not be descriptive. But if it is an English word with merely a flourish "ine" it is not an invented word; a word might be an invented word if of foreign origin, and so likely to be known only to scholars; it is not necessary that the word should be wholly meaningless. A judge might say it was invented if remotely descriptive: "*Savonol*" *case*, "*Nourishing Stout*" *case*, *Ragget* v. *Findlater*, 22 W. R. 53, L. R. 17 Eq. 29. "Absorbine" is not an invented word, since before 1901 it was used in America, so it cannot be used here afterwards as an invented word: *British Electrozone case*, 13 R. P. Cas. 447. The real effect of the "*Solio*" *case* was that sub-sections (*d*) and (*e*) of section 10 of the Patents, &c., Act, 1888, are independent: *Edwards* v. *Dennis*, 30 Ch. D. 454, 34 W. R. Dig. 197; Kerly on Trade-Marks, p. 371; *Davis & Co.* v. *Stribolt & Co.*, 59 L. T. 854, 37 W. R. Dig. 186.

Hughes, K.C., in reply.—In regard to the "*Electrozone*" *case*, it seems contrary to principle; and to say that a man is less entitled to a mark because he has used it himself must be wrong: *Payton & Co.* v. *Snelling, Lampard, & Co.*, 16 R. P. Cas. 283; *Manchester Brewery Co.* v. *North Cheshire and Manchester Brewery Co.*, [1898] 1 Ch. 539, [1899] A. C. 83.

Feb. 2.—JOYCE, J.—In November, 1901, the plaintiff applied for and afterwards obtained the registration as a trade-mark of the word "Absorbine" in class 2 in respect of chemical substances prepared for use in medicine and pharmacy. The uses of the word appeared to have been solely in connection with and as a designation of a liquid preparation professing to be especially prepared to remove wind-puff, capped-hock, thorough-pin, fatty tumours, enlarged glands, and all puffs and swellings. The defendants, who were well-known manufacturers and vendors of veterinary preparations, had previously made and sold an ointment — "Tipper's Absorbent Ointment" — for application in cases similar to those for which plaintiffs' liquid remedy was advertised to be specially prepared or appropriated. At a date practically contemporaneous with the plaintiffs' application for their trade-mark "Absorbine" the defendants, who appeared to be perfectly honest tradesmen, without any knowledge of what the plaintiffs were doing, changed the title of their absorbent ointment to "Absorbine," and they had sold the same under the title of "Absorbine Tippers" ever since, though perhaps not in very large quantities. The plaintiffs having discovered what the defendants were doing, on the 30th of November, 1903, instituted this action, not only for the usual relief in respect of the trade-mark, but also for an injunction restraining the defendants from passing off their goods as and for those of the plaintiffs. The defendants replied with a motion to expunge the trade-mark from the register. At the conclusion of the trial, if not before, it was virtually admitted on behalf of the plaintiffs that the only ground for the passing-off action was the use of the word "Absorbine," and I then intimated, and, if necessary, decided, that if "Absorbine" were allowed to remain on the Register of Trade-Marks the action for passing-off as distinguished from infringement of trade-mark was unnecessary. It was quite clear that the word "Absorbine" had obviously reference to the character or quality of the goods. It could only be registered, if at all, under section 64, sub-section 1 (*d*), of the Patents, &c., Act, 1888, as being an invented word. Whether it was or was not an invented word within the meaning of the statute is the single question that remains for me to decide.

The first two syllables of the word under consideration were beyond all question the common English word "absorb." I have not been told how the whole word was invented. In the application for its registration in America it was spoken of by the applicant as an arbitrary or arbitrarily chosen word. It might simply be a misspelling of the present participle of the verb absorb, or it might represent that participle pronounced in a careless, slovenly fashion. If it were that, it was certainly incapable of registration in respect of such a veterinary medicament as that of the plaintiffs; or it might be the common English word "absorb" with a common termination thereto. Such a termination was found in very many words designating chemical substances, chlorine, glycerine, &c., also in medicinal preparations as maltine, phosphorine, &c. When so used I am not aware that the syllable "ine" had any meaning at all of itself, nor has it any here. It was little if anything more than a sort of flourish rounding off the word or expression to which it was attached in order to make a euphonious name. In the "*Solio*" *case*, *Eastman, &c.* v. *Comptroller-General*, [1898] A. C. 571, it was decided, contrary to what had previously been held, that a word might be a good invented word, although it might have some reference to the quality or character of the goods, and that the word "solio" was an invented word. But the present Lord Chancellor said: "My lords, I desire to give my opinion with reference to the particular word and not to go behind it. I can quite understand suggesting other words—compound words or foreign words—as to which it would be impossible to say that they were invented words, although perhaps never seen before, or that they did not indicate the character or quality of the goods, although as words of the English tongue they had never been seen before. Suppose a person were to attempt to register as a single English word 'cheapandgood,' or even without taking so

gross an example, using a word so slightly differing from an ordinary and recognized word as to be neither an invented word nor avoiding the prohibited choice of a word indicating character or quality. The line must be sometimes difficult to draw; but to my mind the substance of the enactment is intelligible enough, and the comptroller has to make up his mind whether in substance there had been an infringement of the rule. Of course also words which are merely misspelt, but which are nevertheless in sound ordinary English words, and the use of which may tend to deceive, ought to not be permitted." And Lord Herschell, a very high authority on the subject, said: "It may no doubt sometimes be difficult to determine whether a word is 'invented' or not. I do not think the combination of two English words is an invented word, even although the combination may not have been in use before, nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word if to the eye or ear the same idea would be conveyed as by the word in its ordinary form." And Lord Shand in the same case said: "At the same time I agree with your lordships, and especially with what has been said by my noble and learned friend Lord Macnaghten, in thinking, especially after the decision to be given in this case, that the comptroller will be fully warranted in taking care that there shall not be admitted under the guise or cover of words called invented by the applicant, words really in ordinary use which might in a disguised form have reference to the character or quality of the goods. There must be invention, and not the appearance of invention only; it is not possible to define the extent of invention required; but the words should, I think, be clearly and substantially different from any word in ordinary and common use; a word with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words would not be an invented word; and a word would not be 'invented' which, with some trifling addition or very trifling variation, still leaves the word one which is well known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word."

I know of no authority which requires me to hold that such a word as "Absorbine" was an invented word. None of the syllables or parts of which the word was composed was invented, and I see no invention in the combining of them so as to form the whole. The case of *Linotype Co.'s Trade-Mark*, [1900] 2 Ch. 238, and also that of *Savonol* (*Pell's Trade-Mark*), 17 Pat. Rep. 266, were materially different from the present. In the circumstances I am bound to hold that "Absorbine" was not an invented word, and consequently it must be expunged from the Register of Trade-Marks and the action must be dismissed.

Solicitors, *Lionel E. Townroe; Belfrage & Co.*, for *T. W. Robinson*, Birmingham.

Chan. Div.
Swinfen Eady, J. } April 13, 14.

GEORGE *v.* THOMAS. (*a.*)

Vendor and purchaser—Specific performance—Vendor's title—Adverse claim—Practice.

When a bonâ fide *claim has been made by a third party affecting the vendor's title, although no action to enforce such claim is actually pending, the court will not make a decree for specific performance of a contract for sale against the purchaser, but will order the vendor's action for specific performance to stand over for a reasonable interval, to see whether the third party will meantime institute proceedings to enforce his claim.*

On a sale of house property the vendor represented that rates were payable by the tenant. At the date of the sale the vendor knew that the tenant claimed that rates ought to be paid by the landlord. Before completion of the purchase the tenant brought an action against the vendor to enforce his said claim, but this action was dismissed on a technical ground. The tenant, however, expressed an intention of taking further proceedings in the matter against the vendor. The purchaser refused to complete on the ground that the vendor did not show a good title. In an action for specific performance brought by the vendor,

The Court refused to make an immediate decree for specific performance, and ordered the case to stand over for a definite period in order to see whether the tenant would in the meantime institute new proceedings to enforce his claim.

Action.

The plaintiff was the owner of the leasehold property known as Nos. 118 and 119, Cheapside, in the City of London, under an indenture of lease dated the 29th of September, 1883, at a ground-rent of £250 per annum.

The property was sub-let, as to the ground floor of No. 119 to Walter Whiffen, at a yearly rent of £300, and as to the remainder thereof to another tenant.

By the terms of his lease Whiffen was liable to pay rates and taxes amounting to about £125 per annum in respect of the ground floor of No. 119.

Rates and taxes had, in fact, been paid in respect of the entire property by the plaintiff, or his predecessors in title, during a period of twenty-five years up to the end of February, 1903. At that time the plaintiff first became aware of Whiffen's liability under his lease to pay rates and taxes.

On the 21st of July, 1903, the plaintiff put the property up for sale by auction described as a "profit rental." The particulars of sale after deducting outgoings, including therein payment of rates and taxes in respect of the property other than that portion let to Whiffen, showed a clear annual profit of £550.

The defendant bought the property at the price of £5,500 and paid to the plaintiff a deposit of £550. The completion of the purchase was fixed for the 29th of September, 1903.

Whiffen had, to the knowledge of the plaintiff, repudiated his liability to pay rates and taxes since February, 1903.

On the 29th of September, 1903, the day fixed for the completion of the purchase, Whiffen commenced an action against the plaintiff for the rectification of his lease on the ground that the provision therein contained relative to the payment of rates and taxes by the tenant had been inserted by mistake.

This action came on for hearing before Buckley, J., and was dismissed on the ground that Whiffen, by purporting to sub-let to a third party for all the residue of his term, had in fact assigned, and no longer had any interest.

It appeared from the evidence that Whiffen, by his solicitor, had expressed the intention of taking further proceedings with a like object against the plaintiff.

The defendant refused to complete on the ground that the value of the profit rental was not as described in the particulars of sale, and alleged that the plaintiff did not show a good title.

The plaintiff, the vendor, thereupon instituted the

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

present action for specific performance of the contract against the purchaser.

Eve, K.C., and *Methold*, for the plaintiff.—The defendant has no ground for rescission or compensation. Whiffen has failed in the action he brought against the plaintiff, and is not now in a position to make any claim against the plaintiff.

Vernon-Smith, K.C., and *Duke*, for the defendant.—The plaintiff knew that Whiffen denied his liability to pay rates before the sale to the defendant. Whiffen's action was not decided on its merits. The court should not make an order for specific performance, but should, at least, take time to determine if Whiffen intends to prosecute his claim: *Bentley* v. *Craven*, 1 W. R. 401, 17 B. 204, and *Pegler* v. *White*, 12 W. R. 455, 33 Beav. 403.

SWINFEN EADY, J., in giving judgment, said: The plaintiff brings this action relying on his title. He says that Whiffen's claim against him is illusory, and urges the court to disregard it.

I ought not, as against the defendant, to assume that that is so. The claim is an honest one; and for a long time the landlord has paid the rates. I ought not to-day to enforce specific performance against the defendant, because sufficient time has not elapsed to enable the court to determine if Whiffen intends to take further proceedings. This might be done either by Whiffen's sub-lessee reassigning to him or by joining with him in bringing an action.

On the other hand, I ought not to dismiss the plaintiff's action. If, after a reasonable interval, Whiffen fails to take further action, I may be forced to regard his claim as illusory. The action will stand over in order that I may have an opportunity of judging if Whiffen's claim is a substantial one.

Further hearing adjourned until the 24th of June.

Solicitors, *Coldham & Birkett; Phillips, Cumming, & Mason.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — March 8.

TAYLOR v. HAMSTEAD COLLIERY CO. (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Scheme of compensation—Right to take proceedings independently of Act—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 2 (b); *s.* 3, *sub-section* 1.

A workman contracted with his employers to accept a scheme of compensation in substitution for the benefits which he might claim under the Workmen's Compensation Act, 1897. *The scheme, which was duly certified by the Registrar of Friendly Societies under section* 3, *sub-section* 1, *of the Act, made provision for payments in cases of fatal and non-fatal accidents, and provided that the contributions made by the employers to the fund were to be in lieu of and to exempt them from any further claims which otherwise the workmen might be entitled to prosecute as the result of accidents occurring during their employment. The workman having been killed by an accident arising out of and in the course of his employment, his widow received certain weekly payments under the scheme, and then brought an action against the employers under the Employers' Liability Act*, 1880, *to recover damages for the death of her husband.*

Held, that she was precluded from suing by section 1, *sub-section* 2 (b), *and section* 3, *sub-section* 1, *of the Workmen's Compensation Act*, 1897.

Appeal from the judgment of the Divisional Court (Wills and Kennedy, JJ.), reversing the judgment of Judge Whitehorne, K.C., at the Birmingham County Court.

The action was brought in the Birmingham County Court by the widow of a deceased workman to recover damages from the defendants under the Employers' Liability Act, 1880. The defendants at the trial took the preliminary objection that, the plaintiff having received compensation under a duly certified scheme, she was precluded by section 1, sub-section 2, of the Workmen's Compensation Act, 1897, from bringing an action for damages under the Employers' Liability Act. After taking evidence on the question of fact raised by the preliminary objection, the county court judge found as facts: (1) That there was a duly certified scheme within section 3, sub-section 1, of the Workmen's Compensation Act; (2) that the deceased workman in each case had accepted the scheme willingly and under no compulsion whatever, and with full knowledge of its terms, in substitution for and in place of benefits which he might claim under the Workmen's Compensation Act; (3) that this was a legal and effectual contract with the deceased workman and the defendants; (4) that the plaintiff had received, was receiving, and would in future receive the full benefits under the scheme thus contracted for.

On these findings the judge held that compensation under the scheme was by section 3, sub-section 1, of the Workmen's Compensation Act, 1897, the same as compensation under the Act, and that therefore the employers were, under section 1, sub-section 2 (*b*), not liable both to pay that compensation and also to proceedings under the Employers' Liability Act. The Divisional Court held that taking the benefit of a scheme under the Workmen's Compensation Act, 1897, was not the same as taking proceedings to recover compensation under the Act, and that the plaintiff was not debarred by section 1, sub-section 2 (*b*), from claiming damages under the Employers' Liability Act, 1880; but that the payments received under the scheme would probably have to go in reduction of the damages awarded. The defendants by leave appealed.

By section 1, sub-section 2 (*b*), of the Workmen's Compensation Act, 1897, "When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." By section 3, sub-section 1, "If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act." The scheme, which was entitled "Rules of the South Staffordshire and East Worcestershire Mining District Compensation Fund," was applicable to a number of collieries in the district, including the defendants' colliery, and rule 3, which was headed "Objects and purposes," was as follows: "The objects of this society are the raising of funds by certain specified contributions from the employers and workmen of the collieries and ironstone mines of the South Staffordshire and East Worcestershire mining district (see rule 33) to make provision in cases of fatal and non-fatal accidents, as follows:—(*a*) A sum at the death of any member; (*b*) a weekly allowance to the widows and children of married members whose death was the result of an accident; (*c*) a weekly allowance to the dependants of members over sixteen years of age whose death is the result of an accident, such dependants being members of a workman's family as specified in the Fatal Accidents Act, 1846; (*d*) a weekly allowance to members who suffer non-fatal accidents. The society is formed under the powers given by section 3 of the Workmen's Compensation Act, 1897, and the contributions made by the employers to this society are to be in lieu of and to exempt them from any further claims which otherwise the members of this society may be entitled to prosecute as the result of accidents occurring during their employment."

W. Shakespeare (*A. Powell, K.C.*, with him), for the defendants.—A workman can only make a claim either under the Workmen's Compensation Act, 1897, or independently of it. The scheme, by section 3, sub-section 1, of the Act, is a scheme of compensation, benefit, or insurance for the workman, if and when he would otherwise become entitled to compensation under the Act, and by the agreement with the workman the provisions of the scheme have been substituted for the provisions of the Act. The scheme derives its force from the Act, or has a close connection with it, and therefore compensation under the scheme is compensation under the Act within section 1, sub-section 2 (*b*), of the Act. That being so, the employers cannot also be liable independently of the Act. They are only liable, by section 3, sub-section 1, in accordance with the scheme. The decision in *Edwards* v. *Godfrey*, 47 W. R. 551, [1899] 2 Q. B. 333, shows that a workman cannot, except by adopting the procedure specified in section 1, sub-section 4, claim to recover compensation under the Act and independently of it. [MATHEW, L.J., referred to *Beckley* v. *Scott & Co.*, [1902] 2 I. R. 504.] Secondly, apart from the Workmen's Compensation Act, 1897, no one can be called upon to pay twice for the same wrong. A workman cannot, after having made a contract with his employers for a scheme of compensation for injuries by accident, and having received compensation under the scheme, bring an action under the Employers' Liability Act, 1880, or at common law. Rule 3 of the scheme is a contract not to sue the employers. There is no statutory prohibition against contracting out of the Employers' Liability Act, 1880: *Griffiths* v. *Earl of Dudley*, 30 W. R. 797, 9 Q. B. D. 357. The defendants are therefore not liable.

James Wilson, for the plaintiff.—The scheme provides for compensation which under the Act of 1897 is to be in lieu of compensation under the Act. The provisions of the scheme are for that purpose only "substituted for the provisions of this Act," within section 3, sub-section 1. The scheme leaves untouched the workman's remedies independently of the Act. No doubt the workman or his dependants cannot claim compensation both under the scheme and under the Act of 1897. At the same time taking compensation under the scheme is not made by the Act a bar to bringing an action at common law or under the Employers' Liability Act, 1880. If the Act had intended to deprive the workman of his other remedies it would have said so in clear terms. Rule 3 of the scheme has not the effect of contracting out of the Employers' Liability Act, 1880.

Shakespeare replied.

COLLINS, M.R.—This is an appeal from the judgment of the Divisional Court overruling the decision of Judge Whitehorne at the Birmingham County Court. The case is of importance, because it involves a point which, we have been told, is common to many other large collieries in the district.

A workman in the defendants' employment met with his death by an accident arising out of and in the course of his employment. His widow brought an action in the county court under the Employers' Liability Act, 1880. At the hearing it was proved that there was a duly certified scheme within section 3, sub-section 1, of the Workmen's Compensation Act, 1897, in operation at the defendants' colliery, which prescribed certain compensation in all cases of accident arising out of the employment, including accidents causing death. The point was taken that the existence of the scheme was an answer to the action. The county court judge arrived at certain findings of fact, and he held that as the workman had agreed to the scheme, and as the widow had received compensation under the scheme, she was not entitled to bring an action under the Employers' Liability Act, 1880. The section upon which the decision of the Divisional Court turned was section 1, sub-section 2 (*b*), of the Workmen's Compensation Act, 1897. That enactment is an expression by the Legislature that the remedies open to the workman—namely, his remedy at common law, his remedy under the Employers' Liability Act 1880, and his remedy under the Workmen's Compensation Act, 1897—are not concurrent, but separate, remedies, as to which the workman must exercise his option, and the exercise of the option is conclusive. Effect was given to that view of the section in *Edwards* v. *Godfrey*, the headnote of which is as follows: "Where a workman, who has been injured by an accident arising out of and in the course of his employment, brings an unsuccessful action to recover damages against his employer, and is desirous of having compensation for his injury assessed under the Workmen's Compensation Act, 1897, he must follow the procedure prescribed by section 1, sub-section 4, of that Act, and must apply then and there to the judge trying the action for an assessment of compensation; he cannot at a subsequent date initiate independent proceedings against his employers by a request for arbitration under that Act." A. L. Smith, L.J., who delivered the leading judgment, said: "Our decision must depend upon the true construction of sub-sections 1, 2 (*b*), and 4 of section 1, and some light is thrown upon them by clause 14 of Schedule I. As I read section 1, sub-section 2 (*b*), it gives to the workman, in cases where he would previously have had a right of action, an option, which he may exercise as he likes, of bringing an action at common law, or of resorting to the procedure for the assessment of compensation given by the Act itself; this seems to me to be the clear meaning of the sub-section. The respondent has availed himself of the right given him by that sub-section; he has exercised his option in favour of

bringing a common law action, which has failed. Having been defeated in this action, there would, but for the provisions of section 1, sub-section 4, have been an end of any claim by the respondent against the appellant in respect of the injury. That sub-section, however, is in favour of the workman, and gives him a very great advantage where he has exercised his option and finds too late that he has exercised it in the wrong way; it gives him a *locus penitentiæ*, and enables the county court judge before whom the action is tried, if applied to by the plaintiff at the time, to assess compensation under the Act. That is a clear benefit to the workman, and while giving it to him the sub-section also confers a benefit upon the employer by giving the county court judge power to deduct from the compensation which he awards all the costs caused by bringing the action instead of taking proceedings under the Act; that is a fair enactment, giving something to master and man alike." That is a decision that the two proceedings are not consistent; that in one sense they are inconsistent; and that there must be an election which proceeding to adopt, the workman not being at liberty to pursue the two remedies. I now come to the provisions as to contracting out contained in section 3, sub-section 1, of the Act of 1897. That section allows a scheme of compensation to be agreed upon between the employer and his workmen, and it provides that the scheme must fulfil certain conditions before it can be certified by the Registrar of Friendly Societies. The scheme here has been certified by the registrar, and the county court judge has found that the contract with the workman adopting the scheme is a valid and binding contract. The result is that in the case of a workman who agrees to the scheme, as the workman in the present case did, the provisions of the scheme are substituted for the provisions of the Act. If the workman had taken his remedy under the Act he could not then have taken proceedings under the Employers' Liability Act, 1880. But it is said that the plaintiff here did not take proceedings under the Act, but under the scheme. The answer to that is that the scheme, when a valid one, is substituted for the Act. Is there any difference in the position of a workman because he has taken that which is substituted for the rights given by the Act instead of those rights themselves? In my opinion he is in precisely the same position in both cases. The Divisional Court decided the case upon a different ground. They decided the case upon section 1, sub-section 2 (*b*), of the Act, which was mainly relied upon before them, the last clause of which provides that "the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." The Divisional Court said that the action under the Employers' Liability Act, 1880, was a proceeding independent of the Act of 1897, and that that proceeding would be barred by previous proceedings to assess compensation under the Workmen's Compensation Act, 1897; but that under that section proceedings under a scheme were not proceedings under the Act. Up to that point I do not know that I am prepared to differ from the Divisional Court. But there is the additional point that, though compensation under the scheme is not compensation under the Act, acceptance of compensation under the scheme does undoubtedly bar any proceedings being taken under the Act, because the scheme by section 3, sub-section 1, is substituted for the provisions of the Act, and a workman who has taken the benefits under the scheme is in the same position as if he had taken compensation under the Act. By the workman's assent to the scheme, and by the receipt of compensation under it, he is put in the same position as if he had sought for and received compensation under the Act. The widow of the workman is in no better condition than the workman. In my opinion the judgment of the learned county court judge was right, and must be restored, and the decision of the Divisional Court must be reversed.

ROMER, L.J.—I am of the same opinion. Where under section 3, sub-section 1, of the Workmen's Compensation Act, 1897, one finds a scheme certified by the Registrar of Friendly Societies, and one also finds a contract made between the workman and the employer such as is referred to in that sub-section, then in my opinion the workman and those claiming through him, who come under the provisions of the scheme, and are bound by the contract to accept the provisions of the scheme as substituted for the provisions of the Act, are in the same position as if he or those claiming through him had availed himself or themselves of the provisions of the Act by claiming compensation under it, in which case neither he nor they can subsequently take advantage of any other remedies either at common law or under other Acts. I think that this appears from those parts of the Act which have been referred to by the Master of the Rolls, and particularly from the words of section 3, sub-section 1, "the provisions of the scheme shall be substituted for the provisions of the Act, and thereupon the employer shall be liable only in accordance with the scheme." In the present case there is a scheme certified by the Registrar of Friendly Societies, and there is a contract between the employers and the workman which contains this provision in rule 3: "The society is formed under the powers given by section 3 of the Workmen's Compensation Act, 1897, and the contributions made by the employers to this society are to be in lieu of and to exempt them from any further claims which otherwise the members of this society may be entitled to prosecute as the result of accidents occuring during their employment." The employers contributed to the funds of the society and the workman was a member of the society, and so the clause applies. The county court judge has found—and his finding is binding upon us and final—that the workman accepted the scheme willingly and under no compulsion whatever, and with full knowledge of its terms, in substitution for and in place of the benefits which he might claim under the Act, and that this was a legal and effectual contract. That being so, I think, upon the true construction of this contract, that the words at the end of rule 3, which exempts the employers from any further claims which otherwise the members of the society may be entitled to prosecute as the result of accidents, cannot properly be cut down, and they in effect carry out the provisions of section 3, sub-section 1, of the Act, and are valid and binding. The wording of rule 3 is clear. It follows that, if those words have to receive their ordinary meaning and cannot be cut down, those who come under the scheme are debarred from bringing an action at common law or under the Employers' Liability Act, 1880, the contract exempting the employers from any further claim. The scheme, therefore, is an absolute bar to an action. As the Master of the Rolls has pointed out, this point was not really brought to the attention of the Divisional Court, and consequently was not dealt with by that court in their judgment. The appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. Section

3, sub-section 1, of the Workmen's Compensation Act, 1897, specifies the terms and conditions under which a workman can agree to contract himself out of the Act. In the present case the workman elected to take compensation under the scheme, and the exercise of that option is final under section 1, sub-section 2 (*b*) of the Act. If a workman, who has not agreed to a scheme, elects to bring an action under the Employers' Liability Act, 1880, and he fails in that action, section 1, sub-section 4, of the Act of 1897, entitles him to ask the court which tries the action, to assess compensation under the Act of 1897. In *Edwards* v. *Godfrey* it was decided that, if the plaintiff does not follow the procedure prescribed by that sub-section, he cannot subsequently take proceedings to recover compensation under the Act of 1897. It seems to me to be impossible to give effect to the decision in *Edwards* v. *Godfrey* without holding that the option is limited as I have said. The workman here was bound by the scheme. I should like to say, with reference to the case of *Beckley* v. *Scott & Co.*, in the Court of Appeal in Ireland, that I am much struck by the cogent reasoning of Holmes, L.J., in that case.

Appeal allowed.

Solicitors for the plaintiff, *A. H. Arnould*, for *E. J. Stanbury-Eardley*, Birmingham.

Solicitors for the defendants, *Timbrell & Deighton*, for *W. Shakespeare & Co.*, Birmingham.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Feb. 24.

KAUFMAN *v.* GERSON. (*a*)

Conflict of laws—Contract made and to be performed abroad—Contract obtained by moral coercion—Agreement to stifle prosecution—Validity according to law of foreign country—Enforcement in England.

The defendant's husband having misappropriated money which had been entrusted to him by the plaintiff in France for a specific purpose, the parties being all domiciled in France, the plaintiff induced the defendant, by threats to prosecute her husband and thus to dishonour her name and that of her children, to sign an agreement to pay the money by instalments out of her own property. The agreement was made in France, and was intended to be performed there, and, according to the evidence, was valid according to the law of France. The defendant paid some of the instalments due under the agreement, and having come to reside in England an action was brought against her in England to recover further instalments under the agreement.

Held, that, as the agreement was obtained from the defendant by moral coercion, it was not enforceable in England, even though it might be valid according to the law of France.

Judgment of Wright, J. (51 *W. R.* 683, [1903] 2 *K. B.* 114), *reversed.*

Appeal from the judgment of Wright, J., at the trial of the action without a jury (reported in 51 W. R. 683, [1903] 2 K. B. 114).

The action was brought to recover a sum of £152, the balance of £654, from Augusta Gerson under a written guarantee whereby she guaranteed the payment of the £654 due from her husband, Emile Gerson, to the plaintiff.

The facts were, shortly, as follows, as found by the learned judge: The plaintiff, Kaufman, in France placed in the hands of Gerson, as a friend whom he wished to assist, a sum of money to be used in buying skins to be dressed and sold for their joint benefit. Gerson appropriated part of the money to his own use instead of applying it in buying skins. His conduct was criminal in France, and a prosecution was threatened. In order to avoid a prosecution and protect the good name of Gerson's children, the defendant under the influence of Kaufman's threat to prosecute her husband and, as the Court of Appeal found, to dishonour her name and her children's names, and at his instance, agreed in writing to make good by instalments out of her own property the amount of the defalcation on the express terms that there should be no prosecution on the part of Kaufman. This agreement was made in France, and it was intended by the parties to be governed by the French law and to be wholly performed in France. The defendant was English by birth, her husband a German by birth; both were at the time of the agreement domiciled in France. According to the uncontradicted evidence of the only witness called as an expert in French law, and to some authorities which he cited, the agreement was not invalidated in France either on the ground of the compromise of a criminal charge or on the ground of oppression or undue influence, or on the ground of want or illegality of consideration. The defendant paid some instalments, and being now resident in England and having property here, this action was brought against her to recover instalments due and payable under the agreement. It was contended on her behalf that the consideration for the agreement was, according to English law, illegal and contrary to public policy, and that the agreement was obtained by means of undue influence and threats, and therefore ought not to be enforced in the English courts.

Wright, J., held that the contract being valid according to the law of the country where it was made and intended to be performed, though invalid in England, was enforceable here the undue influence or duress under which the contract was obtained not being such as would avoid the contract under any but unreasonable and uncivilized institutions of law. He accordingly gave judgment for the plaintiff.

The defendant appealed.

Montague Shearman, K.C., and *Eustace Hills*, for the defendant.

Montague Lush, K.C., and *Israel Davis*, for the plaintiff.

COLLINS, M.R.—This in appeal from the judgment of Wright, J., and it raises an important question. The appellant, who is the wife of a man named Gerson, was induced by threats of a criminal prosecution in France against her husband to give an undertaking to the plaintiff to pay him a sum of money. The money was to be paid over a series of years, and a balance remains unpaid. The plaintiff and the defendant both being now in England, the plaintiff sues the defendant for the balance. Two points are raised. First, that the agreement is bad on the ground that it is an agreement to stifle a criminal prosecution. Secondly, that the agreement is bad on the ground that it was obtained by duress or undue pressure. The learned judge, after having heard the evidence of a French *avocat*, came to the conclusion, on the first point, that there is nothing wrong according to French law in an agreement for value to stifle a prosecution; and he held that, as the contract was made in France by persons who were domiciled there and was intended to be performed there, the defence that the contract was bad on the ground that it was an agreement to stifle a prosecution was not one upon

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

which an English court would stay its hand. The second point is that the circumstances here were such that the contract was obtained by coercion, and is therefore one which the English courts would not enforce. That involves a question of fact—namely, whether the defendant has established that the contract was obtained by coercion. The learned judge seems to me to have so found. He said: "Gerson appropriated part of the money to his own use instead of applying it in buying skins. His conduct was criminal in France, and a prosecution was threatened. In order to avoid a prosecution and to protect the good name of Gerson's children, his wife, the present defendant, under the influence of Kaufman's threat and at his instance, agreed in writing to make good by instalments out of her own property the amount of the defalcation, on the express terms that there should be no prosecution on the part of Kaufman." Upon looking at the wife's evidence it seems clear that she signed the guarantee under threat of her husband's prosecution, and of the dishonour of her name and her children's names. Two answers are given to that. It is said in the first place that the lady and her husband were married in France without a settlement, but with community of goods under the French code, and that the wife was civilly liable with her husband for his debts. Even, however, if that were so, it is clear that in this case the plaintiff was not content with any such remedy as that, but wanted something more, and he got it by the strongest possible moral pressure under a threat to dishonour her name and her children's names. Yielding to that threat, the wife was constrained by it to sign the guarantee, and she paid sums of money under it from time to time under continual threats to prosecute her husband. It was not until she was driven by these civil proceedings in England that she set up the defence and refused to make any further payments.

The real question is whether the agreement thus obtained can be enforced in this country. I will not deal with the first point stated above—namely, that a contract to interfere with the course of justice cannot be enforced in this country. The law of France is said to differ from the law of England upon that point, and I do not say that such a contract, valid in that country, might not be enforced here. I am not prepared to give any final opinion upon that point. I am, however, not prepared to say that such a contract might not be enforced in this country. I propose to decide this case upon the second point. It is said that by the law of France an agreement brought about by moral pressure or coercion can be enforced in that country. The learned judge seems to take that view. He seems to have thought that it was coercion according to the law of England, but that it was not coercion according to the law of France, and that, therefore, the agreement was enforceable here. The learned judge said: "The second ground on which the contract in the present case is impeached is that it was obtained by the undue influence or duress of a threat to prosecute the husband for crime. If this objection is to be regarded as based on considerations of public policy, the same answer applies as in the case of the first objection. It seems, however, to be more in the nature of an objection to the proof of consent of the defendant to the contract, a consent induced by duress or undue influence being by English law treated as no consent. If this be the correct view, it would seem that the law of the country in which the contract is made and is to be performed and in which the parties are domiciled ought to prevail, unless there is such duress as must be considered to avoid the contract under any but unreasonable and uncivilized institutions of law—a description which would be applicable to such a case as that of consent obtained—*e.g.*, by physical torture or by the use of drugs, but which cannot properly be applied to this case." The whole point is contained in the last few lines. The learned judge admitted that if the contract had been obtained by physical violence, as, for example, by the use of a pistol, it would not have been enforceable here, whatever view courts in other countries might take. If that be so, what does it matter what form the coercion takes? Some persons are more easily coerced by moral than by physical threats. Why is it not coercion if the threat is to dishonour the wife and her children by prosecuting her husband? It is said that the case must come within some principle universally recognized in all civilized countries under which the courts of those countries will refuse to enforce such a contract, and that, unless that be so, the English courts are not entitled to refuse to enforce the contract which is valid and enforceable in the country where it was made. The authorities, however, are opposed to that view. Mr. Lush cited two passages from Story on Conflict of Laws. Story says, in section 258, that contracts which are founded in moral turpitude and which are inconsistent with good order and the solid interests of society, even though they might be held valid in the country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or even of natural justice, are allowed to have their due force and influence in the administration of international jurisprudence. The principle of the English courts is that persons asking for their assistance must come with clean hands. If a suitor is obliged to aver something which is contrary to public morality and which would debar him from obtaining relief if the contract was made here, then he is debarred from suing here, though he might not be debarred from suing in the foreign country where the contract was made; and the fact that that other country allows him to sue cannot control the action of the English courts. In Westlake on Private International Law (3rd ed.), s. 215, it is said: "Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here, notwithstanding that it may have been valid by its proper law. The plaintiff in such a case encounters that reservation in favour of any stringent domestic policy, with which alone any maxims for giving effect to foreign laws can be received. . . . The difficulty in every particular instance cannot be with regard to the principle, but merely whether the public or moral interests concerned are essential enough to call it into operation; and where a breach of English law is not contemplated this is necessarily a question on which there is room for much difference of opinion among judges." The question is whether the contract obtained by such moral pressure is one which the courts here will enforce. Whether a foreign court would enforce it or not, the principle applicable is one which ought to exist universally, and an English court will not violate its own principle by giving effect to a contract brought about by moral coercion. Our decision is not contrary to any authority, and is consistent with the weighty *dicta* of Turner, L.J., in *Hope* v. *Hope*, 8 De G. M. & G. 731, with which Knight-Bruce, L.J., agreed. In *Rousillon* v. *Rousillon*, 28 W. R. 623, 14 Ch. D. 351, Fry, J., said very much the same. Upon this broad general principle the defendant is entitled to the protection afforded by the English courts in refusing to give effect to a contract which ought never to have been made. The appeal must therefore be allowed.

ROMER, L.J.—I am of the same opinion. The

principle of law is succinctly and accurately stated by Mr. Westlake in the passage from his book which has been read by the Master of the Rolls. The only difficulty lies in the application of the principle there stated. Shortly, the facts amount to this—that the plaintiff extorted a contract from a wife by threats of criminal proceedings against her husband if she did not comply. Those proceedings were such that if taken they would probably have resulted in the ruin of the husband and the social disgrace of the wife and children. By these means the plaintiff obtained the contract he is now seeking to enforce. That being so, in my opinion the principle stated in Mr. Westlake's book applies. To enforce a contract made under such circumstances would be for the court to do something which would conflict with the essential moral interests concerned. The court ought not to, and cannot, be asked by the plaintiff to assist him in enforcing a contract so arrived at. A suggestion was made that the defendant had affirmed the contract after the improper pressure and its effects had been removed. As to that I will only say that it was neither pleaded nor proved.

MATHEW, L.J.—I am of the same opinion. The policy of the English courts in cases like the present is that a person who has obtained an agreement by means which are unfair or unjust cannot be permitted to arm himself with rights under it. What were the means used by the plaintiff to obtain this contract? On the evidence it appears that there was a form of moral torture—nothing less—applied to secure it. It would be a violation of essential moral principles if the court were to allow their powers to be used to enforce a contract of that kind. I agree that there is no evidence of any ratification of the contract by the defendant.

Appeal allowed.

Solicitors for the plaintiff, *Leggatt, Rubinstein, & Co.*

Solicitors for the defendant, *Dixon, Weld, & Dixons.*

In Lunacy.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) Jan. 25, 26.

In re GIST (A PERSON OF UNSOUND MIND). (*a.*)

Lunatic—Real estate—Permanent improvements—Application that sums so expended may be a charge on such real estate for the benefit of persons entitled to personally—Nature of improvements—Administration in lunacy—Jurisdiction—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 118.

Under section 118 *of the Lunacy Act,* 1890, *the court has discretion to consider not only the benefit of the lunatic personally, but also the question of what is fair as between his real and personal property; and the court has jurisdiction under that section to order that money already expended under a previous order in permanent improvements should be charged upon the real estate improved. Repairs incidental to the ordinary course of management would not come within the category of permanent improvements, and therefore ought not to be made a charge upon the real estate.*

Attorney-General *v.* Marquis of Ailesbury, 36 *W. R.* 737, 12 *A. C.* 672, *discussed.*

This was an appeal from an order of a master in lunacy.

The appellant was the heir-at-law of the lunatic, who was unmarried and was seised as tenant in tail in possession of considerable real estate in the Midlands; and the appeal was against an order of the master, dated the 8th of December, 1903, which in substance directed that the amount expended upon what were said to be permanent improvements of the lunatic's real estate, which was being administered in lunacy, and a moiety of the costs and expenses incurred in the matter might be declared a charge upon such realty for the benefit of the persons entitled under the statutes of distribution to his personal estate, and that a mortgage of the real estate to secure the amount of the charge to the lunatic's personal estate should be made to trustees.

As long ago as 1877 an order had been made by Baggallay, L.J., directing that the sums of money necessary for the expenses and permanent improvement of the estates should be a charge on those estates, and could be raised by mortgage (*In re Gist*, 5 Ch. D. 881, 25 W. R. Dig. 151), and similar orders were made in 1886 and 1888. By an order, dated the 14th of March, 1894, it was, amongst other things, ordered that J. H. Belfrage, the then committee of the estate of the lunatic, should be at liberty to make certain improvements therein mentioned, such as to cut and sell timber of the estimated value of from £700 to £800 upon the estate, and also to execute certain permanent improvements such as repairs to the farmhouses and buildings specified in his affidavit, "and to expend thereon so much as shall be necessary of the proceeds of the said sale of timber."

By another order dated the 12th of May, 1898, the committee was again authorized to expend a sum of money in substantially repairing and rebuilding some cattle sheds on part of the lunatic's estate, and to cut some more timber, the repairs to be paid for out of the proceeds of the sale of timber.

Also by another order of the 1st of August, 1900, it was amongst other things ordered that E. G. Righton, who had been appointed committee of the estate in the place of J. H. Belfrage, deceased, as such committee as aforesaid should be at liberty to expend a sum not exceeding £400 upon certain repairs and improvements referred to in an affidavit, and which included the felling of timber, sundry repairs, and laying pipes for the water supply and sinking wells.

On the 9th of July, 1901, directions were given to Righton authorizing the expenditure of a further sum for certain improvements and repairs upon the estate, such as new roofs to barns. The costs of the improvements under the various orders after being taxed were directed to be paid out of any moneys in the hands of the committee of the estate available for the purpose. These sums were expended in addition to the ordinary repairs and maintenance of the estate, and the expenses amounted to about £3,010 18s. 10d., and were, as a matter of fact, paid out of the personal estate of the lunatic for permanent additions and improvements of the freehold estates, of which the lunatic was, as stated above, tenant in tail in possession, and also a moiety of the costs. All the above-mentioned orders were made in the presence of the next-of-kin and the heir-at-law. The entailed estates were equal to about three-fourths of the whole of the lunatic's property.

On an application being made to the master that these sums should be a charge on the real estate for the benefit of the next-of-kin, it was strongly contended on behalf of the heir-at-law that the matter was *res judicata;* the master on the previous occasions having in the exercise of his judicial discretion decided definitely the parts of the estate out of which the improvements and costs to which the application referred were to be paid, and that he was now precluded from rehearing the matter on what was prac-

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

tically an appeal from his previous orders which were final.

The master, purporting to act under section 118 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), pointed out that the principle laid down by Baggallay, L.J., in the order of June, 1877 (referred to above), which related to contemplated expenditure only, was extended in an order of Lindley, L.J., in June, 1886, to amounts that had already been expended, and he accordingly decided to follow those orders and declare that the entailed estates should be charged as desired, the amount to be certified by the master if the parties could not agree, and an order was therefore in substance made accordingly. The majority of the above-mentioned orders had been made before the same master as in the present case.

Section 118, sub-section 1, of the Lunacy Act, 1890, provides as follows: "The judge may order that the whole or any part of any moneys expended or to be expended under his order for the permanent improvement, security, or advantage of the property of the lunatic, or any part thereof, shall, with interest, be a charge upon the improved property or any other property of the lunatic, but so that no right of sale or foreclosure during the lifetime of the lunatic be conferred by the charge."

From this order of the master the heir-at-law appealed.

Younger, K.C., and *Wace*, for the appellant.—They stated the facts and read the various orders and affidavits. Reference was made to section 27 of the Lunacy Act, 1891 (54 & 55 Vict. c. 65), with respect to the jurisdiction of the masters in lunacy. [They were stopped.]

H. Terrell, K.C., and *H. B. Howard*, for the next-of-kin.—The court can alter its record: *In re Swire, Mellor* v. *Swire*, 33 W. R. 785, 30 Ch. D. 239. The master did in fact vary his order; what better evidence is there when the judge says himself, "I did not intend that order to be as it is." [VAUGHAN WILLIAMS, L.J., referred to ord. 28, r. 11, "It means the accidental omission of the ministerial officer." His lordship further referred to the judgment in *In re St. Nazaire Co. (Limited)*, 27 W. R. 854, 12 Ch. D. 88.] [STIRLING, L.J., referred to *Attorney-General* v. *The Marquis of Ailesbury*, 36 W. R. 737, 12 App. Cas. 672.] No one here will be injured by making this amendment: *Hatton* v. *Harris*, [1892] A. C. 547, 41 W. R. Dig. 162. If the appellant says this is irrevocable, the respondents say it is merely a question of administration of the lunatic's estate, and on a question of administration the court has ample jurisdiction, when nobody will be injured. [VAUGHAN WILLIAMS, L.J.—Has the master in exercising his jurisdiction in lunacy a right of rehearing? I myself do not know. Under the old Court of Chancery before the Judicature Act he had such a right, but I do not myself know whether that Act took it away from the Commissioners in Lunacy or not.]

They also cited the following cases: *In re Vavasour*, 29 Ch. D. 306, 33 W. R. Dig. 130; *Attorney-General* v. *The Marquis of Ailesbury*, 36 W. R. 737, 12 App. Cas. 672; *Lawrie* v. *Lees*, 30 W. R. 185, 7 App. Cas. 19, at p. 35; [by VAUGHAN WILLIAMS, L.J., *In re Badcock*, 4 My. & Cr. 440]; also section 118 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5).

Younger, K.C., in reply.—If there is anything in section 118, it is that it is a discretionary section; there is no question whatever that the court has authority to make the order. *Primâ facie* the respondents assume that the permanent repairs and improvements are to be charged on the estate, that is, those amounting to permanent improvements. It is neither the law nor the practice in lunacy. The order of 1877 was made because of the exceptionally large scheme there sanctioned, so the particular method there adopted was employed: *Oxenden* v. *Lord Compton*, 2 Ves. jun. 69. Under section 116, sub-section 4, of the Lunacy Act, 1890, it is provided: "The powers of this Act relating to management and administration shall be exerciseable in the discretion of the judge for the maintenance or benefit of the lunatic . . . or where it appears expedient in the due course of management of the property of the lunatic." [VAUGHAN WILLIAMS, L.J.—Does not section 118 empower the court either to enable real estate to be charged with these expenses, so that it would not be true to say that the heir at law of the lunatic, without the improvements, would take the real estate? His lordship referred to section 118 in the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70).] The object of section 118 in the earlier and this Act we are now dealing with was not for the court to create an equity for the next-of-kin, but for the lunatic, and these sections were inserted in these Acts for the court to act as a *bonus paterfamilias* for the lunatic. Compare section 123 with section 118, the jurisdiction under section 118 is a matter of special application, outside of the ordinary course; in the words of Lord Loughborough, "It is something extraordinary." In the case of the first two orders, the fund out of which these improvements were to be effected was a fund by the sale of timber to be cut down: *Ex parte Phillips*, 19 Ves. jun. 118; Unless it is established that the improvements are of an extraordinary character, they will not be a charge on the real estate. With regard to the first two orders, the master directed they should be paid out of a particular fund; under the last order, the moneys were paid by the committee out of moneys in his hands. It is only under exceptional circumstances the court will go back, and rehear or alter past orders under section 118.

He cited also *Lord Leitrim* v. *Enery*, 6 Ir. Eq. Reps. 357. [By STIRLING, L.J., *In re Harris*, 49 L. J. Ch. (C. A.) 327.]

VAUGHAN WILLIAMS, L.J.—This is an appeal against an order of the master dated the 8th of December, 1903, and the question which is raised in this case is rather a curious one. A lunatic, Samuel Gist, is tenant for life of some very considerable estates somewhere in the Midlands, and he has been a lunatic for many years. His property has been administered in lunacy, and this is not the first occasion on which questions arising in respect of this administration have been before the court. As long ago as 1877 there was a question before the court, which is reported under the name of *In re Gist*, 5 Ch. D. 881. I shall have to refer to that decision later on. But the question which is raised at present is this: There have been a series of orders made with regard to the raising and expenditure of money in respect of repairs of one character or another on this estate. It is suggested that some of those repairs which have been done have partaken of the nature of permanent improvements. Now when these orders were made they were such that the money was raised out of the personal property, and it was out of personal property that the expenses were paid. I may as well take for example an order of March, 1894. And that order runs "That the said John Henry Belfrage" [his lordship read the order]. The object of the summons that we have to deal with now, really was to charge this expenditure, or part of it, on the real estate, as having been expenditure in the nature of permanent improvements which as between those entitled *in futuro* to the real estate and those entitled *in futuro*

as next-of-kin to the personal estate ought, it is said, to be borne by the real estate. We have gone to a certain extent into the authorities before the Lunacy Act of 1853 and the present Act of 1890, with regard to the practice of those who had then to administer the jurisdiction in lunacy, and how far they would in the course of administration of the lunatic's estate have to go into the equities as between the next-of-kin, and the heir-at-law of the lunatic; but I do not think myself that that practice is of very great importance now, because whatever was that practice, it seems to me that it has been modified by the subsequent legislation.

Generally, the Act of 1890 in section 118 reproduces the legislation contained in section 118 of the Act of 1853. I shall assume for the purposes of my judgment here that whatever may have been the practice in lunacy under the jurisdiction in lunacy prior to the passing of the legislation to which I have been referred, yet after the passing of the Act of 1853, it was competent to those administering lunacy jurisdiction to entertain this question as between the next-of-kin and the heir-at-law, and dispose of the same. In my view of the decision of Baggallay, L.J., in *In re Gist* it is tolerably manifest that he intended to do so. It seems to me that, having certain repairs and permanent improvements to provide for, and some of these repairs and improvements being in respect of this estate of which the lunatic was tenant in fee, and the others being in respect of the estate of which he was tenant in tail in possession, the Lord Justice dealt with the costs of such repairs differently in the case of these two estates. He made an order for charge in respect of the repairs done to the settled estate on that settled estate; but in respect of the costs of repairs done to a farm of which the lunatic was owner in fee the Lord Justice made no such order; and under these circumstances the inference which I draw is that the Lord Justice really did in arriving at that conclusion not only consider the benefit of the lunatic but what was fair as between these two estates. Under these circumstances I assume for the purposes of my judgment, that there is such a power under section 118 of the Act of 1890, and that when the order of 1894 and the other orders were made, it was within the power of the master or judge to take these matters into consideration, and to determine this question, having regard not only to the benefit of the lunatic, but also to what was fair and right as between the expectant owners of the real and personal estate respectively, and I propose to deal with this case upon the admission of the counsel for the appellant that in so far as they are concerned, they are not prepared in any way to suggest that when these orders were made, the master took into consideration the question as between the personal and real estate, independently of the individual benefit of the lunatic. If this is so, and one looks at the orders, and one finds the orders consistent as far as the words are concerned, with the master not having taken this into consideration, then I think we ought to look at section 118 and see what can be properly done in the exercise of the jurisdiction in lunacy in the making of these orders. Notwithstanding the case of *In re Swire*, which was so much urged upon us, in my opinion, if the orders had made it clear that this question was really dealt with by the master at the time of making the orders, he would have had no jurisdiction which he could now properly exercise under section 118. I think that when once the jurisdiction given by that section has been exercised by the master or the judge—and that the fact that they exercised jurisdiction was made manifest upon the order—the jurisdiction could not be exercised a second time. But now I am assuming for this purpose that there is nothing in these orders which shows that the court did have this question before it, or that the master did then have this question before him. On that view, if one turns to section 118, it reads: [His lordship read it.] It seems to me that the construction of this section is that pointed out by Stirling, L.J., in the course of the argument, and I think the master, in the absence of any order already made by him in the exercise of this jurisdiction, would have the power to exercise it subsequently by making an order in respect of moneys already expended. In the first place I agree with the observation of Lord St. Leonards in *Lord Leitrim* v. *Enery*. I think this jurisdiction is one that should not be exercised after a considerable lapse of time. It seems to me that it is a jurisdiction the exercise of which ought to be asked for promptly, and that in this case the next-of-kin having chosen, ever since the dates of these respective orders to stand by and acquiesce in an order which *primâ facie* threw the incidence of these costs on the personal estate, ought not to come now and ask us to alter the incidence of these costs and expenses. If the lunatic here had died very shortly before this last order had been made, I very much doubt whether our jurisdiction would have continued to make an order under that jurisdiction. Be that as it may, in my judgment these persons have come forward too late to make this application, but I should be sorry to decide this case only upon that ground, that the application was made too late. But it is not necessary to rely upon that narrow ground. We have before us the affidavits and the orders, and we know what is the nature of the repairs and works which were done under these various orders, and it is common ground that the great bulk of this work was work which had properly been paid for out of the personal estate; but it is suggested with regard to one or two of the items, which came to a very small proportion of the total sum expended, that they were in the nature of permanent improvements which the real estate ought to bear. Now I take the strongest of all these instances, the case of a mill-house or something which was converted into cottage. It is said that that is like the purchase of new estates mentioned in *In re Badesch*, 4 M. & C. 440. I do not agree. It seems to me that you ought in dealing with these matters to take into consideration the magnitude of the estate and the nature of the estate. It may be very well the case that in the ordinary management of a large agricultural estate like this it was necessary in the ordinary course of management to expend such money as each new tenant may ask for, as a condition of paying the rent. One knows that in truth and in fact the way in which this alteration from a mill-house to cottages came about was this—that some old tenancy had expired, and the person who ultimately became the new tenant made it a condition of the new tenancy that he should have his farm so modified. It seems to me that such expenditure is in the ordinary course of management of this estate. The very instance which I have just taken seems to me to go very strongly to show how really unfortunate it would be to allow an order of this sort to be made after the lapse of such a great time from the original orders. One is not in a position now to ascertain all the facts about this expenditure. Amongst the things that one observes is this—that the master had before him the fact that of the moneys to be provided for this expenditure, a considerable part came from the cutting of timber on the estate. The master might very well have thought that under these circumstances, in the absence of any objection, it was a reasonable order to make, that

this expenditure should be provided for as it was. Be that as it may, I do not think that, having regard to the small proportion of this expenditure, that it can be even suggested that it should be thrown on the real estate, and that after this lapse of time we ought to allow such an order to stand. It seems to me, therefore, that this appeal ought to be allowed; and, to put it on two short grounds, first, because the order appealed from is not an order which ought to be made after this lapse of time; and, secondly, because, even giving the go-by to lapse of time, I am of opinion that, looking to the nature of these repairs, the order of the master for the immediate payment of this expenditure and of these costs out of the personal estate would be a perfectly reasonable and proper order, if this matter now came before us for the first time. With regard to the costs, in my judgment, having regard to the expenditure for the repairs, it is perfectly impossible that the incidence of these costs should be dealt with or altered at all, or that it should be dealt with in a different way simply by saying that these repairs relate partly to real and partly to personal estate. The appeal must be allowed and the order of the master discharged.

STIRLING, L.J.—I also think the appeal ought to be allowed. The order which was made by the master gives the lunatic a charge upon certain estates of which he is tenant in tail for sums which under four orders have been expended in permanent improvements of that estate. Now, the principles on which the court acts with reference to these matters are very clearly set out in *Attorney-General* v. *Marquis of Ailesbury*, 36 W. R. 737, 12 A. C. 672, at p. 688, by Lord Macnaghten, and he cites the following passage from Lord Loughborough: [His lordship read the passage, and continued:] The rule there laid down is that it is the duty of the court, so far as possible, not to interfere with the administration of a lunatic's property, and the illustrations I have given of Lord Loughborough are cases where property is to be bought or sold. The application of these cases is limited to cases of purchase and sale. In *In re Harris* it is said that where it was absolutely necessary to expend money in re-building the court would order that the sum expended should be taken as charged on the lunatic's real estate. And in *In re Badcock*, Cottenham, L.J., who declined to hear objections on the part of the next-of-kin, said that if money were laid out in the purchase of land, or what would amount to the same thing, in building a farmhouse, it would be right that the sum so laid out should retain its character of personalty. Now it is sought on behalf of the next-of-kin of the lunatic to bring the present case within those decisions to which I have last referred, and that one ought to say there has been expenditure of an extraordinary kind made which would give rise to a right to say that an order might be made under section 118, for a charge upon the settled estate, for the amount of expenditure. Now, it is to be observed that all these orders were made both in the presence of the heir-at-law and the next-of-kin. They had therefore an opportunity of pointing out to the master that the expenditure was an extraordinary one, and following upon it to ask him to exercise this jurisdiction. That could be done by the insertion of a few words within the order authorizing a payment to be made, or by a declaration that the order was made without prejudice as to how the expenditure was ultimately to be borne. Nothing of that kind was intended in the order. That being so, it seems to me that the burden lies on the present applicants to make out that extraordinary expenditure has taken place. Now it seems to me that the evidence in support of that is of a very shadowy description. The greater part of the expenditure sanctioned by these orders was for repairs of an ordinary character. In the first order, which is that of 1894, the sum expended in alterations is £600, and of that, the item which was relied on was one of £150 for the conversion of a mill-house into cottages, and which is described in the affidavit. ["It was stipulated as one of the terms," his lordship read.] Now that is all that is said in the matter, and it is said very fairly that the master might have treated it as an ordinary case, and one not calling for the exercise of any discretion on his part. Upon the whole I have come to the conclusion that the applicants have not made out that which it was necessary for them to make out. That being so, it seems to me the application fails. If it were proved that the court had not exercised a jurisdiction which is undoubtedly vested in it in a proper case, it would be open to the court, in my judgment, to make an order under section 118. But if the jurisdiction is once exercised, and the court has decided that the powers vested in it for the benefit of the lunatic ought not to be exercised, then the court cannot go back upon its own order and make such an order as is asked for by this summons.

COZENS-HARDY, L.J.—I am of the same opinion. The question before us is not one of amending the old orders. No such question as that ought to be listened to for a moment. Section 118 seems to give us jurisdiction to give a charge on the real estate of the lunatic unless the judge or master making these former orders had section 118 in his mind. I am not satisfied that any one of the four orders is of such a nature as to prevent us from now exercising the jurisdiction under section 118. I do not take the narrow view of section 118 taken by counsel for the appellant. Any such contention seems to me to be negatived by Baggallay, L.J., in *In re Gist*. There are, however, two grounds which prevent our exercise of the jurisdiction. The first is delay. I do not, however, attach much importance to that. But the other consideration which influences my mind in exercising this jurisdiction under section 118 is really this—that regard must be had to the nature of the estate in exercising the jurisdiction under section 118. It is an estate the rental of which was £5,000 a year, and it is now reduced to £3,500. In approaching a question of this sort regard should be had to the fact that it is almost impossible to draw a line between repairs and permanent improvements, and we are asked to say that certain items on the border-line are to be regarded as improvements. Now, there are three items—one that referred to the mill-house converted into a cottage; the second was a new iron to the well in place of a wooden wheel; and the third was a new roof to an old barn. Not one single item was of such a nature that the master could not have said, under section 118, "This is not a charge in lunacy." It is generally a good rule that masters should, in making such orders, either take into consideration section 118, and express that in the orders drawn up, or add that the order is without prejudice to any question as to how the expenses should be borne ultimately. If neither course is adopted I think a very clear and strong case ought to be made out. Costs to be costs in lunacy.

Appeal allowed.

Solicitors for the appellant, *Routh, Stacey, & Castle*, for *Stapleton & Son*, Stamford.

Solicitors for the respondents, *Bloxam, Ellison, & Co.*, for *Bryan & Helps*, Gloucester.

High Court of Justice.

Chan. Div. } Kekewich, J. } Feb. 3.

In re SPARK'S TRUST.
MASSEY *v.* SPARK. (*a.*)

Deed — Construction — Settlement — Separation deed — Trust for wife and children on separation—Resumption of cohabitation—Continuing validity.

A deed made in contemplation of the separation of a husband and wife which assigns property of the husband to a trustee upon trusts for the benefit of the wife and children is a good voluntary settlement, and though caused by the contemplated separation, is not put an end to by the reconciliation and subsequent resumption of cohabitation of the husband and wife.

Adjourned summons.

On the 31st of March, 1889, John Ernest Hunt Spark, was married, and on the 25th of February, 1893, the three infant defendants were the issue of the marriage, and on that date he was entitled under the will of his grandmother, Hannah Sarah Bewsher, to an undivided moiety of her residuary estate.

Differences having arisen between Spark and his wife, it was decided that they should separate and live apart from one another, and accordingly on the 25th of February, 1893, articles of agreement between Spark of the first part, his wife of the second part, and the plaintiff as trustee of third part were entered into, in which, after reciting that the said J. E. H. Spark had been guilty of misconduct towards his wife, and in order to prevent proceedings being taken against him by her, and as a condition of mutual separation which had been agreed upon between them, and also in consideration of the wife taking the care and custody of the three children of the marriage, the husband had consented to enter into the following agreement, and the said wife the following covenant, namely, "the said J. E. H. Spark doth hereby as beneficial owner assign to the said R. H. Suffield Massey" (the plaintiff) "all his share and interest under the will of his late grandmother, H. S. Bewsher (save the sum of £200 and a sum sufficient to pay the costs of and incidental to this assignment), upon trust to pay the annual interest and proceeds thereof to the said M. E. Spark, his wife, for her life, and from and after her decease to divide the sum equally between such of the said children as shall attain the age of twenty-one years, or being daughters marry under that age, and in consideration of such assignment the said M. E. Spark hereby covenants not to molest the said J. E. H. Spark or to compel him to pay directly or indirectly for the maintenance of herself or the said children. And all the said parties hereby mutually agree to execute any further deed that may be necessary to carry out the assignments and covenants herein contained." These articles were duly signed, sealed, and delivered by the parties thereto.

Mr. and Mrs. Spark then separated, Mrs. Spark having the custody of the children. The share of Mr. Spark under his grandmother's will was received by the trustee and invested, and the interest was henceforth paid to the wife.

Toward the end of 1893, however, they became reconciled and resumed cohabitation, and three other children were born to them after they had done so.

In November, 1903, wishing to make provision for all of their children, the husband and wife applied to the plaintiff to treat the agreement of the 25th of February, 1893, as at an end, as the separation therein contemplated was at an end and the parties had become reconciled, and requesting him to transfer the funds and property subject to the agreement to the defendant, J. E. H. Spark, discharged from its operation.

The plaintiff thereupon took out this summons for the direction of the court as to whether the agreement of the 25th of February, 1893, constituted a revocable deed of separation or a voluntary settlement the trusts of which were still subsisting.

H. Greenwood, for the plaintiff trustee.—If this agreement is a separation deed it is put an end to by reconciliation, but if it is a voluntary settlement it is still subsisting and valid, and the resumption of cohabitation by the husband and wife will not affect it: *H.* v. *W.*, 3 K. & J. 382; *Nicol* v. *Nicol*, 34 W. R. 283, 31 Ch. D. 524; *Westmeath* v. *Salisbury*, 5 Bli. N. S. 339; *Brindley* v. *Mulloney*, 17 W. R. 510, 7 Eq. 343.

Ward Coldridge, for the husband.—This is a separation deed. The only case which suggests that such a deed is a settlement and not a deed of separation is *Ruffles* v. *Alston*, 23 W. R. 465, which is distinguishable, as there the property was the wife's. In *Westmeath* v. *Salisbury*, the daughter, a beneficiary under the deed, was held not to be bound by evidence to prove cohabitation given when she was absent; if it had been a voluntary settlement evidence of cohabitation would have been immaterial. Consideration is necessary to support the provision for children, and here the provision for children is based on separation. There is nothing to show that this deed varies in any respect from ordinary separation deeds.

Leonard Mossop, for the wife and defendant children.—This is a voluntary settlement. As soon as you have an ultimate trust in favour of children which takes effect after the death of the wife you have a deed which goes beyond the scope of a mere separation deed. In *Hulme* v. *Chitty*, 9 Beav. 437, the child born after the reconciliation was held not to be entitled under the deed. In *Brindley* v. *Mulloney* no separation took place. *Ruffles* v. *Alston* applies; there the deed having provisions for children was held not to be void on reconciliation. The trustee has continued to pay the interest to the wife, and rebuts the evidence that reconciliation is intended to end the deed: *Webster* v. *Webster*, 5 W. R. 725, 4 De G. M. & G. 437.

KEKEWICH, J.—This is a point of some interest to persons who have to advise husbands and wives as to arrangements with regard to separation. The point to be decided in this case depends really upon the proper effect to be given to and the proper construction of the agreement of the 25th of February, 1893. It is desirable to look at this agreement for a moment apart from the motive which led to its execution; that motive was no doubt a separation. Now, under this agreement we find that there was an assignment to the trustee by the husband of "all his share and interest under the will of his late grandmother, Hannah Sarah Bewsher, upon trust to pay the annual interest and proceeds thereof to Mary Edith Spark, his wife, for her life, and from and after her decease to divide the same equally between such of the said children as shall attain the age of twenty-one years, or being daughter marry under that age. Now that is a perfectly good voluntary settlement within all the authorities to which reference is always made, such as *Kekewich* v. *Manning*, 1 De. G. M. & G. 176, in which a perfect trust is declared. There is a parting with by the husband of his interest under his grandmother's will, which gives

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

the trustee the right to sue for the share and hold it when received upon the trusts contained in the agreement. It is a perfectly voluntary settlement, and if so it can only be worked out after the performance of the trust—that is, the ultimate handing over of the property to those entitled to it. So that if it can be regarded from that point of view, there is no doubt that it is enforceable by the court. It has been argued that this is not the proper view to take of this deed, because it was made in view of a separation. It provides for the wife's maintaining herself and three children, therefore it seems that it is simply as a provision for the wife during the separation; then, the parties having been reconciled, the consideration fails, and there is no reason why the settlement should not be declared void. There are two points of view from which this transaction can be regarded: on the one hand, separation is the paramount cause without which this agreement would never have existed; on the other, though brought into existence by that cause on the occasion of a separation between the husband and wife, it does contain an assignment of the share of the husband under the will upon his wife and children in the way I have mentioned. Which view ought I to hold with regard to this agreement? Can I say that the trustee is safe in departing from the terms of the deed and giving up this property. The judgment of the House of Lords in *Westmeath* v. *Salisbury* does not decide this point. The same question did not arise there for decision, and the deed was held to be void on different grounds. The case of *Brindley* v. *Mulloney*, before Romilly, M.R., seems to me to be entirely different from this case on account of the ground of the decision there. The deed was similar to the one in this case, and might have been held to have been a separation deed, and there is no doubt that it might have been held to constitute a settlement by the Court of Chancery. But Romilly, M.R., held that the consideration failed. He says: "Separation was the consideration upon which it was based." I do not mean to say that he did not say more than that, but that was the main point of the decision. I must, of course, assume that he was correct in coming to that conclusion. No separation had taken place, and so the consideration failed. Here the consideration has not failed, and I am not asked to set aside the deed on that ground. Romilly, M.R., held that the consideration had failed, and he also held that it was a separation deed. The precise point was before Malins, V.C., in *Ruffles* v. *Alston*. There the deed took the form of a voluntary settlement, and as such was within the doctrine of *Kekewich* v. *Manning*. Under these circumstances the Vice-Chancellor held it to be more than a separation deed. The case was argued on demurrer to the bill, so as to set aside the settlement on the ground of reconciliation, and the demurrer was overruled on the ground that the child was entitled to maintain a bill for enforcing the settlement. The same principle applies to this deed here. The separation was the cause of it, and it resulted in the settlement of this share. That being so, I cannot see that reconciliation affects the voluntary settlement thereby created, and I declare to that effect. All costs to come out of the fund, those of the plaintiff to be taxed as between solicitor and client.

Solicitors for the plaintiff, *Mossop & Rolfe*.

Solicitor for all other parties, *J. T. Campion*.

Chan. Div.
Swinfen Eady, J. } Feb. 24, 25; March 26.

KIRKDALE BURIAL BOARD *v.* LORD MAYOR, &c., OF LIVERPOOL. (*a.*)

Local government—Transfer of powers of other authorities—County borough—Urban sanitary district—"Urban district"—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *ss.* 21, 35, 62.

A county borough, if it be an urban sanitary district under the Public Health Act, 1875, *is an "urban district" within section* 62 (1) *of the Local Government Act,* 1894, *and its council can exercise the powers of that section. Section* 21 *of the Local Government Act,* 1894, *which by the operation of section* 35 *is inapplicable to a county borough, is not to be read as if it were a definition of "urban district" excluding county boroughs.*

This was the trial of an action raising a point of considerable interest in connection with the Local Government Act, 1894—namely, whether the area of a county borough is an "urban district" within the meaning of the Act, and whether its council as a district council is qualified to pass a resolution under section 62 (1) for transferring to itself the powers, duties, property, debts, and liabilities of an authority constituted under any of the adoptive Acts mentioned in section 7 (1), which include the Burial Acts.

The plaintiffs were an authority duly constituted under the Burial Acts, 1852 to 1900, and the area under their control was entirely situated, together with areas under other burial boards, in the county borough of Liverpool, of which the defendants were the urban sanitary authority.

The defendants had long been anxious to become the burial authority for the whole of the county borough, and had on more than one occasion been in communication with the various burial boards on the subject; and they now proposed that a resolution under section 62 (1) should be passed by the city council for transferring to the defendants, acting by such council, the powers, duties, property, debts, and liabilities of the plaintiffs.

To this the plaintiffs objected, and they brought this action asking by their statement of claim for a declaration that the area of the county borough of Liverpool was not an "urban district" within the meaning of the Local Government Act, 1894, or otherwise, and that the said resolution or any resolution to that or a similar effect (if passed) would be *ultra vires* and void; they also claimed an injunction to restrain the defendants from passing any such resolution, and other consequential relief.

Section 62 (1), which gives power to pass such a resolution, commences as follows: "Where there is in any urban district or part of an urban district any authority constituted under any of the adoptive Acts, the council of that district may resolve . . ."

Section 21 (1), which forms part of Part II. of the Act, commences as follows: "Urban sanitary authorities shall be called urban district councils, and their districts shall be called urban districts. . . ."

Section 35, which is also contained in Part II., is as follows: "Save as specially provided by this Act, this part of this Act shall not apply . . . to a county borough."

Eve, K.C., Danckwerts, K.C., and *R. B. Lawrence,* for the plaintiffs.—The corporation propose to take over the duties of these various burial boards, and a scheme will be necessary in order to settle the rights of the several parishes and their contributions to the expenses. The boards will cease to exist, and there

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

will be no authority to represent the parishes. In two of these the parishioners have not provided themselves with burial grounds. The boards think that any scheme ought to precede their extinction. This is not a test case by arrangement, but we are nevertheless supported by other burial boards having the same interests. Nothing in the Act of 1894 constitutes a county borough an "urban district." There is no definition of "urban district" in the Act, except in section 21. If that section could be read into section 62 it would bring what was an urban sanitary authority within the powers of section 62, but directly section 35 is referred to it becomes apparent that this cannot be done in the case of a county borough, since none of the sections in Part II. can apply to a county borough save as specially provided. In support of this view we rely on section 32 in Part II., where certain provisions are made applicable to "a county borough as if it were an urban district," thus showing clearly that it is not so, while the phrase "county boroughs and other urban districts" in section 33 (1) may be explained as an instance of the special provision referred to in section 35. The corporation, therefore, cannot exercise the powers of section 62 (1), and must obtain, under section 10 (1) (*b*) of the Local Government Act, 1888, a provisional order from the Local Government Board for the transfer which they desire.

They referred also to sections 1, 31, 34, and 100 of the Local Government Act, 1888 (51 & 52 Vict. c. 41); sections 7, 16 (1), 20, 23, 26, 36 (2), 67, 68, and 75 of the Local Government Act, 1894 (56 & 57 Vict. c. 73); and sections 5 and 6 of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

Vernon Smith, K.C., Alexander Glen, K.C., and *J. Rutherford*, for the defendants. — In section 53 (2) of the Local Government Act, 1894, there is mention of an "urban district," and the Legislature, when passing the Local Government (Joint Committees) Act, 1897 (60 & 61 Vict. c. 40), had it in view that the term as used in that section included a county borough. Again, section 54 (2) (*c*) of the Act of 1894, as to extension of areas, refers to section 54 of the Act of 1888, and when we turn to that section we find it includes a "borough," which is obviously inclusive of "county borough." This is equivalent to using the term "county borough" in section 54 (2) (*c*), and brings it into connection with the phrase "urban district" there employed. If the view taken by the plaintiffs be adopted it would result in this—that whereas section 62 (2) forbids the adoption of adoptive Acts for any part of an urban district without the approval of the council of that district, the council of a county borough, as not being the council of an urban district, would have no such veto. It would be a strained construction of section 21 to read it as if the words "other than a county borough" were included throughout.

They cited *Wilson* v. *Strugnell*, 7 Q. B. D. 548, 30 W. R. Dig. 50, and referred to sections 1 (1) and 4 of the Local Government (Transfer of Powers) Act, 1903 (3 Ed. 7, c. 15).

Danckwerts, K.C., in reply, referred to section 22 of the Local Government Act, 1894, and sections 154 and 155 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), and cited *Rex* v. *Amos*, 2 B. & A. 533, 541, 542, per Bayley, J.; *Mayor, &c., of Reigate* v. *Hart*, 16 W. R. 896, L. R. 3 Q. B. 244; and *The King* v. *Overseers, &c., of Connahs Quay*, 49 W. R. 463, [1901] 2 K. B. 174.

Cur. adv. vult.

SWINFEN EADY, J.—The question to be determined in this action is whether the area of the county borough of Liverpool is an "urban district" within the meaning of section 62 of the Local Government Act, 1894. If the answer to this question should be in the affirmative, it is not disputed that the defendants, acting by the city council, are entitled to resolve that the powers, duties, property, debts, and liabilities of the plaintiffs, the burial board for the township of Kirkdale, shall be transferred to the defendants acting by the city council, as from a date to be specified in such resolution, and that thereby upon the said date the said powers, duties, property, debts, and liabilities will be transferred accordingly, and that the plaintiff burial board will cease to exist and the defendants will be successors of the plaintiffs.

The definition of "urban district" contained in the Act of 1894 is in section 21. It is the district of an "urban sanitary authority." The defendants are an urban sanitary authority, and therefore if this section were applicable, their district would be an "urban district"; but section 21 is contained in Part II. of the Act, and by section 35 it is enacted that save as specially provided by that Act, that part of that Act shall not apply to a county borough.

It is contended that the effect of section 35 is to exclude a county borough from the definition of "urban district" contained in section 21 except where specially otherwise provided by some other section of the Act, but I only read section 35 as meaning that an "urban district," where mentioned in Part II. of the Act, does not include a county borough, except where expressly so provided. There is no provision that other parts of the Act shall not apply to a county borough save as specially provided, and section 21 cannot, in my opinion, be read as if it was a definition of "urban district" excluding county boroughs.

If section 21 is to be treated as defining "urban district" for all the purposes of the Act, including section 62 (1), then county boroughs are within the definition. If section 21 is excluded by section 35 and is not applicable to section 62 (1) in Part IV., then section 75 (1) meets the case, which provides that expressions used in the Act of 1894 shall, unless the context otherwise requires, have the same meaning as in the Local Government Act, 1888. The expression "urban district" occurs in section 57 (1) (*c*) of that Act, and, having regard to section 100—interpretation of "district council" (*b*)—the expression there means the district of an urban sanitary authority within the meaning of the Public Health Act, 1875. By sections 5 and 6 of that Act, England (except the metropolis) is divided into urban and rural sanitary districts, and urban districts and urban authorities are described, and the county borough of Liverpool is an urban district.

Under these circumstances I am of opinion that the county borough of Liverpool is an urban district within the meaning of section 62 (1) of the Local Government Act, 1894.

Moreover, a contrary decision would lead to this result—which would certainly be a curious one—that in every urban district other than a county borough, the adoptive Acts cannot be adopted for any part of an urban district without the approval of the council of that district; but in county boroughs, which are probably more populous and important, there is nothing to prevent the various portions of the borough, after the appointed day, adopting adoptive Acts without any consent or approval whatever of the council of the borough.

The expression "urban district" is also used in section 54 in Part IV. of the Act of 1894, and in my opinion the expression is used there as including a county borough. Thus section 54 (1) provides: "Where . . . the area of an urban district is extended, then," &c.; and section 54 (2): "The

provision aforesaid shall be made—(c) Where the area of an urban district is extended by an order of the Local Government Board under section 54 . . . of the Local Government Act, 1888."

Now, the Local Government Act, 1888, s. 54 (1) provides (*inter alia*) for the alteration of the boundary of any county borough by the Local Government Board, and in my opinion the provision made by section 54 of the Act of 1894 in the case of an extension or diminution of the area of an urban district applies where the area of a county borough is altered under section 54 of the Act of 1888.

The plaintiffs placed considerable reliance on the definition of "parochial elector" in section 75 (2) of the Act of 1894. "The expression 'parochial elector,' when used with reference to a parish in an urban district, or in the county of London, or any county borough, means," &c., and it was contended that "urban district" could not include a county borough, as, if it did, it would not have been necessary to add the words "or any county borough," but the answer to this argument is that in this particular instance the context shows that it was not intended to include a county borough in the expression "urban district."

Again, the Local Government (Joint Committees) Act, 1897, is to be construed as one with the Local Government Act, 1894, and it is clear from section 1 (1) of the Act of 1897 that the statute contemplates that one of the councils appointing a joint committee for the purposes of the Burial Acts may be the council of a county borough. But it only has power to do that if it is a district council, and if its district is an "urban district" within the meaning of section 53 of the Act of 1894.

Reading these two statutes together, I am of opinion that the Legislature itself has afforded an exposition of the sense and meaning in which the expression "urban district" is used in the earlier Act: see *Battersby* v. *Kirk*, 2 Bing. N. C. 584, at p. 606; *Morgan* v. *London General Omnibus Co.*, 32 W. R. 416, 12 Q. B. D. 201, at p. 207, and on appeal 32 W. R. 759, 13 Q. B. D. 832.

For these reasons I am of opinion that the claim of the plaintiffs fails. The judgment will be as follows: The court, being of opinion that the area of the county borough of Liverpool is an "urban district" within the meaning of section 62 of the Local Government Act, 1894, dismiss the action with costs.

Solicitors, *Sharpe, Parker, & Co.*, for *Cleaver, Holden, & Co.*, Liverpool; *Venn & Co.*, for *E. R Pickmere*, Town Clerk, Liverpool.

K. B. Div. (Bigham, J.) March 10, 11, 14, 21.

GRANGE & Co v. TAYLOR. (a.)

Bill of lading—Construction—Undivided portions of a bulk cargo—Error in apportioning damaged grain—Duty of shipowner—Rights and duties of consignees inter se.

Bills of lading for undivided portions of a bulk cargo contained the following clause: "If the parcel herein signed for constitutes part of a larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage and or sweepings, if any." Impressed in the margin was the following note: "Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any." One consignee received a full quantity of sound grain. On the apportionment of the unsound grain the plaintiffs refused to accept more than their proportion of unsound grain, and sued for short delivery.

Held, that the clause and note in the bill of lading did not impose any duty on the shipowner to apportion the grain, and that the error was caused by the consignee's agents.

Action tried in the Commercial Court.

The endorsee of two bills of lading claimed for short delivery of a quantity of maize shipped under those bills of lading on board *The Palestrina* and discharged at the Victoria Docks, and also for breach of contract contained in the bills of lading and for conversion of the plaintiffs' goods.

The facts sufficiently appear in the following considered judgment.

J. A. Hamilton, K C, and *Leck*, for the plaintiffs.

Carver, K.C., and *Adair Roche*, for the defendants.

The following cases were cited: *Porteus* v. *Watney*, 3 Q. B. D. 534; *Petrocochino* v. *Bott*, L R. 9 C. P. 355; *Spicer* v. *Martin*, 14 A. C. 12; and *Nottingham Patent Brick and Tile Co.* v. *Butler*, 15 Q B. D. 261.

London and St. Catherine Dock Act, 1864 (27 & 28 Vict. c. 178) s. 120, was also referred to.

BIGHAM, J.—This is an action by endorsees of bills of lading against shipowner to recover damages for short delivery of a quantity (108 quarters) of maize. The defence is that the maize was delivered to the dock company, and that they were the agents of the plaintiffs to receive it. The defendants' ship, *The Palestrina*, took on board a large quantity of maize in bulk at Odessa to be carried to London. The shipper asked for and obtained from the defendants several bills of lading, each being for an undivided portion of the bulk. This was done to facilitate the sale of the maize. The bills of lading contained the following clause: "If the parcel herein signed for constitutes part of a larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage and or sweepings, if any"; and in the margin there was an impressed note—"Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any." Two of these bills of lading came into the hands of the plaintiffs, who were buyers of the portion of the bulk thereby represented. The bills of lading for the remainder reached the hands of other buyers, among whom was a Mr. Paul. The vessel arrived in London and went to the I jetty of the Victoria Dock, where she began her discharge by means of an elevator which stands on that jetty. The maize was gathered under the open hatchways and then lifted in the elevator over the ship's side and shot into the barges of the bills of lading holders. Mr. Paul came first in time, and therefore first in turn, and received his full bill of lading quantity. Before the discharge to him was completed, but when it was too late to stop it, part of the remaining bulk was found to be heated. This heated grain was put on the quay, and was there apportioned among the different bill of lading holders, 108 quarters being the quantity which ought to have been taken by Mr. Paul as the quantity applicable to his bill of lading. He had, however, already received and taken away his full quantity in sound maize. The result was that at the end of the discharge the plaintiffs found that unless they took the 108 quarters they would be short by that quantity of their share of the bulk. They refused to take the 108 quarters, alleging that if they did so they would be saddled with more than their proper proportion of heated grain, and they then brought this

(a.) Reported by W. T. TURTON, Esq., Barrister-at-Law.

action. The question is whether the shipowners are liable. The answer depends on the nature of the obligations of the shipowner under the bill of lading contract and on the usage or practice ordinarily followed in the discharge of those obligations. The bill of lading, of course, obliges the shipowner to deliver goods corresponding with the description in the document, and it also obliges him to deliver such goods to the proper person to receive them. But the plaintiffs contend that, having regard to the words, "each bill of lading to bear its own proportion of damage," the obligation is not discharged by a mere delivery of the bill of lading quantity, but delivery must in such case be made up by the shipowner of the proper proportions of sound and damaged. It is said that the bill of lading is a contract between the holder and the shipowner and between no other persons, and that, as between those two parties, the words relied upon can have no other meaning than that contended for. I am of opinion that the words put no such burden on the shipowner. It would be very unreasonable if they did. The delivery is made to the barges of the receivers turn and turn about. At first nothing but sound grain may come out of the ship, and it will be impossible to say whether there will be any damaged grain or, if any, how much. Again, the character of the damage may vary very much; some part may be badly damaged and the other part only slightly. How is the shipowner to foresee this, and how, where, and when is he to sort the grain? Skilled men are required for such work; the crew cannot do it. Is the shipowner to find and employ such men? Then, where is the sorting to be done? It cannot be done in the ship. Is the shipowner to hire quay space for the work? And when is it to be done? Until the last parcel of the bulk is out the sorting is impossible. Must the shipowner hold back all delivery until that point in the discharge is reached? I agree with Mr. Hamilton that the mere difficulty or even impossibility of discharging a duty affords no excuse for a breach if in fact the duty has been undertaken; but when I am asked to say that the shipowner has undertaken the difficult duty here contended for I expect to find plain and unambiguous words imposing it. I do not find such words in this case. If the shipowner had given but one bill of lading for the whole parcel his duty would have been completely discharged by delivering the grain with the damaged and sound mixed just as it came to hand out of the ship. Was it intended that his compliance with shipper's request to give several bills of lading should throw upon him the burden of sorting the bulk and dividing the damaged grain in the manner suggested? I cannot think so. Then why are the words introduced, and what is their effect? This bill of lading is headed, "Chamber of Shipping, Black Sea—Berth Contract Bill of Lading, 1902"; and in the top left corner are the words, "As agreed with the London Corn Trade Association and the Chamber of Shipping, 12th March, 1902." Thus the bill of lading appears to be in a form adopted by the members of the Corn Association in this country and shipowners who send their ships to the Black Sea. It is in common use in connection with a very large trade, and is doubtless well known to all people in that trade. Now, the shipment of grain in bags and the stowing of it in the ship's hold in separate parcels are expensive operations which add to the cost of the grain when it arrives in this country without enhancing its value. It is therefore apparently often shipped in bulk, and bills of lading are given for undivided portions of the bulk. This is a great convenience to the merchant, for it enables him to sell the grain in small parcels. The form has been drawn with special reference to this practice, and the clause relied upon has been inserted in consequence of it. Then if the shipment is made under this practice (it is not necessarily so made) the impressed note is put in the margin of each bill of lading to draw attention to the fact—"Part of parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any." The London Corn Trade Association's form of sale contract, which was given in evidence before me, contains a corresponding provision—"Should any of the within-mentioned quantity form part of a larger quantity . . . in bulk, no separation . . . shall be deemed to be necessary. All damages and sweepings . . . shall be shared by the various parcels *pro rata*," showing that when the grain comes to be sold the sales are made on the footing on which the bills of lading are drawn. When the bill of lading is read by the light of these facts the meaning and object of the clause in question becomes quite plain. It is put there for the purpose of regulating the rights of the holders of the different bills of lading *inter se*, and is not intended to increase the shipowner's duty at all. But the plaintiffs insist that the contract in the bill of lading does not and is never intended to do more than express the agreement between the shipper and the shipowner; in other words, that it cannot regulate the rights of cargo-owners *inter se;* and they refer to *Porteus* v. *Watney* (3 Q. B. D.) in support of this contention. No doubt the primary object of a bill of lading is to evidence the terms on which the shipper and shipowner have agreed for the carriage and delivery of goods, and Brett, J., at p. 542 of the volume in question, is reported as saying: "The bill of lading claims to be a contract between the shipowner and the person taking the bill of lading. There is no relation whatever between the holders or takers of other bills of lading and any one holder of a bill of lading. They are not co-sureties. When, therefore, it is said we can look at all the bills of lading and then divide the days of demurrage or the lay days between them, we are looking at other bills of lading which cannot be given in evidence." These words must, however, be read with reference to the form of the bill of lading in that case. The form contained no reference whatever to the holders of other bills of lading. The action was by shipowner against bill of lading holder for demurrage. The bill of lading contained the words "on paying freight for the said goods and all other conditions as per charter-party." This charter-party gave a lien on all cargo for demurrage at the port of discharge. The defendant had always been ready and willing to take his goods, but the holders of bills of lading for other cargo lying on top had made default in taking their cargo away, so that the defendant's goods could not be discharged. It was held that by the terms of his bill of lading contract the defendant had rendered himself liable for payment of the demurrage, and that he could not escape by saying that the delay was due to the negligence of holders of other bills of lading. Indeed, so much did Brett, L.J., consider the different bills of lading holders strangers to each other that he held that if the man in actual default had paid the shipowner, the defendant could not have relied on the payment by way of defence; an opinion which involved the rather startling conclusion that if there had been goods below belonging to a score of different bills of lading holders, the full amount of the demurrage would have been recoverable from each of them. The Lord Justice at p. 543 uses these words: "I think that if the consignee of a portion of the cargo had a bill of landing in the same words, and had been called upon to pay, and had paid the whole demurrage to the shipowner, the holder

of another bill of lading, if used, could not set that up as a defence. That defence would arise in respect of a wholly independent contract between the shipowner and the holder of the other bill of lading. He could not set it up as a defence, because he would have no right to prove that other and wholly independent contract. I accept the proposition that it would be no defence for the owner of the bill of lading to say that the shipowner had been paid the same sum by all other holders of bills of lading for cargo in the ship." But the authority is in truth of no application to the present case. The bill of lading before me appears on its face to be one of a group. The makers and takers of it know it to be one of a group. The same thing is no doubt true in the case of the bills of lading for the remainder of the bulk. The shipowner, not for his own benefit, but merely for the benefit of the various receivers, subscribes to the stipulation as to the division of damaged grain. All the receivers buy their bills of lading with notice, and in my opinion, become bound towards each other by what the shipowner has done for them. Even if it should be true that the intention has not been legally effected, and that the bills of lading holders are not bound *inter se*, that affords no reason for saying that the words used in the attempt to accomplish the intention should be twisted to a purpose for which they were never used—namely, to impose a heavy obligation on the shipowner. The view which I take of the meaning of the bill of lading contract is borne out by the practice followed in the discharge of grain cargoes at Victoria Docks and at the jetty in question. The practice is for the servants of the dock company to bring the cargo in the ship's hold under the open batchways; for this service the shipowner pays the dock company 4d. a ton. The grain is then lifted by means of an elevator out of the hold and shot from the elevators into the barges of the consignees; for this service the consignees pay the dock company 1s. 9d. per ton. If any of the grain is found to be heated it is discharged on the quay and there sorted by the dock company's servants, the cost being covered by the dock company's charge against the consignees. In this way the dock company act as the agents of the ship to discharge the cargo and as the agents of the consignees to receive it; and the evidence, though in parts conflicting, satisfies me that as a matter of fact the receipt of the grain into the elevator is the receipt by the dock company, as agent for the consignee or bill of lading holder. If this be so, the shipowner has in this case not only discharged the bill of lading quantity, but the plaintiff have also received it, with the result that the claim for short delivery fails. It was, however, contended on the plaintiffs' behalf that, whatever the general practice might be, the grain in this particular instance was not in fact received by them until it was placed in their barges or trucks. It appeared that upon this jetty there were two elevators belonging to different owners. The elevator which was used on this occasion belongs to a firm of Thompson & Co., who use it for the discharge of their own vessels. But sometimes no vessel of their own happens to be alongside, and the elevator is idle. On such occasions Thompson & Co. solicit other shipowners to send their ships to the wharf, so that they may be discharged by their elevator, and they have an arrangement with the dock company by which in such circumstances they do all the work above described for the dock company for an inclusive charge of 1s. 11d. a ton. Thus the dock company get the work for which they charge 2s. 1d. (1s. 9d and 4d.) done for 1s. 11d. This course was followed in the present case. Thompson & Co. were anxious to secure a discharge and delivery by their elevator because, I suppose, they could do the work for less than 1s. 11d. per ton, and so make a profit, and, as they feared that the job might fall into the hands of the owner of the rival elevator, they went to the defendants and induced the defendants to send the ship to the part of the jetty where their elevator stands. It was said by the plaintiffs that the defendants, by allowing the vessel to go under Thompson's elevator in these circumstances, made Thompson & Co. their agents, and that all the work, whether done on the ship or in the elevator or on the quay, was therefore done by the defendants. I do not, however, take this view of the matter. Neither the plaintiffs nor the defendants had anything to do with the arrangement between the dock company and Thompson, and when the time for paying for the work arrived debit notes were sent in by the dock company to the ship and cargo-owners for the 4d. and 1s. 9d., just as though no such arrangement existed. I wish to add that the practice at these docks appears to have been substantially the same for the last thirty years, although, no doubt, elevators have only recently come into use. Dealing with the question in 1874, Brett, J., after stating the practice in relation to the delivery of bales of hides, says: "I am of opinion that the moment the shipowner has cleared the goods from the deck he ceases to be responsible in any way for them; and that, whatever remedy the plaintiffs may have against the dock company or anyone else, they cannot under the circumstances charge the shipowner with the loss of the bale": see *Petrocochino* v. *Bott*, L. R. 9 C. P., at p. 361. It is perhaps necessary to mention one other matter. It appeared that when Thompson's men in working out the ship came across the heated grain they notified the circumstance to the dock clerks, and after the apportionment the clerks, in the ordinary course of their duty, entered the 108qrs. in the dock books as belonging to Mr. Paul. The plaintiffs suggested that, even if there was no short delivery, this was a conversion. To this there are two answers. The first is that there was no conversion; the book entry interfered in no way with the plaintiff' rights—the plaintiffs might have taken away the 108qrs. at any moment, and no one would have objected. The second answer is that, even if there was a conversion, it was not by the defendants; they, as I have already said, had finished with the goods when they delivered the grain into the elevator. The fact is that the plaintiffs did not want the 108qrs. They preferred their action for short delivery. If they had taken the 108qrs., as they might have done at any moment if they had wished, they would have been left with an action for breach of the duty to properly sort and apportion—an action which, if brought against the present defendants, would have failed, as this action fails, on the ground that the defendants had entered into no contract to do the work of sorting and apportionment. There must be judgment for the defendants with costs, and for the defendants on the counterclaim for freight.

Solicitor for the plaintiffs, *Lowless & Co.*

Solicitor for the defendants, *Botterell & Roche.*

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) } Jan. 19, 20, 21; March 7.

In re FITZGERALD.
SURMAN *v.* FITZGERALD. (*a.*)

*Conflict of laws—Scotch law—Scotch marriage contract made in Scotland—*Lex loci*—Intention of parties—Life interest by way of alimentary provision—Inalienable life interest in domiciled Englishman—Fraud upon creditors—Public policy.*

As a general rule the law of the matrimonial domicil is applicable to a contract in consideration of marriage, but this rule yields to the intention of the parties that some other law shall be applied, in which case effect will be given in the courts of the country of the matrimonial domicil to the provisions of the contract in accordance with the foreign law, so long as the provisions are not contrary to public policy.

By a Scotch marriage contract a domiciled Scotchwoman settled property upon trust to pay the income to her intended husband, a domiciled Englishman, for his life, and the contract contained a declaration that all payment to the husband should be "strictly alimentary," and "not assignable nor liable to arrestment nor other legal diligence at the hands of his creditors." The trustees of the settlement were English, and the trusts had been administered in England. The husband purported to charge his life estate.

Held (*by* Vaughan Williams *and* Cozens-Hardy, L.JJ., Stirling, L.J., dissentiente), *that the intention of the parties being that the Scotch law should apply to the marriage contract, the husband could take no greater interest than the Scotch law would allow him, and as the nature of the interest given by the contract ought not to vary with the domicil of the husband, the English courts would give effect to the Scotch law, the gift of an inalienable life interest to a man not being contrary or repugnant to the public policy of English law.*

Decision of Joyce, J. (51 *W. R.* 586), *reversed.*

This was an appeal from the decision of Joyce, J. (reported 51 W. R. 586, [1903] 1 Ch. 933). The case came before the court upon on application by the trustees of a settlement made upon the marriage of Sir Gerald and Lady FitzGerald for the determination of questions which had arisen in the administration of the trusts thereof in the following circumstances.

On the 20th of September, 1862, a settlement in English form and a contract of marriage in Scotch form were executed in contemplation of the marriage which was afterwards solemnized between the parties. Sir Gerald was at the date of the marriage domiciled in England, and his wife was at the same date domiciled in Scotland. The marriage settlement and contract were executed in Scotland. By the English settlement certain property was assigned to the trustees to be held upon trust to invest and pay the income to Sir Gerald and his assigns during his life, and after his death to Lady FitzGerald during her life, and after the death of the survivor to stand possessed of the trust fund upon trusts for the children of the marriage as therein provided. The Scotch contract of marriage was made between the husband and wife. It recited the English settlement, and thereby Lady FitzGerald assigned to the trustees all her present and future property. The trusts declared of this property were as follows: (1) For the payment of the expenses of the trust; (2) for the payment of the income to Lady FitzGerald for life; (3) in case Sir Gerald should survive his wife, for payment of the income to him during the remainder of his life, it being declared by the contract "that all payments to the said Sir Gerald should be strictly alimentary and should not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors"; (4) upon trusts for the children of the marriage as therein provided.

On the 23rd of September, 1862, the marriage was solemnized in Scotland.

On the 19th of June, 1863, the only child of the marriage, Miss Geraldine FitzGerald, was born.

On the 16th of May, 1901, Lady FitzGerald died.

Numerous incumbrances had been created by Sir Gerald and Miss FitzGerald upon their respective interests in the English settlement and the Scotch contract, some before and some after Miss FitzGerald had attained twenty-one, which event happened on the 19th of June, 1884. On the death of Lady FitzGerald various questions arose between Sir Gerald and his mortgagees, and the present summons was taken out to have them determined. The question now before the court was whether the mortgagees had any charge on Sir Gerald's life interest in the funds comprised in the Scotch contract. The question depended mainly upon whether that contract must be construed according to Scotch or English law. If according to the former, Sir Gerald appeared to be restrained from anticipating or charging his life interest. Five out of the six trustees were domiciled in England, and the trust had always been administered in this country. The trust fund comprised, *inter alia*, Scotch mortgages on heritable bonds which it was alleged were according to the law of Scotland treated as real estate. There was evidence that, according to the law of Scotland, if Sir Gerald failed to maintain the children of the marriage, they would have the right to attach the alimentary provision made for him under the marriage contract, the alimentary provision being arrestable for alimentary debts, though not for other debts.

Joyce, J., held that the domicil of Sir Gerald had remained English all along; his residence was in England; the trustees were all subject to the jurisdiction of the English court, and it was they who had invoked its aid to determine the question that had been raised. In the existing circumstances, even if the construction and effect of the Scotch settlement were to be determined by the law of Scotland, it appeared to his lordship that its validity and operation with respect to the matter now in question must be determined by the law of England. Again, considering the question as one purely of contract, it was contrary to the policy of this country that property should be so settled as to continue in enjoyment of a bankrupt nowithstanding bankruptcy; in other words, the declaration in the Scotch settlement that all payments to Sir Gerald should not be assignable or liable to arrestment at the instance of creditors was void and inoperative according to English law. His lordship accordingly held that Sir Gerald's assignees or incumbrancers were the persons entitled to receive payment from the trustees of the Scotch settlement.

From that decision Sir Gerald appealed.

A. H. Jessel, for the appellant.—It is submitted that Joyce, J., was wrong in holding that an English court will not give effect to the alimentary clause which prevents the alienation of the life interest. The learned judge did not give sufficient weight to the fact that the settlement is in the Scotch form. The parties were married in Scotland and adopted a Scotch

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

form of settlement; their intention, therefore, was to adopt also the Scotch law. This is borne out by the fact that the bulk of the property settled consisted of heritable bonds, which must be deemed realty. If no contract exists, the law of the country in which the parties elect to make their matrimonial domicil is the law which governs. But where there is a contract the law which governs the interpretation of that contract is the law to which the parties intended to submit themselves as shown by the form of the contract, and in this case that is Scotch law: Dicey's Conflict of Laws, pp. 540. 568; *In re Barnard*, 56 L. T., p. 9, 35 W. R. Dig. 177; *In re Sibeth*, 33 W. R. 556, 14 Q. B. D. 417; *Viditz* v. *O'Hagan*, 47 W. R. 571, [1899] 2 Ch. 569. This last case was reversed (48 W. R. 516, [1900] 2 Ch. 87), but not as to the point that marriage articles were governed by English law. A provision against assignment of a life interest is not contrary to public policy, for it is constantly done, though in another way, by a gift over on bankruptcy or any other event and a discretionary trust in favour of the donee. If it was an English document, the alimentary provision might be invalid. But it was executed in Scotland, where marriage took place, and is in Scotch form: *Corbet* v. *Waddell*, [1879] 7 Rettie, Court of Session Cas. 200; *Chamberlain* v. *Napier*, 29 W. R. 194, 15 Ch. D. 614; *In re Bankes, Reynolds* v. *Ellis*, 50 W. R. 663, [1902] 2 Ch. 333. Even assuming that the alimentary provision is bad in English law, the appellant is entitled to succeed. The forum of administration has nothing to do with the question, but the court must give effect to the law of the forum which the parties selected: *Harrison* v. *Harrison*, L. R. 8 Ch. 342; *Noell* v. *Robinson*, 2 Ventris 353; *Scott* v. *Allnutt*, 2 Dow & Clark 404. The law laid down in Westlake on Private International Law, that the forum of the matrimonial domicil governs the interpretation of the contract, is wrong: see Foote's Private International Law, pp. 317, 318; *Lansdowne* v. *Lansdowne*, 2 Bligh 60; *Anstruther* v. *Adair*, 2 M. & K. 513.

Crossman, for Miss FitzGerald.

Badcock, K.C., and *Methold*, for the first mortgagee of the life interest.—Sir Gerald FitzGerald acted on the supposition that he had power to assign up to 1895, when he discovered that though domiciled in England this settlement contained a provision in his favour to defeat his creditors. Such a provision is contrary to the policy of the English law, which does not allow a life interest to be protected against creditors: *Brandon* v. *Robertson*, 18 Ves. 429, and *Graves* v. *Dolphin*, 1 Sim. 66. It may have been the intention of the parties that it should be so protected, but the question is whether such an intention can be carried out. The matter must be determined according to the *lex fori*. If the parties had intended that the interpretation should be according to Scotch law they should have appointed Scotch trustees. But they have not done so, and the matter has to be determined by the English courts, which will give effect to the contract only so far as it conforms to English law. If the appellants' contention were correct an Englishman could contract himself out of any restriction imposed by English law. There is no reason to the contrary here to prevent this contract being construed according to English law: Dicey's Conflict of Laws, pp. 653, 654, and *Collies* v. *Hector*, 23 W. R. 485, L. R. 19 Eq. 334. Though the forms of entering into a contract of marriage are regulated by the *lex loci contractus*, the essentials are regulated by the *lex domicilii*: *Brook* v. *Brook*, 9 W. R. 461, 9 H. L. Cas. 93, and *Hope* v. *Hope*, 5 W. R. 387, 8 De G. M. & G. 731. It has been held that an agreement which, if made in this country, would be void on the ground of champerty, is none the less void if it has been made in a foreign country where such a contract would be legal: *Grell* v. *Levy*, 16 C. B. N. S. 73. So, too, an agreement which is contrary to the policy of the English law as to restraint on trade will not be enforced by the English courts, even though it be perfectly valid according to the law of the country where it was made: *Rousillon* v. *Rousillon*, 28 W. R. 623, 14 Ch. D. 351; *Sottomayor* v. *De Barros*, 26 W. R. 455, 3 P. D. 1; *Lord Cranstoun* v. *Johnston*, 3 Ves. 170. [COZENS-HARDY, L.J., referred to *Freke* v. *Lord Carbery*, 21 W. R. 835, L. R. 16 Eq. 461.] The mortgagees have had a proper assignment of the life interest executed to them, and they ought not to be debarred by the fact that the law of Scotland recognizes this alimentary provision, which alone prevents their being entitled to the benefit of their security: *Ex parte Pollard*, Montague & Chitty 237; *Scott* v. *Allnutt*, 2 Dow & Clark 404; Dicey's Conflict of Laws, p. 653.

They also cited Dicey's Conflict of Laws, p. 514; Foote's Private International Law, p. 189; *Duncan* v. *Lawson*, 37 W. R. 524, 41 Ch. D. 394; *Duchess of Buccleugh* v. *Hoare*, 4 Maddocks 467; *Johnstone* v. *Baker*, 4 Maddocks 474n.; *Jerningham* v. *Herbert*, 4 Russ. 388.

Hamilton, K.C., and *Vernon, Blakesley, Withers, Pepys*, and *Northcote*, for other incumbrancers.

E. Ford, for the trustees.

Jessel, in reply.—The only cases in which the courts of this country refuse to recognize a foreign contract are those in which the foreign contract is shocking to the conscience of this country, as being against its public policy, but that is not the case here.

He cited *In re Missouri Steamship Co.*, 37 W. R. 696, 42 Ch. D. 323; *Kaufman* v. *Gerson*, 51 W. R. 683, [1903] 2 K. B. 114; *Printing and Numerical Registering Co.* v. *Sampson*, 23 W. R. 463, L. R. 19 Eq. 462; *Janson* v. *Driefontein Consolidated Mines*, 51 W. R. 142, [1902] A. C. 484; *Maxim-Nordenfeldt Guns and Ammunition Co.* v. *Nordenfeldt*, 41 W. R. 604, [1893] 1 Ch. 630; *Badische Anilin Fabrik* v. *Schott*; *Wharton* v. *Masterman*, 43 W. R. 449, [1895] A. C. 186; *Saunders* v. *Vautier*, Cr. & Ph. 240.

Cur. adv. vult.

March 7.—COZENS-HARDY, L.J., read his judgment first, as follows: The first question for consideration on this appeal is whether what I may shortly describe as the Scotch settlement is subject to the law of Scotland, or whether it must be governed by English law. Now this Scotch settlement dealt with the property of a domiciled Scotch lady, who was about to marry a domiciled Englishman, and there is no doubt that the "matrimonial domicil" was English. It is not suggested that a permanent residence in Scotland after the marriage was contemplated. As a general rule the law of the matrimonial domicil is applicable to a contract in consideration of marriage. But this is not an absolute rule. It yields to an express stipulation that some other law shall apply. See *Van Grutten* v. *Digby*, 11 W. R. 230, 31 Beav. 561, in which case the matrimonial domicil was French, but the contract, though made in France and void by French law, was nevertheless treated by Sir John Romilly as valid so far as it related to property within the jurisdiction: see also *Viditz* v. *O'Hagan*. The decision in that case was reversed by the Court of Appeal, but not on a ground in any way affecting this point. It is not necessary that there should be an express stipulation. It is sufficient if the court arrives at the conclusion that the parties in fact con-

tracted with reference to some law other than that of the matrimonial domicil. Applying these principles to the Scotch settlement, I find several important indications. (*a*) The great bulk of the property—viz., £13,200, was invested in heritable bonds. It has been settled by a chain of authorities, which ought not now to be reviewed by us—viz., by Sir William Grant in *Johnstone* v. *Baker*, by Sir John Leach in *Jerningham* v. *Herbert*, and by Sir James Wigram in *Allen* v. *Anderson*, 5 Hare 163, that heritable bonds must be regarded in our courts as immovables. If so, it can scarcely be denied that the *lex loci—i.e.*, the law of Scotland—must apply to the extent of the £13,200. I am aware that there has been a change of investment of part of this sum into English securities, but this change cannot alter the law applicable to the settlement. I may add that, as to the £13,200, the matter does not rest in contract. There is an actual completed assignment of the heritable bonds. (*b*) There was, however, £500 cash belonging to the lady, which was paid over to the trustees for investment, and which was, in fact, invested in Consols, although it might have been invested in heritable securities in Scotland. It seems to me that this sum cannot fairly be treated as intended to be subject to a different law from that which is applicable to the bulk of the property. (*c*) The whole frame of the settlement is in Scotch form, and the limitations are of such a nature that they can only take effect if Scotch law is to be applied. I therefore feel bound to treat this as a settlement made in Scotland by a domiciled Scotch lady of Scotch property, in Scotch form, and subject to Scotch law. The trustees of this Scotch settlement must in Scotland follow the Scotch law, and their residence in England, or their English domicil, is irrelevant. This being so, it follows, in my opinion, that we are bound to hold that Sir Gerald FitzGerald takes such interest, and such interest only, as the courts in Scotland would declare him entitled to: *Anstruther* v. *Adair*. There ought to be no difference in a matter of this kind between the Court of Session and the High Court. The nature and extent of his interest cannot depend upon his domicil, although his capacity to deal with his interest may perhaps depend upon his domicil. To take the somewhat analogous case of a life interest in English property given by the will of a domiciled Englishman for the separate use of a married woman, without power of anticipation, it has never, so far as I am aware, been suggested that the nature and extent of her interest varied according as her domicil was, or was not, English. The trust would be regarded in our country as valid and operative, even though by the law of her domicil neither the separate use nor the restraint upon anticipation was recognized. And, on general principles, the same view ought to be adopted by the courts of the country in which the married woman was domiciled. In short, by the law of England, it is the Scotch law which must be applied to this Scotch settlement. It is, however, strongly urged that a strictly alimentary provision for an adult male is not only unknown to and inconsistent with the provisions of English law, as in general it undoubtedly is, but that it is contrary to public policy, and ought therefore to be wholly disregarded in an English court. I cannot adopt this argument. There is nothing immoral in such a provision. Indeed, there are many instances in which pensions or retiring allowances are by statute made not transferable, or liable to be attached by any legal process. I may refer to the pension allowed to a retiring clergyman under the Incumbents' Resignation Act, 1871, and to the observations of the Court of Appeal on that statute in *Gathercole* v. *Smith*, 29 W. R. 434, 17 Ch. D. 1. Moreover, it has been long settled that at common law, and apart from any statutory enactments prohibiting assignment, certains salaries or pensions are inalienable. For example, the half-pay of an officer. In *Harty* v. *Odlum*, 3 T. R. 681, Lord Kenyon says: "I am clearly of opinion that this half-pay could not be legally assigned by the defendant. . . . Emoluments of this sort are granted for the dignity of the State and for the decent support of those persons who are engaged in the service of it. It would, therefore, be highly impolitic to permit them to be assigned, for persons who are liable to be called out in the service of their country ought not to be taken from a state of poverty. It might as well be contended that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned." In the following year the same question came up for consideration in *Lidderdale* v. *Duke of Montrose*, 4 T. R. 248. This was an action by an officer on half-pay against the Paymasters-General of the Army to recover arrears of his half-pay, and the only question was whether an assignment by way of mortgage, of which the defendants had due notice, justified them in withholding the money from the plaintiff. The court were clearly of opinion that, "on principles of public policy, as well as on account of the interest of the officers themselves, by law such assignments were void." The mortgagee was not party to this action, but it seems to have been thought that he might obtain equitable relief, and he accordingly filed a bill in the Exchequer: see *Stone* v. *Lidderdale* (Anstr. 533). It was argued that the assignment was good in equity, as a transfer of any valuable contingency or possibility, if made for good consideration, is affirmed in equity. But Macdonald, C.B., in a considered judgment, declined to accept this view, and held that the plaintiff was not entitled to any relief in equity in respect of the mortgage. In short he declined to affect the conscience of the mortgagor in respect of future instalments of the half-pay. In my opinion it is impossible to disregard this "alimentary provision" on the ground of public policy. The Scotch court would declare that the interest given to Sir Gerald cannot be assigned, and would disregard the claim of his specific mortgagees, and it is our duty to follow and adopt the Scotch law: *Anstruther* v. *Adair*. But then it was urged that Sir Gerald could bind, and did bind, the income as and when it reaches the hands of the trustees in England, and that, whatever might be the rights of his alimentary creditors, he himself ought not to be allowed to claim from the trustees the income which he has, by a contract binding on his conscience, charged in favour of his mortgagees. I doubt whether this doctrine, which is explained and illustrated by Lord Macnaghten in *Tailby* v. *Official Receiver*, 37 W. R. 513, 13 App. Cas. 523, has any application to a vested life interest, the assignment of which takes effect, if at all, for reasons wholly independent of conscience. An assignment of a vested equitable interest is complete and operative, though voluntary. It in no way depends upon contract, or upon anything further to be done by the assignor. The doctrine applies only where there is no present property capable of assignment, such as possibilities and expectancies. The case of *Stone* v. *Lidderdale* is an authority against the respondent's contention, and I know of no authority in its favour. I may observe that the defendant Lidderdale was a domiciled Englishman, whose general capacity to contract was undoubted. Moreover, this contention is really only another way of presenting the argument that we ought to disregard the Scotch law. If the life interest is capable of assignment, the court

would grant specific performance of the contract, and would aid the mortgagees by granting an injunction. If, however, as in *Stone* v. *Lidderdale*, the interest is non-assignable, I think it follows that no effect can be given to a deed purporting to assign by way of anticipation. The decision of the House of Lords in *Scott* v. *Allnutt*, which was relied upon, does not really touch the case. In my opinion, the order of Joyce, J., was wrong, in so far as it declared that the whole of the income during the life of Sir Gerald is payable to his assignees or incumbrancers, according to their respective priorities. If the amount of the income were very large, any excess beyond a reasonable amount would, according to the Scotch law, pass to the assignees or incumbrancers, but I do not understand that it is suggested that there is any excess in the present case. I think the declaration should be to the effect that Sir Gerald is entitled to the whole income during his life, free from the claim of any assignees or incumbrancers, but without prejudice to the rights (if any) of his alimentary creditors, or of Miss FitzGerald, and without prejudice to any prior payment in respect of the policy, which is the subject of another appeal by Miss FitzGerald.

STIRLING, L.J., then read the following judgment: I agree with Cozens-Hardy, L.J., that Sir Gerald and Lady FitzGerald entered into a contract that their rights in the property of Lady FitzGerald (who at the time of the marriage was domiciled in Scotland) should be regulated by the Scotch law: *Este* v. *Smyth*, 2 W. R. 148, 18 Beav. 112; *Chamberlain* v. *Napier*. That property is now vested in trustees who are domiciled in England; but that circumstance is merely accidental, and cannot, as between the trustees and Sir Gerald FitzGerald, affect either the duty of the trustees or the rights of Sir Gerald, which must, I conceive, be governed by the law of Scotland; and if a Scotch court would (as I think the evidence shows it would) hold that trustees domiciled in Scotland ought to pay the alimentary provision, made for Sir Gerald by the contract in Scotch form of the 20th of September, 1862, into his hands from time to time as it becomes payable, regardless of the incumbrances which he has purported to make thereon, then, in my opinion, this court ought likewise to hold that such is the duty of the trustees in the present case. If Sir Gerald FitzGerald were a domiciled Scotchman there would be nothing more to be said. But he was at the date of the marriage, and has ever since been, a domiciled Englishman, and he is now resident within the jurisdiction of the English courts. His capacity to deal with his property is an incident of his status (see *Viditz* v. *O'Hagan*), and, therefore, is governed by English law. By that law, as stated by Lord Macnaghten in *Tailby* v. *Official Receiver*, "it has long been settled that future property, possibilities, and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial, provided the intention of the parties is clear. To effectuate the intention, an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence, if this is of such a nature and so described as to be capable of being ascertained and identified." In *In re Coleman*, 39 Ch. D. 443, this principle was applied to an assignment of an interest under a will to which the assignor became entitled only by virtue of the exercise in his favour of a discretion vested in the trustees of the will. In this respect the capacity of Sir Gerald FitzGerald is entirely different from that of a domiciled Scotchman, who, according to the law of Scotland, is unable to alienate an alimentary provision any more than, according to the law of England, a retired officer can alienate his half-pay, either at law or in equity, or a retired incumbent the provision allowed to him under the Incumbents' Resignation Act, 1871, or a married woman separate estate as to which she is restrained from anticipation. In such cases the person entitled to the property in question is by English law incapacitated from dealing with it. But that law does not in general recognize any restraint as regards the property of a man of full age. I cannot see why the English owner of an alimentary provision, created by foreign law, should be held to be incapable of making a disposition of it when it comes to his hands. The foreign law has full effect given to it when it is allowed to determine what ought to come to the hands of the owner in respect of the alimentary provision; after it reaches his hands he is not under any obligation imposed by the foreign law as to how he should apply it, and, as it seems to me, the English law ought to determine whether that which has come to his hands, and become property at his disposal, is to any and what extent subject to obligations arising out of dealings valid according to that law. In my opinion, therefore, an assignment of an alimentary provision, created under foreign law, by will or voluntary deed *inter vivos* in favour of a domiciled Englishman ought to be held by the courts of this country to bind funds coming in respect of that provision to his hands within the jurisdiction of those courts. In the present case the alimentary provision was created by a contract into which Sir Gerald entered for valuable consideration. But I cannot see that this puts Sir Gerald in a better position than if he were a volunteer; for I take it to be clearly settled that the doctrine on which I rely applies to property acquired by contract for value just as much as property acquired by gift. In my judgment, therefore, an order ought to be made on the lines of that actually made by the Court of Appeal in *In re Coleman*, to which I have already referred. But, although I have been unable to satisfy myself that the opinion which I have expressed is opposed to any existing authority, I can adduce no decision in support of it, while the weighty and considered opinions of my brethren are adverse. In these circumstances I cannot regret that my own view is not to prevail.

VAUGHAN WILLIAMS, L.J.—In my judgment the ante-nuptial contract entered into by Sir Gerald FitzGerald and Miss Lockhart, with the concurrence of her mother, Lady Lockhart, ought not to be construed and applied according to English law, which is undoubtedly the law of the matrimonial domicil of the husband and wife, and which law would *primâ facie* determine all questions arising under that marriage contract, but ought to be construed and applied according Scotch law. It is the intention of the parties, gathered from the terms and circumstances of the contract, which determines the law which governs it, and in my judgment the Scotch form of this contract, coupled with the fact that Miss Lockhart, at the time of her marriage, was a domiciled Scotchwoman, and that the property, the subject of settlement, came from her family, is sufficient to displace the *primâ facie* presumption that the law of the matrimonial domicil is to govern the contract.

Now the Scotch law is thus stated by the late Lord Advocate (Mr. Graham Murray) in his affidavit: "By the law of Scotland it is possible for a person to create a life interest in favour of another person, and by declaring that life-rent to be alimentary, to exclude,

so far as the life interest does not exceed in amount a reasonable provision, the diligence of ordinary creditors and restrain all power of anticipation. When, therefore, as here, a lady by ante-nuptial marriage contract conveys her funds to trustees, it is possible for her to create a life-rent of these funds in favour of her surviving husband, and to exclude his ordinary creditors and to restrain him from anticipation."

The late Lord Advocate further points out that the non-chargeable nature of such an alimentary liferent would be upheld by the Scottish courts, if the question were there raised by a creditor against a Scottish trustee, and says that it is for the English court to determine whether, in a question with the English creditors of an English debtor, it will give effect to the Scotch law.

Assuming, as I do, that Scotch law governs all the rights created by the express or implied force of the words of the contract, it may be that there are rights which operate upon the contractual rights which are governed, not by the law which by the disclosed intention of the parties has come to be "the proper law of the contract," determining all questions of its legal effect and construction, but by the law of the actual domicil at the time when any dealing with the property the subject of the contract is attempted, such as questions of personal capacity in cases of minority, coverture, &c.

I cannot, however, persuade myself that in this case any question of personal capacity is raised. The case is simply this, that previous to the marriage a contract in the Scotch form, governed as to its legal construction and effect by the law of Scotland, was executed, whereby Miss Lockhart's property was settled upon trust (amongst other things), in case the husband should survive, that the proceeds of the estate should be paid to him for his life, but that all payments to him should be "strictly alimentary," and should "not be assignable nor liable to arrestment, or any other legal diligence at the instance of his creditors." These words of the contract limit the interest which the husband is to take, in the same way as in an English marriage contract the wife's interest is made subject to a restraint on anticipation. The restriction or chargeability in either case arises out of the terms of the contract and the trust thereunder. There is no personal incapacity; neither the wife in the case which I have put, nor the husband in the present case, can claim more under the trust than is given to her or him by the trust. It seems to me that no equity acting on the conscience of Sir Gerald FitzGerald can enable him, in respect of the life income given to him by the trust created by the contract, to do with that income that which it is impossible for him to do according to the effect of the Scotch contract, when construed by Scotch law.

Indeed, in the matter of the comparison of equities, I think that no obligations can bind the conscience of a person taking a life estate bestowed on him by another more strongly than the trust contract containing the conditions under which the donor has bestowed the gift, and this whether the conditions are expressed or are imposed by the law governing the contract. *Anstruther* v. *Adair* is really an authority for the proposition that an English court of equity, in construing a Scotch contract or enforcing a trust thereunder, will not enforce a wife's equity to a settlement against a husband who comes to the court to enforce against the surviving trustee resident in London his right to have a fund transferred to him absolutely, as the survivor of his wife, by virtue of a clause in the marriage contract. This seems to me in principle to decide that a court of equity in England will not, in contravention of plain provisions in a foreign contract, enforce equities binding the conscience of a beneficiary claiming under that contract.

If I am right in holding that in this case no question of personal capacity is raised, and if I am also right in what I have just said as to a court of equity not enforcing equities which, though binding the conscience of such a beneficiary, are inconsistent with the instrument under which he claims when construed by its proper law, *i.e.*, the foreign law, the only remaining question is whether the provision in this Scotch marriage contract, "that all payments to Sir Gerald FitzGerald shall be strictly alimentary and shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors," so conflicts with what are deemed in England to be essential public interests, that the provision cannot be enforced here. This, as I understand, is the ground on which Joyce, J., refused to give effect to the provision. He relied upon the law as stated in Westlake on Private International Law (3rd ed.), s. 215, that "where a contract conflicts with what is deemed in England to be essential public or moral interests, it cannot be enforced here, notwithstanding that it may have been valid by its proper law."

The law thus stated seems to me to be accurate, and to correspond, as pointed out by Westlake, p. 40, with article 6 of the Code Napoleon: "Private contracts cannot derogate from laws which interest public order or good morals." The question in each case is whether the foreign law or the private agreement conflicts with a law in which the public order and good morals concerned are essential enough to call into operation the reservation in favour of stringent domestic policy, which in principle is recognized and insisted upon by all civilized nations.

The English law, in so far as it refuses to give effect to provisions which affect to control the rights of disposition which are attached to an absolute transfer of property, does not seem to me to be a matter regarding "public order or good morals." It is, I think, merely a logical development from legal definitions adopted by the English law. But it is true that in its application this law has been made the means of protecting creditors, and yet I do not think that in a country which allows restriction on anticipation in respect of the separate property of a wife, it can possibly be said that to enforce a provision in a Scotch contract inconsistent with this law would be contrary to public order and good morals, even though the result might be to defeat the just rights of a creditor. There are other instances to which my attention has been called by the judgments of my learned brethren, which I have been allowed to read, in which sometimes the Legislature and sometimes the courts of common law have recognized restrictions as inconsistent as those in this Scotch contract with the alleged essential rule of public order and good morals.

I agree with the judgment delivered by Cozens-Hardy, L.J.; I cannot agree with the conclusion of Joyce, J.

THE COURT granted a stay of execution, pending an appeal to the House of Lords, on terms.

Solicitors, *G. J. Fowler*; *Surman & Quekett*; *Redfern & Hunt*; *White, Borrett, & Co.*; *Trower, Still, & Co.*; *Keen, Rogers, & Co.*

From K. B. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) And K. B. Div. (Bucklley, J.) — March 7, 8, 18.

In re BURNAND.

Ex parte THE TRUSTEE *v.* BAKER, SUTTON, & Co. (a.)

Bankruptcy—Right of trustee to books of bankrupt—Books of underwriter at Lloyd's—Underwriting as agent in the names of other persons—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 50—*Bankruptcy Rules,* 1886-1890, *r.* 349.

An underwriter at Lloyd's entered into agreements with other persons to act as their agent to carry on the business of an underwriter at Lloyd's in accordance with the custom of Lloyd's, and it was a term of the agreements that he should provide and keep books which the other parties should at all times be allowed to inspect. The agent in fact kept one set of books only in which his accounts with the other persons were entered. On the bankruptcy of the agent the other persons set up a claim to joint property in the books, and refused to hand them over to the trustee in his bankruptcy.

Held, on appeal (reversing the decision of Buckley, J.), *that the other persons had a joint property in the books with the bankrupt, and that the trustee in the bankruptcy was not entitled to have the books handed over to him, but had merely the right to inspect them.*

Application by the trustee in the bankruptcy of P. G. C. Burnand for the delivery up of the books of the bankrupt used by him in his business as an underwriter at Lloyd's.

The respondents, Messrs. Baker, Sutton, & Co., were accountants, in whose custody the books had been placed before the bankruptcy. They did not claim any personal right to withhold the books from the trustee, but refused to give them up because they had been warned not to part with them by five persons in whose names and on whose behalf the bankrupt had acted as agent for the purpose of underwriting policies of insurance and carrying on the ordinary business of an underwriter at Lloyd's. These persons claimed that the books were the joint property of themselves and the bankrupt, as they contained the records of all transactions entered into by the bankrupt on their behalf.

The material parts of the agreements under which the bankrupt underwrote in the names of these persons, so far as concerns the present case were as follows:—

Clause 1: "The said P. G. C. Burnand shall . . . act as the agent of the said A. B. for the purpose of underwriting policies of insurance at Lloyd's, and carrying on the ordinary business of an underwriter at Lloyd's in the name and on behalf of the said A. B. in accordance with the usual custom of Lloyd's, and upon the terms and conditions hereinafter contained."

Clause 5: "Proper underwriting and account books shall be provided and kept in the usual manner, and shall at all times be open to the inspection of the said A. B. or his agent thereunder appointed in writing, and the said P. G. C. Burnand shall at all times give to the said A. B. such information or explanations as to the books or the state of the account as he may require. The said books and accounts if required by the said A. B. shall be periodically audited by a professional accountant."

Clause 6: "The said A. B. so long as the underwriting is carried on under this agreement shall pay to the said P. C. G. Burnand while he shall duly perform the engagements on his part herein contained as a remuneration for his services in conducting the said underwriting business for keeping and providing books and papers and for providing a proper office and clerical assistants and all other outgoings and expenses connected with the underwriting business . . . the sum of £—— per annum."

S. G. Lushington, for the trustee.—The agreements clearly intend that Burnand is to be the owner of the books, otherwise there would be no need for them to contain the power of inspection given to the other party. That being so, it is the trustee's duty under section 50 of the Bankruptcy Act, 1883, to get possession of them, and by rule 349 no person is entitled to withhold possession of them, or to set up any lien thereon.

Muir Mackenzie, for the respondents.—The books were purchased with the money of the other parties. They are in the position of solvent partners who are entitled to possession of the firm books as against the trustee of a bankrupt partner.

S. G. Lushington was not called upon to reply.

BUCKLEY, J.—The respondents in this case have no property in or right of possession of the books, but they set up a *jus tertii,* and say that the parties for whom the bankrupt acted as agent have a joint property in the books with the bankrupt.

Now these books were provided and kept under the terms of certain contracts between the debtor and each of these other parties, and the clauses in these contracts which relate to the books provide that the books shall at all times be open to the inspection of the parties for whom the bankrupt acted as agent, and it is also provided that the bankrupt is to receive certain remuneration for *inter alia* "keeping and providing books." I think the result of those clauses is that the bankrupt had to find and pay for the books, and that they were his property. There would be no object in providing that the other parties should have a right to inspect if the books were their property.

Moreover, the books contain the record of sums receivable by or claims enforceable against six persons for which each of the six was severally liable. As between the five persons other than the bankrupt no one of them could claim the books against the others, or any of them, or against the bankrupt. He was to provide and keep them, they were his property, and must be handed over to the trustee in his bankruptcy.

From this decision Baker, Sutton, & Co. appealed.

Montague Lush, K.C., and *Muir Mackenzie,* for the appellants.

Scrutton, K.C., and *Lushington,* for the trustee, cited *Clarke* v. *Tipping,* 4 Beav. 588.

Montague Lush, K.C., replied.

VAUGHAN WILLIAMS, L.J.—I think this appeal ought to be allowed. From the agreements made between Burnand and the five persons named, I doubt whether one ledger for the five names was intended to be kept. If separate books had been kept for each name, whatever right Burnand might have had during the agency, when the agency determined each person named would have a right to his own book. But that is not the case here. One book only was kept for all the names and for Burnand's transactions with the five persons named, and the five persons named knew and acquiesced in this. In my opinion no order should have been made giving Burnand or his trustee exclusive control of the books. In the result the five persons named ought to have control of the books, and the trustee of Burnand the right of inspection. The order must be discharged.

STIRLING, L.J.—If separate books had been kept for each one of the five names, Burnand would have

(a.) Reported by P. M. FRANCKE and A. R. TAYLOUR, Esqrs., Barristers-at-Law.

had no right to the books as against each one of the five. But here one set of books only were kept with all five names. At the most Burnand obtained a joint interest with the five others, and Burnand's trustee cannot have a claim overriding that of the five others. At the same time inspection must be allowed to Burnand or his trustee.

COZENS-HARDY, L.J. — I can see no reason for giving the trustee a right overriding that of the five others, but an undertaking to allow Burnand or his trustee to have the right to inspect the books must be given by the five named persons.

Appeal allowed.

Solicitors for the trustee, *Parker, Garrett, Holman, & Howden.*

Solicitors for Baker, Sutton, & Co., *Ward, Bowie, & Co.*

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) Feb. 10.

KILGOUR *v.* GADDES. (*a.*)

Easement—Prescription—Right of way—Right to use pump—Long user—Dominant and servient tenements held under same landlord—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2.

A right of way or other easement capable of being acquired under section 2 *of the Prescription Act,* 1832, *by long user, cannot be so acquired by a lessee of a tenement over an adjoining tenement where both tenements are held under the same landlord.*

Application by the plaintiff for judgment or a new trial in an action tried before Walton, J., and a jury.

The plaintiff and the defendant were occupiers of adjoining houses in High-street, Longtown, in the county of Cumberland. The action was brought for an injunction to restrain the defendant from wrongfully entering the plaintiff's premises and drawing water from a well and making use of a pump thereon, and for damages. The defendant pleaded that he and the former occupiers of his premises had enjoyed as of right and without interruption for forty years the right to use the well and pump in question as being appurtenant to the defendant's premises, and that a right had been acquired so to use them by virtue of the Prescription Act (2 & 3 Will. 4, c. 71); and he counterclaimed for a mandatory injunction directing the plaintiff to remove an obstruction erected by him for the purpose of preventing the exercise of the alleged right by the defendant, and for damages.

Both the plaintiff's premises and the defendant's premises were of leasehold tenure and were held under the same ground landlord. In January, 1850, the landlord granted a lease of the latter premises for ninety-nine years, and in July, 1850, he granted a lease of the former premises for ninety-nine years. In 1899 the defendant became the assignee of the lease of January, 1850, and in 1900 the plaintiff became the assignee of the lease of July, 1850. The evidence showed that during the time the plaintiff had been in occupation of his premises and for many years previously the defendant and his predecessors in occupation had been in the habit of taking water from the pump in common with other adjoining owners. In December, 1902, the plaintiff, after expressing his willingness to allow the defendant to take water at reasonable hours, erected a partition and door, so that he might prevent access to the pump at unreasonable hours. On the 29th of December the defendant, at ten o'clock at night, burst in the door with the object of obtaining water. The plaintiff therefore brought this action.

The principal question at the trial was whether an easement for the use of the pump by the occupier of the defendant's premises had been acquired under the Prescription Act.

Walton, J., left certain questions to the jury, in answer to which they found that for forty years before the commencement of the action the pump had been used as of right by the occupiers of the defendant's premises, and that before January, 1850, when the long lease was granted, such occupiers had used the pump in question for the purpose of obtaining a supply of water for such premises.

The learned judge reserved the case for further consideration, when it was contended on the part of the plaintiff that the easement claimed by the defendant was incapable of being acquired under the Prescription Act, on the ground that such an easement could not be acquired by one tenant against another where both held under the same landlord.

Walton, J., held that an easement had been acquired by the defendant, and that the defendant was entitled to judgment on his counterclaim for an injunction and 1s. damages.

The plaintiff appealed.

Lancelot Sanderson, K.C., and *Lumb,* for the plaintiff.

Cavanagh, for the defendant.

The following cases were cited: *Bright* v. *Walker,* 1 C. M. & R. 211; *Wheaton* v. *Maple & Co.,* 41 W. R. 677, [1893] 3 Ch. 48; *Timmons* v. *Hewitt,* 22 L. R. Ir. 627; *Gayford* v. *Moffat,* L. R. 4 Ch 133, 17 W. R. Ch. Dig. 42; *Frewen* v. *Phillipps,* 9 W. R. 786, 11 C. B. N. S. 449; *Fahey* v. *Dwyer,* 4 L. R Ir. 271; *Beggan* v. *McDonald,* 2 L. R. Ir. 560; *Harris* v. *De Pinna, per* Chitty, J., 33 Ch. D. 238.

COLLINS, M.R.—The point in this case is a short one. It is whether as between two termors of separate tenements held under the same landlord a right of way can be acquired by prescription for the owner of one tenement over the other tenement. I say advisedly for the owner, for such a right cannot be claimed merely by a tenant against a tenant. A claim for a right of way by prescription must necessarily be a claim by the owner of a fee against the owner of a fee. Here there are two tenants, one of a so-called dominant tenement, the other of a so-called servient tenement, holding under the same landlord. If the proposition is true that a prescriptive right of way acquired under the Prescription Act must be acquired by an owner of a fee against an owner of a fee, the argument used on behalf of the defendant in this case would lead to this anomalous result, that the tenant of an owner of land has acquired for his owner a right of way over the owner's own land. That contention cannot be supported. I limit what I am saying to a right of way, and I am not concerned with the right to light, which stands apart and is governed by different provisions, viz., those of section 3 of the Prescription Act. Rights of way and other rights acquired under section 2 must be acquired, if acquired at all, as of right. This appears from the provisions of section 2 itself, and it is made more clear by section 5, which says that "it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed." Whether the enjoyment set up is enjoyment for twenty years or for forty years, it must have been an enjoyment which is

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

claimed as of right. The right to light stands on a different footing, and there the enjoyment need not be as of right. The reason why the enjoyment must be as of right is pointed out by Palles, C.B., in the case of *Timmons* v. *Hewitt*. He said: "These extracts from the judgments in *Beggan* v. *McDonald* appear to me to show that the case is no authority upon the question before us. Where the two tenements are held by termors under the same landlord, prescription does not apply; because, as pointed out by Lord Cairns in *Gayford* v. *Moffat*, 'the possession of the tenant of the demised close is the possession of the landlord; and it seems to be an utter violation of the first principles of the relation of landlord and tenant to suppose that the tenant, whose occupation of close A was the occupation of his landlord, could by that occupation acquire an easement over close B, also belonging to his landlord.' This doctrine was approved and acted upon by the Court of Common Pleas in this country in *Clancy* v. *Byrne*, Ir. R. 11 C. L., 355. If I am asked how it is consistent with the Prescription Act, I answer that such user and enjoyment is not as of right within the meaning of the second section. It is a user by a termor, who, if he acquire the right, must acquire it as incident to the land of which he is termor, and thus for the benefit of his reversioner. Such user cannot be as of right, unless a reversioner can in law by user acquire a right against himself." That was an authoritative enunciation of the law, and it seems to me to be conclusive of this case.

Walton, J., rested his judgment in this case on the authority of *Harris* v. *De Pinna*. In that case Chitty, J., expressed the opinion that an easement in the shape of a right of way or of that class could be acquired by a tenant over land belonging to his own landlord. But that opinion seems to have been based on an unsound foundation. It purported to be based on the two Irish cases of *Fahey* v. *Dwyer* and *Beggan* v. *McDonald*. *Beggan* v. *McDonald*, however, gives no support to the opinion at all. That was a case of two separate owners, and is no authority in a case of two tenants holding under the same landlord. *Fahey* v. *Dwyer* purported to follow *Frewin* v. *Phillipps*, but *Frewin* v. *Phillipps* was a decision on a claim to light, and it did not decide that a right such as is claimed here could be acquired by one tenant against another. I am of opinion that those cases do not support the view taken by Chitty, J. In the case of *Wheaton* v. *Maple & Co.*, a decision of this court, I find a statement of the law on this question by Lindley, L.J., which, in my opinion, is an authority for the proposition that a right claimed under the Prescription Act other than a right to light must be claimed in respect of the fee.

The Lord Justice there said: "I am not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant by such a person not to interrupt in the case of light, and I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years. Although, therefore, a grant by a lessee of the Crown, commensurate with his lease, might be inferred as a fact, if there was evidence to justify the inference, there is no legal presumption, as distinguished from an inference in fact, in favour of such a grant." In that passage he was dealing with the doctrine of a lost grant. Later on he deals with the Prescription Act as follows: "I come now to the last question—viz., whether section 3 has conferred an easement as against the Crown's lessees. So far as mere language is concerned, and apart from the nature of the subject-matter with which the section is dealing, I should see no difficulty in applying section 3 to all English subjects, whether lessees of the Crown or other people; I should see no difficulty in reading "absolute and indefeasible" as meaning absolute and indefeasible as against all persons to whom the section is applicable. But if the section is so read, the consequence will necessarily be to create, by mere occupation and enjoyment, a class of easements which at common law could never have been acquired by prescription, but only by express agreement or grant. An easement for a term of years may, of course, be created by grant, but such an easement cannot be acquired by prescription, and not being capable of being so acquired, it does not fall within the scope of the statute 2 & 3 Will. 4, c. 71. The expression "absolute and indefeasible," as applied to easements of all kinds, coupled with the declared object of the Act, which is to shorten the time for prescription, shows that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden for ever on the servient dominant. This view of the statute was clearly expressed soon after it passed in *Bright* v. *Walker*, and although some passages in Baron Parke's judgment in that case have been criticized, and even dissented from, the broad view which underlies the judgment has never been disapproved." That is inconsistent with the cases which Walton, J., followed, and is a sufficient answer to the defendant's claim. The appeal therefore succeeds.

ROMER and MATHEW, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Ullthorne, Currey, & Co.*, for *C. B. Hodgson*, Carlisle.

Solicitor for the defendant, *J. A. Broughton*, Carlisle.

From K. B. Div.
(Lord Alverstone, L.C.J., Collins, M.R., and Romer, L.J.) } Jan. 25.

BORTHWICK v. ELDERSLIE STEAMSHIP CO. (LIMITED). (a.)

Ship—Bill of lading—Exemption—Warranty of seaworthiness of ship—Fitness of ship to carry goods.

Meat was shipped at Melbourne for carriage to London under a bill of lading which contained the following clause in large print: "Neither the steamer, nor her owners, nor her charterers, shall be accountable for the condition of goods shipped under this bill of lading nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever." There was also a small print clause exempting the shipowner from liability for loss or damage resulting from (inter alia) "*defects, latent or otherwise, in hull,*

(a.) Reported by W. F. BARRY, Esqr., Barrister-at-Law.

tackle, boilers, or machinery, refrigeration, or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or at the commencement or any stage of the voyage), if reasonable means have been taken to provide against such defects and unseaworthiness." The ship had on previous voyages carried cargoes of horses, and for the purpose of cleansing the ship to receive the meat a quantity of carbolic acid was used. Upon the arrival of the meat in London it was found to be tainted with carbolic acid. The learned judge at the trial found that the damaged condition of the meat arose from the tainted condition of the ship at the commencement of the voyage in consequence of the use of carbolic acid, and that if proper care and skill had been used at Melbourne the damage would not have occurred. He held, however, that the large print clause, notwithstanding the limited exemption in the small print clause, exempted the shipowner from liability.

Held, that the large print clause did not confer upon the shipowner a general exemption from liability for loss arising from the unseaworthiness of the ship at the commencement of the voyage, and as reasonable means had not been taken to provide against the unseaworthy condition of the ship, the small print clause did not exempt him.

This was an appeal by the plaintiff from the judgment of Walton, J. (reported in 8 Com. Cas. 150).

The action was brought by the indorsee of bills of lading to recover damages for breach of contract in the carriage of meat by sea.

The meat was shipped under several bills of lading all in the same form, by which the defendants acknowledged that the meat had been shipped in good order and condition at Melbourne, Australia, on board the defendants' steamship *Nairnshire*, to be delivered (subject to the exceptions and conditions in the bills of lading contained) at London to order or assigns.

The bills of lading were respectively headed "Refrigerator Bill of Lading," and contained the two following material clauses. The first clause was in printed Roman type, and was as follows: "Neither the steamer nor her owners nor her charterers shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever. The steamer shall be at liberty to jettison the whole of the goods, or any part thereof, if considered necessary on account of decomposition or otherwise." The second was printed in small italics, and was as follows: "The act of God, the King's enemies, pirates, robbers, thieves, by land or sea (but not pilferage), arrests, or restraints of princes, rulers, or people, riots, strikes, lock-outs, or other labour disturbances, or delay or hindrance caused directly or indirectly thereby, and loss or damage resulting therefrom or from any of the following causes or perils are excepted—viz., insufficiency in packing or in strength of packages, loss or damage from coaling on the voyage, rust, vermin, breakage, leakage, drainage, sweating, evaporation, or decay, resulting from bad stowage, or otherwise, or from the leakage or flow of or from contact with the urine, manure water, or drainage from horses, cattle, sheep, or other animals carried on the said ship or from their stalls, however caused, or otherwise howsoever; injurious effects of other goods, whether arising from bad stowage or otherwise; effects of climate, insufficiency of ventilation, or temperature of holds; risk of craft, of transshipment, and of storage afloat or on shore; fire on board, in hull, in craft, or on shore; rain, hail, snow, frost, or ice; explosion, barratry, jettision; collision, whether with another ship or any other obstacle; stranding, lying upon, or touching the ground; perils of the seas, rivers, or navigation of whatever nature or kind, and howsoever caused; whether or not any of the perils, causes, or things above-mentioned, or the loss or injury arising therefrom, be occasioned by or arise from any act or omission, negligence, default or error in judgment of the master, pilot, officers, mariners, engineers, crew, stevedores, ship's husband or managers or other persons whomsoever in the service of the owners, or charterers; whether on board the said ship or on shore, or on board any other ship belonging to or chartered by them, or for whose acts they would otherwise be liable, whether such act, omission, negligence, default, or error in judgment shall have occurred before or after the commencement of or during the voyage; or any other causes beyond the control of the owners or charterers, or by or from any accidents to or defects latent or otherwise in hull, tackle, boilers, or machinery, refrigeration, or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness."

Upon arrival in London the meat was found to be tainted with carbolic acid. It appeared that *The Nairnshire* was fitted with refrigerating chambers for the purpose of carrying frozen meat. Before the voyage in question *The Nairnshire* had made two voyages with cargoes of horses, some of which were carried in the 'tween decks. For the purpose of cleansing the ship, and in order to disinfect her for the purpose of receiving the cargo of frozen meat, a quantity of carbolic acid was used.

The learned judge at the trial found as a fact that nothing had happened during the voyage from Melbourne to London to cause the frozen meat to become tainted by carbolic acid; that the damaged condition of the meat arose from the tainted condition of the ship at the commencement of the voyage in consequence of the use of carbolic acid; and that if proper skill and care had been used before she started from Melbourne the damage would not have occurred. He held, however, that the earlier clause, in large print, exempted the defendants from liability, notwithstanding the later clause. He accordingly gave judgment for the defendants.

The plaintiff appealed.

J. A. Hamilton, K.C., and *Loehnis*, for the plaintiff.

Carver, K.C., and *D. C. Leck*, for the defendants.

The following cases were referred to: *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 26 W. R. Dig. 216; *Tattersall* v. *National Steamship Co.*, 32 W. R. 566, 12 Q. B. D. 297; *Maori King* v. *Hughes*, 44 W. R. 2, [1895] 2 Q. B. 550; *In re Richardson and Samuel*, [1898] 1 Q. B. 261, 46 W. R. Dig. 156; *Rathbone Brothers & Co.* v. *McIver, Sons, & Co.*, *ante*, p. 68, [1903] 2 K. B. 378; *Price* v. *Union Lighterage Co.*, *ante*, p. 325, [1904] 1 K. B. 412.

Lord ALVERSTONE, L.C.J.—With great deference to the opinion of Walton, J., especially in any case of this kind, I have come to the conclusion that the learned judge has overlooked, or, rather, has not given sufficient effect to, certain broad considerations

which should always be taken into account in construing commercial or other documents. It is true to say that where there are, whether in a bill of lading or in any other document, a number of clauses the instrument must be read so as to make the clauses consistent, and not to reject a clause as surplusage, unless it is impossible to read it with the other clauses. There is one other general consideration which, as it seems to me, the learned judge did not give sufficient effect to. I prefer to state it in the language of Vaughan Williams, L.J., in *Rathbone Brothers & Co.* v. *McIver, Sons, & Co.*: "With reference to the carriage of goods by sea, the law implies certain warranties on the part of the shipowner. It puts upon him certain obligations which will always bind him, unless there are in the contract clear and express words which without ambiguity relieve him from that which I may call his common law obligations." It is to the same principle that, I think, Romer, L.J., referred: "Shipowners have been for a long time endeavouring to limit the general liability cast upon them by law as carriers by sea by inserting special exceptions, without going the length of excepting their liability in respect of the warranty of seaworthiness, and they have been, as I understand, from time to time extending the special exceptions. I think, however, I am right in saying that as a principle of construction the warranty of seaworthiness will be held not to have been excepted unless it plainly appears that it was intended to except it. In other words, the court will not readily infer an exception of that warranty." Those two passages lay down in clear and forcible language the principle which has to be applied. The learned judge in the present case has not given sufficient effect to the fact that the small print clause deals expressly with the warranty of seaworthiness of the ship. I agree with the first part of the argument of Mr. Carver that the small print clause leaves matters as they stood at common law so far as regards the warranty of seaworthiness, except that it gives a qualified exemption to the shipowners. In other words, the small print clause exempts the shipowners from loss or damage resulting from any defects, latent or otherwise, in hull, tackle, boilers, or machinery, refrigeration or otherwise, or their appurtenances, whether or not existing at the time of the goods being loaded, or the commencement of the voyage, or insufficiency of coals at the commencement or any stage of the voyage, if reasonable means have been taken to provide against such defects and unseaworthiness. The part of the argument which I am unable to follow is that the large print clause is intended to be an overriding clause exempting the shipowners from liability for unseaworthiness, whether existing at the commencement of the voyage or not, even though reasonable means have been taken to provide against unseaworthiness. It is said that the shipowners are protected unconditionally notwithstanding the limited protection afforded to them by the small print clause. I am unable to come to the conclusion that the large print clause, construed fairly, limits the warranty of seaworthiness so as to exempt the shipowners from liability for what occurred in this case. The clause protects the shipowners from liability "for any loss or damage thereto" (to the goods) "whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not." I think it is material to observe that the clause goes on, "nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever." It seems to me to be plain that the clause as to "failure or breakdown of machinery cannot be construed as getting rid once and for all, by reason of the words "or from any other cause whatsoever," of the liability of the shipowners for unseaworthiness. When one sees where those words are inserted, following, as they do, immediately on the clause relating specially to "failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise," I have no doubt that the words "or from any other cause whatsoever" relate to a subject-matter *ejusdem generis* with that which is dealt with in the preceding words, and cannot be construed as a general clause relieving the shipowners from liability for the unseaworthiness of the ship. I read the clause as protecting the shipowners from liability for loss or damage arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other similar cause whatsoever, whether arising from a defect existing at the commencement of the voyage or occuring during the voyage. I adopt Mr. Hamilton's argument that the latter part of the clause was inserted so as to extend in favour of the shipowners the exception as to loss arising from failure or breakdown of machinery, and to make it apply whether the failure or breakdown arose from a defect existing at the commencement of the voyage or not. The ship had before the voyage in question carried a cargo of horses, and in consequence she had to be disinfected. For this purpose a quantity of carbolic acid was used, which left a taint in the ship rendering her unfit to carry a delicate cargo like meat. That was the condition of the ship, and it rendered the ship unseaworthy for the carriage of the meat. I am unable to construe the large print clause as conferring a general exemption from the warranty of seaworthiness. In my opinion the warranty of seaworthiness is cut down as described in the small print clause, and under that clause the defendants, as they did not take reasonable means to provide against unseaworthiness, are not relieved from liability for loss or damage arising from the unseaworthiness of the ship. The appeal must, therefore, be allowed.

COLLINS, M.R.—I am of the same opinion, and have nothing to add.

ROMER, L.J.—I agree.

Appeal allowed.

Solicitors for the plaintiff, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the defendants, *Lowless & Co.*

High Court of Justice.

Chan. Div. } March 4.
Kekewich, J. }

In re COOPER AND CRONDACE'S CONTRACT. (*a.*)

Vendor and purchaser—Contract for sale and purchase—Conditions of sale—"Remarks"—Form of conveyance.

Provisions in a contract for sale and purchase, stating that something should be done either by vendor or purchaser after the estate has been vested, should be inserted as a covenant in the conveyance.

(*a.*) Reported by A. C. THOMAS, Esq., Barrister-at-Law.

Adjourned summons.

The question for consideration in this case was whether the effect of a certain clause (6) contained in the contract for the sale and purchase should be included in the conveyance as a covenant.

The property to which the contract related was sold by auction, and, together with the particulars and conditions of sale, there was a page headed "Remarks," clause 6 of which provided that: "Each purchaser will have to erect within six months from the date of sale, and afterwards maintain, a good and sufficient fence on the sides of his plot marked T on the plan within the boundary."

Cave, K.C., for the vendor.—General remarks are a part of the agreement: *Leggott* v. *Barrett*, 28 W. R. 962, 15 Ch. D. 306. Where such a provision is made it should be inserted as a covenant in the conveyance: *Birmingham District Land Co.* v. *Allday*, 41 W. R. 189, [1893] 1 Ch. 342.

Hon. T. H. Watson, for the purchaser.—There is no mention in "Remarks," "Particulars," or "Conditions" of any covenant being required from purchaser. In ordinary practice, if there is to be a covenant it is always mentioned in the particulars: Key & Elphinstone's Precedents, vol. 1 (7th ed.) 311. The vendor will not be hurt by not having this part of the contract entered as a covenant in the conveyance, as in case of need he could still sue on the contract: *Palmer* v. *Johnson*, 33 W. R. 36, 13 Q. B. D. 351, C. A. Conditions of sale should be construed against vendor: *Birmingham District Land Co.* v. *Allday*, [1893] 1 Ch. 342. In any event the words heirs, executors, administrators, and assigns, and the separate covenant with the mortgagee, are far too wide and should be struck out.

KEKEWICH, J.—This is a case of some novelty. No authority directly in point was cited by counsel for either side. What is the object of having a conveyance? Not merely to vest the estate in the purchaser, but also to express in a definite concluded form the terms of the contract which have to be performed by the purchaser. It is not usual to enter in a conveyance things to be done beforehand—for instance, that the vendor will put up a fence. There the purchaser would be well advised to see that it was done before the purchase was completed. Again, if there is something completely outside the contract, as, for instance, a question of compensation for injury to the property that would not appear on the conveyance. But otherwise the conveyance is meant to express in a clear and binding form, once for all, the clear contract between the parties as far as it has not been performed. I think that a conveyance that falls short of that is not a well-settled conveyance. For instance, if there are restrictive covenants to which the vendor is liable, and as to which he is entitled to a covenant by the purchaser—which I have held to be a covenant of indemnity—that must be put into the conveyance. If it is not there, I agree the conveyance is not properly settled. For once you have got a conveyance you cannot go behind that and say there is something more to be done. When once the bridge of conveyance has been passed neither party can go back, and cannot sue on an agreement made at the time of the contract, but not included in the conveyance, for it must be assumed not to have been embodied in the conveyance because it is presumed to have been abandoned.

That seems to me to be the object of a conveyance. Therefore, when you have to inquire whether this or that ought to be in the conveyance, you must find out if it is a part of the contract. Does the contract provide that it must be done either by the vendor or purchaser after the estate has been vested. For that purpose you must look at the contract itself. This particular contract here is that Lot 17, described in the particulars and subject to the conditions, should be sold by the vendor to the purchaser. It is common knowledge that although conditions of sale are different things from particulars of sale, that the purchaser takes the property in the particulars subject to the conditions.

It is the commonest possible occurrence to find in the particulars a reservation of a right of way, some restrictive covenant, some easement, which is part of the description of the property sold, and which is recognized as a part of or a fetter on the enjoyment of the property. Now, in this particular instance, we have three categories instead of two. I have seen the same thing before. Besides the conditions which are properly called signed conditions, there are "general remarks." They generally fall into the particulars. Take the general remark. [Reads clause 6.]

If that obligation had been intended to be imposed as one of some half-a-dozen out of a larger number, on two or three of these lots, it would have probably occurred to the draftsman to have inserted it at the foot of each description in the particulars as a note to each special lot. But it applies to every one. Therefore it comes into the particulars. The purchaser takes Lot 17, as described in the particulars, with the obligation to erect and afterwards maintain the fences specified. There you have something that must be done after the date of completion. It was not possible that it was intended that the fence should be erected before completion. So that you have something which ought to be introduced and to be in the conveyance in order to complete it and perform the contract. But it is pointed out by counsel for the purchaser that there is no condition to that effect, and the conditions would have been more perfect had it been there. But I cannot think that the omission removes the obligation—the obligation is to do this, and if the conveyance is prepared without this, the vendor runs great risk of not being in a condition to insist on it at all. It would be extraordinarily difficult to frame the indorsement of a writ so as to enforce this, if there was nothing in the conveyance about it. I do not say it would be impossible. The answer would be that it is an obligation which now has no legal means of enforcement not having been inserted in the conveyance. There will be a declaration that a covenant must be inserted in the conveyance, on the part of the purchaser, his heirs, executors, administrators, and assigns.

Solicitors, *F. C. Holland; Johnson, Weatherell, & Sturt*, for *Potter & Crundwell*, Farnham.

Chan. Div.
Byrne, J. } March 3.

VEZEY v. RASHLEIGH. (a.)

Contract—Written agreement—Land—Parol variation—Specific performance—Defence.

Although a parol waiver of a written agreement concerning land, amounting to a complete rescission of the original contract, may be a good defence to an action for specific performance, yet variations verbally agreed upon cannot be relied upon by way of defence, and the original agreement may, notwithstanding, be ordered to be specifically performed.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Motion.

This was a motion in an action for specific performance of an agreement which was resisted upon the ground (among others) that it had been subsequently varied by the parties by a parol agreement.

In 1903, the plaintiff, J. R. Vezey, brought an action against the defendant, Sir Colman Rashleigh, respecting a lease dated the 15th of August, 1901, of certain mines in Cornwall. This action was compromised, and an order was made in it by consent that all further proceedings, except such as were necessary for the purpose of carrying into effect the compromise set forth in the schedule thereto, should be stayed. The schedule, after declaring that the lease of August, 1901, should be treated as determined, continued: "2. A new lease of the premises comprised in the lease of the 15th of August, 1901, to be granted by the defendant, Sir C. B. Rashleigh, to the plaintiff, J. R. Vezey, at the rent of £50 per annum and dues 1-30th for the term of twenty-one years from Christmas, 1903"; (then followed a provision as to certain plant, buildings, and effects) "and to be on the same terms as the said lease of the 15th of August, 1901, with the exception that the lessee is not to be allowed to sink a shaft"; and the plaintiff was to pay the said defendant £100 towards his costs. Subsequently there were some negotiations between the plaintiff and Sir C. Rashleigh, and a conversation took place between them concerning certain proposed alterations in the terms of the new lease, and on the 11th of December, 1903, two documents containing the same terms were signed, one by the plaintiff and the other by the defendant, Sir C. Rashleigh. These documents were headed: "Topics of conversation between Sir Colman Rashleigh and Mr. Vezey," and contained the proposed or suggested alterations. The plaintiff alleged that an agreement was come to between himself and Sir C. Rashleigh that the terms of the lease as stated in the schedule to the order should be varied in accordance with the terms contained in the abovementioned documents of the 11th of December, 1903, and that those documents constituted a fresh written agreement between the parties varying the terms of the former agreement of compromise; and he therefore refused to execute a lease in the terms of the schedule to the said order. Sir C. Rashleigh denied that any such agreement had been entered into between them, or that the documents of the 11th of December, 1903, were or were intended to be an agreement, and he now moved in the action that the plaintiff should be ordered, in pursuance of the said agreement of compromise contained in the order, to execute a counterpart of the lease in accordance with the agreement.

Norton, K.C., and *G. B. Rashleigh*, for the defendants, referred to Fry on Specific Performance (4th ed.), p. 350, par. 809, and p. 448, par 1039, and *Price* v. *Dyer*, 17 Ves. 365, and *Robinson* v. *Page*, 3 Russ. 114.

Rowden, K.C., and *A. J. David*, for the plaintiff.

BYRNE, J.—The first question is whether the memorandum of the 11th of December, 1903, taken by itself, amounts to an agreement to rescind the agreement contained in the order. I do not think that it was intended to operate as an agreement at all. I cannot think that a business man such as the plaintiff would be content to accept as an agreement a document headed "Topics of Conversation." The question therefore becomes this, How far can I receive parol evidence to prove what took place at the discussion between the parties? It appears to me that *Price* v. *Dyer* and *Robinson* v. *Page* are authorities showing that although you may prove rescission of a written agreement by parol evidence of a subsequent agreement, that means parol evidence of an agreement for rescission only, and does not mean parol evidence of an agreement to make alterations in the terms of an existing contract. In *Price* v. *Dyer* the Master of the Rolls said (p 363): "It is then said that the agreement was waived; and that a written agreement may be so far waived by parol that the court will refuse the interposition of its equitable jurisdiction to enforce it. Not conceiving that there was in this case any waiver within the meaning of the *dicta* or decisions upon this subject, it is not necessary for me to give a precise opinion upon the point; but, as at present advised, I incline to think that upon the doctrine of this court such would be the effect of a parol waiver clearly and satisfactorily proved; but here there was no such waiver. The waiver spoken of in the cases is an entire abandonment and dissolution of the contract; restoring the parties to their former situation." In the case before me although there is a contradiction between the parties, there is no contradiction between them on the point that all that was intended to be done at the interview was as to a variation in the terms of the original agreement. In *Robinson* v. *Page* the then Master of the Rolls said (p. 121): "Now, in the whole of this transaction it does not appear to me that, when the treaty was entered for this variation, there was any intention in the mind of the parties to abandon the original contract. It is laid down in the authority I have referred to" (*Price* v. *Dyer*) "that, where the parties have entered into a binding agreement in writing, and variations are afterwards introduced by parol, or by an instrument not signed according to the Statute of Frauds, these variations are not sufficient to prevent the execution of the agreement, and are no answer to a bill for specific performance." I think, therefore, that in this case Sir C. Rashleigh is entitled to have the terms of the agreement as they appear in the schedule to the order carried out. There will be a reference to chambers to settle the terms of the lease in case the parties differ.

Solicitors, *Rashleigh, Son, & Hall; W. H. Martin.*

Chan. Div. } April 19.
Farwell, J. }

STEVENS v. KING. (a.)

Will—Gift in satisfaction of debt—General power of appointment—Lapse.

Where, under a general testamentary power, a sum of money is appointed in satisfaction of a debt, such appointment will not fail owing to the death of the appointee in the testator's lifetime.

The trustee of a marriage settlement made certain over-payments to the tenant for life of the settled fund. In compliance with an order of the court the tenant for life by her will appointed a sum equal to the amount overpaid to her in favour of the said trustee, who subsequently died in her lifetime.

Held, that there was no lapse, and that the sum appointed as aforesaid became payable to the estate of the deceased trustee on the death of the tenant for life.

Williamson v. Naylor, 3 *Y. & C. Ex.* 208, *and* In re Sowerby's Trust, 2 *K. & J.* 630, *followed.*

Petition.

This was an application by the person entitled to a fund in court under an indenture of settlement, for the payment out of court of the said fund.

By an indenture of setttement dated the 26th of

(a.) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

April, 1860, and made between Blinks of the first part, Charlotte Stuart of the second part, and William King, the trustee, of the third part, in consideration of the then intended marriage between the said Blinks and Charlotte Stuart, the fund, the subject of this petition, was assigned to the said William King upon trust to pay the income thereof to the said Charlotte Stuart for her separate use without power of anticipation during her life, and after her death to stand possessed of the said fund and the income thereof upon such trusts as the said Charlotte Stuart should by will appoint, and in default of such appointment upon certain trusts therein mentioned.

The said intended marriage between Blinks and Charlotte Stuart was duly solemnized on the 29th of April, 1860.

It appeared from the evidence that King, the trustee, had from time to time made certain overpayments to the said Charlotte Blinks, the tenant for life, amounting in all to £284.

The said settlement was the subject of an administration action, and on such action coming on for further consideration the court ordered that Charlotte Blinks should pay interest to King in respect of the said sum of £284 during her life, and it was further ordered that the said Charlotte Blinks should, in exercise of the power in that behalf contained in the said indenture of settlement, execute a valid testamentary appointment of a sum of £284 in favour of the said William King; and that the said Charlotte Blinks should not invalidate such appointment by any subsequent exercise of the said power.

By her will dated the 14th of September, 1877, the said Charlotte Blinks, after appointing a sum of £500 to go in satisfaction of a debt, appointed a sum of £284 to William King, in compliance with the said order, and appointed her sister executrix of her will. William King, the trustee of the said settlement, died in the lifetime of the testatrix.

On the death of Charlotte Blinks, the tenant for life under the settlement, the fund in court became distributable. Accordingly the petitioner, who was entitled under the ultimate trusts of the settlement filed this petition for the payment out of court of the settled fund. The petition was opposed by the personal representative of William King on the ground that the gift to him under the will of Charlotte Blinks had not lapsed by reason of King's death in the lifetime of the testatrix, and that a sum of £284 was payable out of the fund in court to King's estate.

Hart, for the personal representative of William King.—The gift to King ought not to fail. Whether lapse occurs is a question of intention, and here the intention clearly is to satisfy a debt, and not merely to give a bounty. Gifts in satisfaction of a debt do not lapse as a general rule. The debt rather than the person is regarded: *Williamson* v. *Naylor*, 3 Y. & C Ex. 208; *Philips* v. *Philips*, 3 Hare 281; *In re Sowerby's Trust*, 2 K. & J. 630; *Turner* v. *Martin*, 7 De G. M. & G. 429. In the cases cited the gift took the form of a legacy, not an appointment, but the principle to be applied in this case is identical with that applied in the cited cases. Here the gift is made by order of the court in satisfaction of a debt, and effect ought to be given to it.

Vaughan Hawkins, for the petitioner.—The order was merely to execute a valid appointment, and thereafter not to invalidate it. The appointment to King shows no wider intention than to comply with the terms of the order. There is no reason why the general rule as to lapse should not apply.

FARWELL, J., in giving judgment, said: Charlotte Blinks, the tenant for life, admitted her liability to William King, her trustee, and undertook to execute such appointment in his favour as was ordered by the court. She did in fact execute such appointment by her will; she also appointed her sister executrix. It is alleged that the gift to William King lapses, owing to his death in the lifetime of the testatrix; whether this is so is a question of fact and of intention. In *Williamson* v. *Naylor* and in *In re Sowerby's Trusts* the court found that if the testator intended not merely to make a gift, but to perform a moral duty, and the duty still existed at the testator's death, although the legatee was dead, there was sufficient ground to prevent failure of the gift owing to lapse. It is clear in this case that the intention was not merely to make a gift, but to perform an obligation which in fact still existed at the testatrix's death. This is shown by the reference to the order of the court contained in the will, and by the appointment of an executrix who under the terms of the will would have no assets to deal with other than the appointed funds. If King had been paid off, either wholly or in part, during the lifetime of the testatrix, to that extent he would have been unable to take under the will. The conclusion at which I arrive is, that the gift to King does not lapse, and that the sum of £284 ought to be paid out of the fund in court to King's personal representative.

Solicitors, *W. J. Fraser & Sons; W. W. Box.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) — JAN. 15, 18.

ASTON TUBE WORKS v. DUMBELL AND ANOTHER. (a.)

Practice—County court—Costs—Money paid into court—Remitted action—Defendant successful as to remainder of claim—Scale of costs applicable—Power of county court judge to give defendant costs—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65—*County Court Rules, ord.* 14, *r.* 12; *ord.* 53, *r.* 18.

The plaintiffs brought the action to recover the sum of £71 for goods sold and delivered. An order was made under order 14 that, as regards £23 18s. 10d. of that amount, judgment should be entered for the plaintiffs unless that sum was paid into court, and the action was then remitted to the county court. The defendants gave notice that they consented to judgment being entered for the plaintiffs as regards the sum paid into court. At the trial the defendants succeeded as regards the rest of the claim with costs, and their bill was taxed by the registrar on Scale C, "when the subject-matter or sum recovered exceeds £50." The county court judge reversed this decision, and taxed defendants' costs on Scale B, "when the subject-matter or sum recovered exceeds £20 and does not exceed £50."

Held, that the action was an action for over £50, and that the defendants were therefore entitled to have their costs taxed on Scale C.

Appeal by the defendants and cross-appeal by the plaintiffs from the judgment of the Wolverhampton County Court.

The action was brought in the High Court by the plaintiff company to recover the sum of £71 for goods sold and delivered. An order was made that as regards £23 18s. 10d. of that amount judgment should be entered for the plaintiff company unless that sum was paid into court. The defendants paid that sum into court, and the action was then remitted for trial to the

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

county court. The defendants gave notice that they did not defend the action as regards the amount paid into court. At the trial the defendants succeeded as regards the remainder of the claim, and judgment was entered for them with costs from the date of their consenting to judgment in respect of the £23. The registrar taxed the defendants' costs on the basis of Scale C, which is applicable "where the subject-matter or the sum recovered exceeds £50." On appeal to the county court judge he decided that the defendants were only entitled to have their costs taxed on the basis of Scale B, which is applicable "where the subject-matter, or sum recovered, exceeds £20 and does not exceed £50."

From this decision the defendants appealed, and there was a cross-appeal by the plaintiffs against the allowance of any costs to the defendants.

Disturnal, for the defendants.

McCondie, for the plaintiffs.

The arguments sufficiently appear from the judgments.

Lord ALVERSTONE, L.C.J.—Two important points are raised by the appeal and cross-appeal in this case. The first is whether the defendants who have succeeded, except as to £23, in an action brought against them for £71, and have obtained an order for their costs incurred after they consented to judgment for the £23, which they had brought into court under an order made under order 14, are entitled to costs on Scale B or Scale C of the scale of costs in use for the time being in the county court—that is, whether they are to be treated as having succeeded in respect of a claim exceeding £20, but not exceeding £50. The registrar taxed on Scale C. There was an application to the county court judge for a review of taxation. He decided that Scale B was applicable, and the defendants appeal from his decision. Now, I agree that the result of the authorities is that the action remains one action after the order sending it to the county court, and various consequences were pointed out in argument as following from that. For the plaintiffs it was argued from *White* v *Headland's Patent Electric Storage Battery*, 47 W. R. 273, [1899] 1 Q. B. 507, that the plaintiffs, having recovered £23 in the action for £71, the defendants could not be entitled to costs on the scale applicable where more than £50 has been recovered or claimed. In that case an action was brought in the High Court for £73. An order was made under order 14, giving the plaintiff leave to sign judgment for £53, and giving the defendants leave to defend as to the remainder, and it was ordered, under section 65 of the County Courts Act, 1888, that the action should be sent for trial to the county court. The plaintiff signed judgment for the £53, and at the trial in the county court he got judgment for the remainder of his claim with costs. The Court of Appeal held that he was entitled to have his costs in the county court taxed according to Scale C. Now, assuming that the result of the trial in the county court had been the other way, it could not, I think, have been successfully contended the defendants were only entitled to costs on Scale B. Here the defendants having brought into court a sum which they say is sufficient to satisfy the plaintiffs' claim, and being willing to submit to judgment for that sum and costs, the plaintiffs say it is not enough and seek to recover the whole £71, the contest between them being whether or not the plaintiffs are entitled to any more than they have got. Ord. 53, r. 1, of the County Court provides that where the costs of a defendant are being taxed, the word "recovered," wherever it occurs in the scale shall be deemed to be claimed. Applying that rule to the decision in *White* v. *Headland's Patent Electric Storage Battery*—namely, that the action is one action, I think it is clear that Scale C. is the scale applicable here, being the scale which applies to the amount originally claimed by the plaintiffs. If the plaintiffs had recovered the whole of the claim they would have been entitled to have their costs taxed upon Scale C, and I think it would be a great injustice if the defendants, who have succeeded as to the residue of their claim, were not also entitled to taxation upon Scale C, the scale of costs applicable being determined so far as they are concerned by the amount which the plaintiffs claim. I am therefore of opinion the defendants' appeal should be allowed. The second question which arises on the plaintiffs' appeal is whether the defendants are entitled to any costs at all. It was argued that as the defendants had paid the £23 into court under an order of the High Court made under order 14, the payment could not be treated as a payment into court to which the County Court Act and rules applied, and the county court judge therefore had no power so to treat it to give the defendants their costs. But the county court procedure is intended to deal with substance and not with form. There are no pleadings in the county court, and where the money is in court and the defendant gives notice to the plaintiff that he may take it in satisfaction of his claim, that is just as good a payment into court as it would be in the High Court if the provisions of ord. 22, r. 1 of the High Court rules were complied with.

It was also contended that the defendants were not entitled to any costs on the ground stated in *dicta* of Ridley and Darling, JJ., in *Wright & Son* v. *Bull*, [1902] 2 Q. B. 124, W. R. Dig. 53. In that case the action was brought in the High Court for £20 2s., and leave was given to the plaintiffs under order 14, to sign judgment for £14 if that sum was not paid within seven days. The defendant had leave to defend as to the residue of his claim, the action was sent for trial, under section 65 of the County Court Acts, 1888, in the county court. The defendant paid the £14 within seven days and at the trial in the county court judgment was given for him as to the residue, but no order was made as to costs.

The Divisional Court held that he was not entitled to any costs. In the course of his judgment Ridley, J., said: "Has the county court judge the same power over the costs which the High Court judge has? Can he say that the costs down to the recovery of the £14 must be borne by the defendant but the rest of the costs must be borne by the plaintiff? I do not think he has such a power, although I should be much inclined to say that he ought to exercise such a discretion if he possesses it. But the discretion of the judge is, by section 113 of the County Court Act, 1888, limited to costs not 'herein otherwise provided for, and that I think narrows the power of the county court judge to deal with the costs to such matters as are not dealt with by the general scheme of the Act. The section seems to me to have been put in with a view to include such costs as were not dealt with by the general enactment as to costs, but in the absence of any special direction it was provided that cost should abide the event." I cannot agree with these *dicta*. To my mind the suggestion cannot be accepted that the words "not herein otherwise provided for" narrow the power of the county court judges in such a way that he cannot deal with costs which are to follow the event in the absence of any special direction. "Otherwise provided for" means otherwise provided for in the rules. The *dicta* in the passage I have read were not necessary to the

decision, because there had been no order as to costs. In that case section 50 of the County Courts Act, 1888, which gives the power to send certain actions of contract for trial in the county court, provides that "the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts. Section 113 provides that all the "costs of any matter or action in the court not herein otherwise provided for shall be paid and apportioned in such manner as the court shall think just, and in default of any special direction shall abide the event of the action or matter. Reading those two sections together I think it is clear that the county court judge's discretion is not limited in the way suggested. It must, I think, be admitted, that if the action is an action in the county court the judge has a discretion under section 113. In my opinion the action, when transferred to the county court, must be conducted in the same way and with the same consequence as if it had been commenced in that court, and section 113 applies. It is not a sufficient answer for the plaintiffs to say that because they have recovered something the costs must be according to that result. The plaintiffs, appeal therefore fails. I wish to add that we decide this case on the understanding that the county court judge did not exercise his discretion, but thought he was bound to allow the defendants their costs on Scale B as being the scale legally applicable.

WILLS, J.—I am of the same opinion, and have little to add. This order as to costs made by the county court judge was not made in the exercise of a judicial discretion between the two scales of costs; it was made upon a wrong view that Scale B, and not Scale C, was the scale legally applicable to the circumstances of the case before him. We should not, of course, interfere with his decision if he had only been considering whether as a matter of the proper exercise of his discretion he should give the defendants their costs on Scale B or on Scale C. But that is not so; he meant to give costs according to the scale provided in the Act, and his decision was founded, not upon an exercise of his discretion, but upon an erroneous application of principle. It was argued for the plaintiffs that in a scheme devised by the Legislature for the trial speedily and at a moderate expense of actions sent for trial in the county court there were no means by which the defendant could get his costs in the county court if he had paid money into court under an order made under section 14.

If that be so, the consequence follows that the defendant is exposed to the certainty of having to pay costs on Scale C if the plaintiff succeeds in the county court; but that if the plaintiff recovers nothing at all in the county court because the defendant has paid into court all that he owes, the defendant cannot be entitled to any costs at all. That is a startling view; and, speaking for myself, if I thought it was the true view to take I would never in such a case make an order for sending the case to the county court at all.

I am not fond of the argument at *ab inconvenienti*; but I think it may sometimes be legitimately used when the argument on the other side leads to a result so unjust as that which has been contended for here. I do not think the Legislature can have intended to bring about such a result, and one has to see whether some other view is not the true one. I agree with my lord's judgment both as to the *dicta* in *Wright* v. *Ball* and on the other points which have been argued in this case.

KENNEDY, J.—I agree.

Appeal of defendants allowed; plaintiffs' appeal dismissed; leave to appeal.

Solicitors for plaintiffs, *A. H. Arnould & Co.*, for *Buller & Cross*, Birmingham.

Solicitors for the defendants, *Christopher & Roney*, for *Hunt & Skidmore*, Wolverhampton.

K. B. Div. (Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) — Dec. 18, 21; Feb. 1.

SURREY COMMERCIAL DOCKS CO. (*Appellants*) *v.* MAYOR, &c., OF BERMONDSEY (*Respondents*). (*a.*)

Local government—Metropolis—Notice before beginning to build—Authority conferred on dock company by private Act inconsistent with public Act — Surrey Commercial Dock Act, 1894 (57 & 58 *Vict. c. clxvii.*), *s.* 4—*Metropolis Management Act,* 1855 (18 & 19 *Vict. c.* 120), *s.* 76.

The appellants, a dock company incorporated by Act of Parliament, obtained in 1894 *statutory authority to extend and alter their works. In order to carry out those alterations it became necessary for the appellants to pull down a certain building and erect another on another site within the dock premises. This work they carried out, but gave no notice to the local authority of their intention to erect the new building.*

Held, that there was no duty on the part of the appellants to give such notice of their intention to build under section 76 *of the Metropolis Management Act,* 1855, *which section provides that before beginning to lay or dig out the foundations of any new building seven days' notice is to be given to the local authority by the person intending to build, as the control of the local authority under that Act was inconsistent with the powers conferred upon the appellants under their statutory authority.*

Case stated by G. Paul Taylor, Esq., metropolitan magistrate.

The appellants appeared in answer to a summons served upon them on behalf of the respondents charging that they, on the 3rd of April, 1903, unlawfully and without having given seven days' notice in writing to the respondents did begin to lay or dig out the foundation of a new building in Finland-yard, Redriffe-road, in the borough of Bermondsey, contrary to the provisions of section 76 of the Metropolis Management Act, 1855.

Upon the hearing of such summons the following facts were proved or admitted:

The appellants are a company constituted and incorporated under the Surrey Commercial Dock Act, 1864, for the purpose of carrying on the undertaking defined in section 15 of such Act, and for executing the works authorized by such Act, and for maintaining such undertaking and works.

The docks, basins, lands, buildings, and other premises, conveniences, and works defined in section 15, and authorized by section 53 of the Surrey Commercial Dock Act, 1864, are surrounded by and contained within dock fences and gates, within which the appellants have and exercise all the powers conferred upon them by the Surrey Commercial Dock Act, 1864, the Surrey Commercial Dock Act, 1894, and the Acts incorporated with such respective Acts or amending the same.

Portions of the appellants' said premises upon which

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

warehouses, workshops, and other buildings are erected are entirely surrounded by water, and none of the portions so surrounded can be drained by gravitation into any sewers of the respondents outside the appellants' said premises. It would, however, be possible to drain them by syphons under the locks, but this would necessitate pumping and be very expensive.

The respondents are under and by virtue of the London Government Act, 1899, the successors of the vestry of the parish of Rotherhithe, in which parish, now part of the borough of Bermondsey, the appellants' premises are situate, and are the local authority for the purposes of section 76 of the Metropolis Management Act, 1855, and sections 37 and 38 of the Public Heath (London) Act, 1891. The appellants' premises are also situate within the district of the Port of London Sanitary Authority, which authority exercises certain powers under the Public Health (London) Act, 1891, within the appellants' premises, under certain orders of the Local Government Board under section 112 of the Public Health (London) Act, 1891.

By the Surrey Commercial Dock Act, 1894, the appellants were empowered to make and maintain the works described in section 4 of such Act, which works included a new road (No. 1) and "sewer commencing in Swing-bridge-road and terminating in Rotherhithe-road, and the raising and alteration of the levels of Swing-bridge-road between the western end of the swing bridge and the commencement of such new road (No. 1) and sewer." In connection with the works specially authorized by this section to make and maintain (*inter alia*) all necessary and proper embankments, approaches, roads, buildings, yards, and other works and conveniences, and to alter, break up, stop up, and divert any pipes, wires, tubes, sewers, drains, and other works on or under any lands within the limits of deviation.

Pursuant to the powers conferred on them by section 4 of the Surrey Commercial Dock Act, 1894, the appellants made the works mentioned in that section, and raised the level of the Swing-bridge-road. The raising of the level of the Swing-bridge-road has rendered it necessary for the appellants to construct an inclined approach for wheeled vehicles from such road to a yard belonging to the appellants called Finland-yard, on the south side of the Swing-bridge-road. This approach would, when completed, occupy the site of certain buildings in that yard consisting of an engineers' office and workshop for fitters and blacksmiths, and in order to construct the approach it became necessary for the appellants to demolish the buildings and erect other buildings instead thereof in the yard. The appellants have demolished the engineers' office, and are about to demolish the workshop for fitters and blacksmiths. They have constructed a temporary approach from and to the Swing-bridge-road to and from the yard, and have erected a new workshop in the yard, which is to be used in connection therewith for the purposes of the appellants' undertaking instead of the fitters' and blacksmiths' workshop.

The appellants did not give to the respondents any notice of their intention to lay or dig out the foundation of this building, but prior to erecting it they deposited with the Port of London Sanitary Authority detailed plans and specifications thereof. Such plans and specifications were duly approved by that authority, and the building was erected in conformity therewith.

Certain of the powers of a local authority under the Public Health (London) Act, 1891, and the Public Health (Amendment) Act, 1890, have been conferred upon the Port of London Sanitary Authority by orders of the Local Government Board under section 112 of the Public Health (London) Act, 1891, but not (*inter alia*) sections 37 and 38. The port sanitary authority claims to be the local authority within the dock walls of the appellants, and on the 5th of September, 1896, the medical officer of health of the said port sanitary authority wrote to the appellants' manager a letter, of which the following is a copy:

"Sir,—In order to avoid any uncertainty in the minds of your officers as to the exact position of the port sanitary authority with reference to sanitary matters, I have to point out that the port sanitary authority is the local authority within the dock walls. Will you kindly give instructions to your dock officials that no sanitary works should be carried out without first submitting detailed plans and specifications thereof to this office and obtaining official sanction. Sanitary works will include all works in connection with the erection, alteration, and repair of water-closets or privies, urinals, drains, &c. Such an instruction will save the dock company much trouble and expense.—Your obedient servant, W. Collingridge, Medical Officer of Health"

On behalf of the appellants, it was contended that the erection of the new building was rendered necessary by the alteration of the level of the Swing-bridge-road. That such erection was a work the appellants were authorized by section 4 of the Surrey Commercial Dock Act, 1894, to make. That the respondents had no power to control them in the exercise of their powers under that section, and that the appellants were under no obligation to serve notice on the respondents of their intention to lay or dig out the foundations of the said new building under section 76 of the Metropolis Management Act, 1855, that section, so far as buildings erected pursuant to their special Act were concerned, having been repealed by implication by the special Act. In support of the appellants' contention, the following cases were cited: *City and South London Railway Co.* v. *London County Council*, 40 W. R. 166, [1891] 2 Q. B. 513; *London County Council* v. *London School Board*, 40 W. R. 604 [1892] 2 Q B 606.

On behalf of the respondents, it was contended that the appellants were bound to give them notice under section 76 of the Metropolis Management Act, 1855, which section provides (*inter alia*) that before beginning to lay out or dig the foundation of any new house or building within any parish or district, seven days' notice in writing shall be given to the vestry by the person intending to build such house or building. That there was no clause in the Surrey Commercial Dock Act, 1894, expressly repealing section 76 of the Metropolis Management Act, 1855. That the powers conferred by the Surrey Commercial Dock Act, 1894, or any other Act conferring powers upon the dock company, could not be held to repeal by implication section 76 of the Metropolis Management Act, 1855, unless it could be shown that the two Acts were inconsistent. That there was no inconsistency in the appellants' having power to erect buildings and giving the respondents the notice specified in section 76 of the Metropolis Management Act, 1855, the following cases being quoted in support of the respondents' contention: *Whitechapel Board of Works* v. *Crow*, (1901) 65 J. P. 549, 49 W. R. Dig. 117; *Uckfield Rural District Council* v. *Crowborough District Water Co.*, 48 W. R. 63, [1899] 2 Q. B. 664; *Grand Junction Waterworks Co.* v. *Hampton Urban District Council*, 46 W. R. 614, (1898) 62 J. P. 566; *London County Council* v. *Wandsworth and Putney Gas Co.*, (1900) 64 J. P. 500, 48 W. R. Dig. 120; *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe*, (1903) 67 J. P. 286, 51 W. R. Dig. 108.

That the contention of the port sanitary authority

that they are the sole local authority with reference to sanitary matters is not true, in view of the fact that the particular powers conferred upon the port sanitary authority by the orders issued by the Local Government Board, dated the 25th of March, 1892, the 29th of December, 1894, and the 30th of June, 1899, neither specifically excluded the powers of the respondents arising under the Metropolis Management Act, 1855, nor their powers as a sanitary authority arising under the Public Health (London) Act, 1891, other than those transferred by the said orders. Among the powers not so transferred are the powers under sections 37 and 38 of the said Act, and it was urged, on behalf of the respondents, that unless they were entitled to notice under section 76 of the Metropolis Management Act, 1855, buildings might be erected without their knowledge as in the present case, and so without any opportunity on their part of securing in their construction compliance with the provisions of the said sections.

The learned magistate found as a fact that the new building was a building within the meaning of section 76 of the Metropolis Management Act, 1855, and had been erected by the appellants upon land belonging to them within the limits of deviation shown on the deposited plans referred to in section 4 of the Surrey Commercial Dock Act, 1894, and that the erection of the new building had been rendered necessary by the raising and alteration of the levels of the Swing-bridge-road authorized by the last-mentioned section.

He was, however, of the opinion that the provisions of section 76 of the Metropolis Management Act, 1855, are not inconsistent with the provisions of section 4 of the Surrey Commercial Dock Act, 1894, and therefore held that the provisions of section 76 of the said of Act of 1855, requiring notice to be given to the respondents before beginning to lay or dig out the foundations of any building within that section, were not repealed with regard to buildings erected by the appellants pursuant to section 4 of the said Act of 1894, and that the appellants had been guilty of the offence alleged in the said summons.

The question for the opinion of the court was whether or not this determination was correct in law.

Macmorran, K.C. (*Cunningham Glen* with him), for the appellants.

Avory, K.C. (*H. C. Biron* with him), for the respondents.

Cur. adv. vult.

Feb. 1.—Lord ALVERSTONE, L.C.J., read the judgment of the court:

This is a special case stated by Mr. Paul Taylor, one of the metropolitan magistrates, and raises a point of some importance under section 76 of the Metropolis Management Act, 1855. The appellants are the Surrey Commercial Dock Co. and the respondents the Corporation of Bermondsey, the successors of the Vestry of Rotherhithe. The area of the appellants' docks is within the area of the borough. The appellants are a company incorporated under the Commercial Dock Act, 1864, for the purpose of carrying on the undertaking mentioned in section 15 of that Act. The statute of 1864 does not appear to contain any clause dealing specially with the Metropolis Management Act, unless it be section 125, upon which no reliance was placed by the respondents. In the year 1894 the appellants obtained statutory powers to make certain alterations in their dock premises, all of which were situated within the area of their undertaking under the Act of 1864; and by section 4 of the Act of 1894 the company were authorized to make and maintain, among other works, "a new road (No. 1) and sewer, commencing in Swing-bridge-road and terminating in Rotherhithe Lower-road, and the raising and alteration of the levels of the Swing-bridge-road between the western end of the swing bridge and the commencement of such new road (No. 1) and sewer." This section, in enumerating the particular works, gave the company power, subject to the provisions of the Act, to make and maintain all necessary and proper sewers, drains, culverts, buildings, yard, and other works, and to alter, break up, stop up and divert any pipes, sewers, drains, and other works on or under any lands within the limits of deviation. The appellant company subsequently raised the level of the swing bridge, as they were empowered to do under this section, and constructed the new bridge, and this alteration involved the occupation of the site of certain buildings of the yard, among others a workshop for fitters. In consequence the appellants demolished the workshop for fitters, and erected a new workshop upon another site within the ambit of their dock premises, such site, as the plans attached to the case show, being wholly surrounded by docks.

It was contended on behalf of the respondents that prior to the commencement of digging out the foundation of the new workshop it was incumbent upon the appellants to give notice to the respondents under section 76 of the Metropolis Management Act, 1855, and that the foundations must be laid at such a level as would permit the drainage of the workshop in accordance with the Act and as the respondent board should order, and that any drain from the workshop must be constructed in accordance with the directions of the vestry under that section. It was contended on behalf of the appellants that, having regard to the statutory powers already referred to, it was not incumbent upon the appellant company to give notice under section 76, but the power and responsibility of deciding as to any drains within the statutory area was vested in the appellant company, and that the respondents had no jurisdiction—at any rate, as far as section 76 was concerned—in that area. Beyond the sections to which we have already referred, no direct assistance can be gathered from any other sections, but it is not unimportant to observe that section 19 does require notice to be given to the respondents where any work to be done, by virtue of the Act of 1894, may pass over, under, or by the side of or interfere with any sewer under their control; and section 27 imposed restrictions with regard to the building line upon buildings erected upon land purchased by the company, and sub-section (8) of section 29 subjected any buildings erected or provided by them to the provisions of the Metropolis Building Act, 1855, and the Metropolis Management Act, 1855.

The learned magistrate decided that the new workshop was a building within the meaning of section 76, that it had been erected on land belonging to the appellants within the limits of deviation shown in the deposited plans referred to in section 4 of the Act of 1894, but he held that the provisions of the Act of 1894 were not inconsistent with section 76 of the Metropolis Management Act, 1855, and that therefore the appellants ought to have given notice. The question appears to us to be one of considerable difficulty. In favour of the respondents it may be urged that the new workshop is not a work specially authorized by the Act of 1894, but is only consequential on the demolition of the old workshop in consequence of the alteration of the Bridge-road, necessitated by the raising of the level of the Swing Bridge-road, and if this be so there does not seem to be any reason why the provisions of a general Act applicable to the area in which the proposed building is situated should not apply. Upon the other hand it may be urged that the control of the

respondents in the matter of foundations is inconsistent with the power and duty of the dock company properly to maintain the works within their area, and that the statute clearly contemplates that the duty of providing the necessary works, and of taking the proper precautions for their construction and maintenance, should rest with the dock company. In this view it would, of course, be inconsistent with this argument that the local authority should be able to deal with the question of the depth of foundation which might in some cases affect the stability of other works which the dock company have been authorised and empowered to maintain. In favour of the appellants the judgment in the *City and South London Railway Co.* v. *London County Council*, 40 W. R. 166, [1891] 2 Q. B. 513, was relied upon, and to a certain extent it is an authority in their favour; it does not, however, seem to conclude the case altogether. That was a case in which the London County Council complained that a station erected by the City and South London Railway Co. did not conform with the general building line. The Queen's Bench Division and the Court of Appeal decided that the company were not bound by the provisions of the Metropolis Management Act in that respect, notwithstanding that the building could have been erected within the general line of buildings without any inconvenience except a considerable expense. In that case the Court of Appeal held that if the buildings which the railway company were erecting were buildings necessary for the statutory purpose it was not within the power of the county council to dictate how in particular they should construct them. That case cannot be regarded as a direct authority for the point raised in the present case, because, as we have already pointed out, the work here constructed was not a work expressly authorized as in the *City and South London Railway Co.'s case*, but it was only something which the court found it necessary to do in consequence of a building previously existing having been destroyed by the works specially authorized. It is, however, found by the learned magistrate, in the case, that the erection of the new building had been rendered necessary by the raising and alteration of the levels of the swing bridge authorized by section 4 of the Act of 1894. Upon the whole we are of the opinion that the principle ought to be extended to this case. It seems to us that dealing with a statutory undertaking as to which rights and obligations are imposed by statute upon a particular body, express enactment or a clear implication is necessary in order to transfer the responsibility to a body acting under a general statute. We think also that to a certain extent the reference to the Metropolis Management Acts in the latter section of the statute to which we have referred confirms this view. We however decide the case upon the broad principle that the interference of control involved in section 76 of the Metropolis Management Act, 1855, is inconsistent with the powers conferred upon the appellants under their statutory authority. It was said that this view was contrary to a decision of the court in the *Charing Cross Electric Supply Association* v. *Woodthorpe*, but when that case is examined that will not be found to be so. In that case the question arose as to notice being given to a number of public authorities, and it was alleged that because a provisional order confirmed by Act of Parliament gave the Board of Trade and the Postmaster-General certain rights of control over the character of certain structures that excluded the necessity of complying with the provisions of the London Building Act, 1894. The court decided in that case that the protection given to one class of the public by the control of those two authorities—namely, the Board of Trade and the Postmaster-General, ought not to deprive the public of the protection given to them by the London Building Act. That decision obviously in no way conflicts with the judgment which we are giving. For those reasons we are of opinion that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants, *W. R. Millar & Sons.*

Solicitor for the respondents, *Frederick Ryall.*

Court of Appeal.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) — April 14.

CHELSEA WATERWORKS CO. *v.* METROPOLITAN WATER BOARD. (*a.*)

Waterworks—Dividend—"Prescribed rate"—Preference stock—"Paid-up capital in the company"—Dividend not prescribed in special Act—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 2, 75—*Companies Clauses Act,* 1863 (26 & 27 *Vict. c.* 118), *s.* 13.

By section 75 *of the Waterworks Clauses Act,* 1847, "*the profits of the undertaking to be divided among the undertakers in any year shall not exceed the prescribed rate, or, where no rate is prescribed, they shall not exceed the rate of ten pounds in the hundred by the year on the paid-up capital in the undertaking, which in such case shall be deemed the prescribed rate, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend.*" *By section* 2, "*prescribed*" *means prescribed in the special Act. By section* 13 *of the Companies Clauses Act,* 1863, *where any company is authorized by a special Act to be thereafter passed to issue any preference stock, the company may issue such stock at a rate of dividend not exceeding* 5 *per cent. per annum.*

A waterworks company was authorized by its special Acts of 1864 *and* 1875, *which incorporated the Waterworks Clauses and the Companies Clauses Acts, to issue preference stock. No rate of dividend was specified in either of the special Acts. The company issued preference stock bearing interest at the rate of* 4½ *and* 5 *per cent. per annum respectively.*

Held, that the "prescribed rate" for the preference stock, within the meaning of section 75 *of the Waterworks Clauses Act,* 1847, *was* 4½ *and* 5 *per cent. respectively.*

Case stated by the Court of Arbitration (Sir Edward Fry, Sir Hugh Owen, and Sir J. Wolfe Barry) appointed under the Metropolis Water Act, 1902, to assess the compensation payable upon the purchase of the Metropolitan water companies.

During the hearing of the arbitration in connection with the Chelsea Waterworks Co. it appeared that the total capital of the Chelsea Co. in shares and stock created, issued, and paid up consists of the following items—viz., £782,322 ordinary stock; £150,000 5 per cent. preference stock; £160,000 4½ per cent. preference stock; £643 4½ per cent. convertible preference stock; making in all £1,092,965.

The arbitrators held that on the true construction of the Chelsea Co.'s Acts, 1852, 1864, and 1875, and the Waterworks Clauses Act, 1847, and the Companies Clauses Act, 1863, the rates of 5 per cent. and 4½ per cent. on the above-mentioned 5 per cent. preference stock and 4½ per cent. preference stock (other than the above-named 4½ per cent. convertible

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

preference stock) were the prescribed rates on those stocks respectively, and that the company were entitled to divide as *maximum* dividends the sums of 10 per cent. on the sums of £782,322 ordinary stock and £643 4½ per cent. convertible preference stock, of 5 per cent. on the sum of £150,000 5 per cent. preference stock, and of 4½ per cent. on the sum of £160,000 4½ per cent. preference stock, and no more.

The court awarded to the Chelsea Co. as follows: (*a*) If the Court of Appeal shall hold that we were right in our decision of the said point of law, then the sum of £3,305,700. (*b*) If the Court of Appeal shall hold that, according to the construction of the said Acts, the company are entitled to divide as a *maximum* dividend the sum of 10 per cent. on the total capital of £1,092 965, then the sum of £3,418,000. (*c*) If the Court of Appeal shall put any other construction on the said Acts than one or other of the constructions hereinbefore mentioned, then the award is to be returned to us with a declaration of the true construction of the said Acts in order that we may make another award in compliance with the said declaration.

None of the Chelsea Waterworks Co.'s special Acts prescribed any rate of dividend. The above-mentioned 5 per cent. and 4½ per cent. preference stocks were issued by the company under the company's special Acts of 1864 and 1875, as hereinafter mentioned.

By the Waterworks Clauses Act, 1847, s. 75, "the profits of the undertaking to be divided among the undertakers in any year shall not exceed the prescribed rate, or, where no rate is prescribed, they shall not exceed the rate of ten pounds in the hundred by the year on the paid-up capital in the undertaking, which in such case shall be deemed the prescribed rate, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate." By section 2, "the expression 'the special Act' used in this Act shall be construed to mean any Act which shall be hereafter passed authorizing the construction of waterworks, and with which this Act shall be incorporated; and the word 'prescribed' used in this Act in reference to any matter herein stated shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word occurs shall be construed as if, instead of the word 'prescribed' the expression 'prescribed for that purpose in the special Act' had been used."

By the Companies Clauses Act, 1863, s. 13 (which was in Part II. of the Act), "where any such company"—that is, any company incorporated either before or after the passing of this Act for the purpose of carrying on any undertaking—"is authorized by any special Act hereafter passed and incorporating this part of this Act to raise any additional sum or sums by the issue of new preference shares, or by the issue of new preference stock, or (at the option of the company) by either of those modes, then in every such case the company . . . may . . . from time to time create and issue . . . such new shares or new stock, either ordinary or preference, and either of one class and with like privileges, or of several classes and with different privileges, and of the same or different amounts, and respectively with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred, or other dividend or interest, not exceeding the rate prescribed in the special Act, and if no rate is prescribed, then not exceeding the rate of five pounds per centum per annum, and subject (as to any such new shares) to the payment of calls of such amounts and at such times as the company from time to time thinks fit."

The Chelsea Waterworks Act, 1852 (15 & 16 Vict. c. clvi.), by section 13, incorporated the Waterworks Clauses Act, 1847, and by sections 16-21 divided the capital of the company into ordinary shares, giving power to the company to issue new shares. By the Chelsea Waterworks Act, 1864 (27 & 28 Vict. c. xxxix.), s. 7, Parts II. and III. of the Companies Clauses Act, 1863, were incorporated in the Act. Section 8 empowered the company to raise, by way of additional capital, any sum not exceeding £285 000 by the issue of new ordinary shares, or by the issue of new preference stock, or (at the option of the company) by all or any of those modes. Under this Act the company issued the £150,000 5 per cent. preference stock. By the Chelsea Waterworks Act, 1875 (38 & 39 Vict. c. cviii.), s. 2, certain parts, including Part II., of the Companies Clauses Act, 1863, and, with respect (*inter alia*) to the amount of profit to be received by the undertakers, the Waterworks Clauses Acts, 1847 and 1863, were incorporated with and formed part of the Act. By section 7 the company were empowered from time to time to raise, by the creation and issue of new shares or new stock, whether preferential or ordinary, or both, any further sums not exceeding in the whole £160 000. Under this Act the company issued the £160 000 4½ per cent. preference stock.

Sir Edward Fry, in delivering the judgment of the Court of Arbitration, said that two important questions arose for their determination. The first was, what was the meaning of "the paid up capital in the undertaking" in section 75 of the Waterworks Clauses Act, 1847? He had no doubt that it meant the whole sum of £1,092,965; it was not the ordinary share capital of the undertaking, it was the paid-up capital of the undertaking, and it dealt with that. If nothing else had occurred the rights of the shareholders would be these—in no case could the profits to be divided ever go beyond 10 per cent. on that £1,092,965, the total ordinary and preference capital of the company. When they came to be divided the preference shareholders would be entitled to their preferential dividends, and the whole residue of net profits, after payment of those dividends, would be divisible among the ordinary shareholders, and their right to dividend would be their aliquot portion of that surplus revenue after paying the preferential dividend, and any deficiency in the dividend would be the difference between what they actually received and what they would have been entitled to receive by a division of that entire surplus profit. The second question was whether a rate had been "prescribed" as to the whole or any part of the capital of the company. Section 2 of the Waterworks Clauses Act, 1847, showed that by the words "prescribed rate" was meant a rate prescribed by statute. Had any rate been prescribed by statute? In the two special Acts of 1864 and 1875, under which the preference stocks were issued, there was incorporated that part of the Companies Clauses Act, 1863, which included section 13. In neither of those two special Acts was any special rate prescribed. Section 13 provided for a rate "if no rate is prescribed then not exceeding the rate of five pounds per centum per annum." In their opinion that was a prescription of a rate. It was a prescription by statute; it was a limitation by statute of the right to receive more than five per cent. or such less sum as the company might determine. With regard to the 5 per cent. preference stock, therefore, they held that that clause applied, and that no more than 5 per cent. could be deemed to be the prescribed amount. With regard to the 4½ per cent. preference stock, the question was not quite so clear, but in their judgment the same conclusion must be arrived at, and for this reason, that what was prescribed was a rate not exceeding £5 per cent. per annum. That seemed

to delegate to the company the right of prescribing something less than 5 per cent. Therefore they thought that the 4½ per cent. must be taken as that amount, and that therefore there was a right to receive only 10 per cent. on the ordinary capital and 5 per cent. and 4½ per cent. respectively on the two classes of preferential capital.

Sir Edward Clarke, K.C., Haldane, K.C., E. Boyle, K.C., and *Boydell Houghton*, for the Chelsea Waterworks Co.—The words "the paid-up capital in the undertaking," in section 75 of the Waterworks Clauses Act, 1847, mean the whole of the paid-up capital, both preference and ordinary. It is a domestic arrangement among the various shareholders that some should agree to take a fixed rate of dividend at 4½ or 5 per cent., which is not touched by section 75. Section 75 was passed for the protection of the public so as to prevent the payment of dividends at a greater rate than 10 per cent. per annum on the whole paid-up capital of the company. The court of arbitration took this view of section 75, but held that the effect of section 13 of the Companies Act, 1863, is to "prescribe" a rate of dividend on preference shares and stock not exceeding 5 per cent. per annum—that is not a correct construction of the Act. It is not a prescription of a rate within the meaning of sections 2 and 75 of the Act of 1847. The Legislature could not have intended by a general Act, applicable to all kinds of companies, to cut down the special rights conferred upon shareholders in waterworks companies by section 75 of the Waterworks Clauses Act, 1847. Further, even if section 13 of the Companies Act, 1863, prescribed a rate of dividend in the case of the 5 per cent. preference stock, there was no "prescribed rate" in the case of the 4½ per cent. preference stock.

J. F. Moulton, K.C., J. D. Fitzgerald, K.C., and *A. B. Shaw*, for the Metropolitan Water Board, were not called upon.

COLLINS, M.R.—This is an appeal from the Court of Arbitration appointed under the Metropolis Water Act, 1902, and the question is whether, upon the true construction of section 75 of the Waterworks Clauses Act, 1847, the company are entitled to distribute among the ordinary shareholders in the shape of dividends a sum which would result in those shareholders receiving dividends exceeding 10 per cent. per annum upon the ordinary stock of the company. [His lordship read section 75 of the Act of 1847 and the definitions of "the special Act" and "prescribed" in section 2, and continued:] Part of the capital of the company consist of preference stock, some carrying interest at the rate of 5 per cent. and some at the rate of 4½ per cent. It is contended that the only rate "prescribed" is the rate of 10 per cent. prescribed by section 75 of the Act of 1847, inasmuch as the special Acts do not prescribe any rate, and that if the full amount of dividend at the rate of 10 per cent. upon the whole of the capital of the company is still unexhausted, then, even though a portion of the capital may consist of 5 per cent. or 4½ per cent. preference stock, the sum available for distribution under the section must be applied to make up the dividends to 10 per cent. upon the whole capital, though as between the ordinary and preference shareholders the latter could only claim 5 per cent. or 4½ per cent. respectively on their shares, and to that extent the ordinary shareholders would benefit by it. That depends upon whether the preference stock has a "prescribed rate" of dividend. It seems to me that Sir Edward Fry has arrived at a correct conclusion, that there is a prescribed rate of dividend in respect of the different classes of capital in the company. There is a rate of 10 per cent. prescribed by section 75 of the Act of 1847 in respect of the ordinary stock, and with respect to the preference stock there are statutory provisions as to the creation and issue of preference shares and stock, by reason of which 5 per cent. and 4½ per cent. are respectively the prescribed rates of dividend on those classes of stock. The special Acts of 1864 and 1875 under which the preference stocks were issued, incorporate that part of the Companies Clauses Act, 1863, which contains section 13, and upon looking at that section I find a limit of dividend for preference shares and preference stock prescribed, such dividend not to exceed the rate of £5 per centum per annum. That part of the Act is to be read into and to form part of the special Acts, and the rate there mentioned is the prescribed statutory rate. There is, therefore, a rate "prescribed for that purpose in the special Act" as to the 5 per cent. preference stock, and that is the prescribed rate."

With regard to the 4½ per cent. preference stock, in my opinion Sir Edward Fry and his colleagues are right upon that also. The Legislature has given the company power to issue preference stock at any rate of dividend not exceeding the rate of 5 per cent. per annum. When that statutory power is exercised the rate becomes a "prescribed rate," and the company are not entitled to distribute more than that rate of dividend. There is, therefore, a prescribed rate by statute for both the preference stocks and a prescribed rate of 10 per cent. for the ordinary stock by section 75 of the Act of 1847. The appeal consequently failed.

ROMER, L.J.—I agree with the reasons given by Sir Edward Fry, and with the judgment of the Master of the Rolls, and I have nothing to add.

MATHEW, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the Chelsea Waterworks Co., *Hollams, Sons, Coward, & Hawksley.*

Solicitors for the Metropolitan Water Board, *Linklater, Addison, Brown, & Jones.*

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) — April 13.

ANDREW v. FAILSWORTH INDUSTRIAL SOCIETY (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Accident arising out of and in the course of the employment—Death from lightning—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

A bricklayer was killed by lightning while working at a height of 23 *feet above the level of the ground on a scaffolding which was being used for the purpose of constructing a building more than* 30 *feet in height. In proceedings taken by his widow under the Workmen's Compensation Act,* 1897, *expert evidence was given to the effect that the deceased man's risk of being struck by lightning was appreciably increased by reason of the exposed position in which he was working at the time.*

Held, that the county court judge was justified in coming to the conclusion that the deceased was killed by an accident arising out of, as well as in the course of, his employment.

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Appeal from an award of Judge Bradbury, sitting in the Oldham County Court, in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of a deceased workman, who met with his death by being struck by lightning while working in the employment of the Failsworth Industrial Society (Limited).

At the hearing of the arbitration it was proved or admitted that the deceased man was a bricklayer, and that he was working in the erection of a building exceeding 30ft. in height, which was being constructed by the employers by means of a scaffolding, and that at the moment when he was struck by lightning he was working with another man on the scaffolding about 23ft. above the level of the ground.

The employers contended that the accident did not arise out of the deceased man's employment, but was an act of God. They relied on *Armitage* v. *Lancashire and Yorkshire Railway Co.*, [1902] 2 K. B. 178, 50 W. R. Dig. 112, as showing that there must be some connection between the accident and the employment.

The county court judge adjourned the case in order that expert evidence might be called as to whether there had been an abnormal degree of danger from lightning to the deceased by reason of the place in which he was working at the time.

At the adjourned hearing the following expert evidence was given by Dr. Garrard, an engineer and electrician: "I have been told of the place and circumstances in which the deceased man was working. He was on a scaffold 23ft. from the ground. I consider that a very exposed position. If it is wet the danger is increased. The main fact is the elevation above the earth. Another feature is that he would constitute a well-defined point at which a discharge would be more likely to occur. Buildings and other erections afford protection over a space which diminishes as you ascend vertically. If you draw a line at an angle of 45 degrees from the highest point of an erection to the earth, persons within the cone are protected, and it is, therefore, clear that, as you ascend, the zone of safety diminishes. I consider that a man working on an elevated scaffold runs an appreciably greater risk from that fact."

The county court judge made an award in favour of the applicant. In the course of his judgment he said as follows: "The question is, did the accident arise out of the employment? It no doubt arose in the course of the employment, but that is not sufficient; it must also arise out of the employment. . . . Mr. Elliott says the accident must arise out of the work which the man was doing, and he says that, if there is no connection between the work and the accident, then it does not arise out of the employment. I am bound to say that I cannot agree with that. Though it may not be connected with or have any relation to the work the man was doing, yet if in point of fact the position in which the man was doing the work, and the place he must necessarily occupy whilst doing the work, are a position and place of danger which caused the accident, it may be fairly said that it arose out of the employment, not because of the work, but because of the position. . . . In this case, therefore, if I come to the conclusion that, as a matter of fact, the position in which the man was working was dangerous, and that in consequence of the dangerous position the accident occurred, I could fairly hold that the accident arose out of the employment. Now, was it a dangerous position? Was the man exposed to something more than the normal risk which everybody, so to speak, incurs at any time and in any place during a thunderstorm? We know that lightning is erratic, and possibly no position and circumstances can afford absolute safety. But if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment; and if in consequence of that extra danger a fatality occurs, I am entitled to say that the section applies and the applicant is entitled to recover. I have had some evidence on the point, and the evidence, especially that of Dr. Garrard, seems to me to entitle me properly to come to the conclusion that in this case, under the circumstances, there was a substantial, abnormally increased risk, owing to the position or place in which the man had to work; and, in accordance with the principles before stated, which I think should govern the case, I find that the accident did arise out of the employment, and I give judgment for the widow for £300, and costs."

The employers appealed.

Arthur Powell, K.C., and *Adshead Elliott*, for the employers.—The accident in this case was not an accident arising out of the employment any more than in the case of *Armitage* v. *Lancashire and Yorkshire Railway Co.*, where a workman engaged at his work was accidentally injured through the tortious act of a fellow-workman which had no relation whatever to their employment. In the Scotch case of *Falconer* v. *London and Glasgow Engineering Co.*, 3 Fras. 564, 38 Sc. L. R. 381, Lord Trayner referred to this very case of a man being struck by lightning. He said: "A servant engaged in a foundry-yard if struck by lightning in the course of his employment and seriously maimed would have no claim to compensation under the Act, nor would his representatives have a claim if he was killed."

C. A. Russell, K.C., and *H. Holman Gregory*, for the applicant.

COLLINS, M.R.—In my opinion this is a perfectly clear case. The *primâ facie* difficulty has been pointed out and dealt with in the remarkably lucid judgment of the county court judge. He refers to the crucial point, and deals with what I may call the fallacies of the employers' argument. [His lordship read the judgment.] I cannot frame a more accurate direction than that given by the county court judge, and I think the evidence justifies the conclusion at which he arrived. Although the event of being struck by lightning has been referred to by judges as a typical instance of an accident not arising out of a man's employment, and as being, on the contrary, *primâ facie*, an instance of something arising altogether outside a man's employment, I think that that *primâ facie* view may be rebutted. The *dictum* on which the employers have sought to rely must, it seems to me, be taken as referring to a case in which the factors on which the county court judge in this case has based his judgment were eliminated. I am of opinion that there was evidence in this case which justified the county court judge in coming to the conclusion that the deceased was killed by an accident arising out of, as well as in the course of, his employment.

ROMER and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the applicant, *Field, Roscoe, & Co.*, for *G. P. Fripp*, Oldham.

Solicitors for the employers, *W. Hurd & Son*, for *Chapman & Brooks*, Manchester.

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) March 29.

BUSHELL v. HAMMOND. (a.)

Licensing law—Control of justices over licensed premises—Power to order alterations on renewing licence—"Part of the premises where intoxicating liquor is sold or consumed"—Premises with front and back entrances—Jurisdiction to order back entrance to be closed—Licensing Act, 1902 (2 *Ed.* 7, *c.* 28), *s.* 11, *sub-section* 4.

Under section 11, *sub-section* 4, *of the Licensing Act,* 1902, *where an application is made for the renewal of a licence in respect of premises which have both a front and a back entrance, the justices have power, on renewing the licence, to order the back entrance to be closed, although there is no evidence that intoxicating liquor has ever been sold or consumed at the back entrance or in the passage immediately inside the back entrance.*

Judgment of Lord Alverstone, L.C.J., *and* Wills *and* Channell, JJ. (51 *W. R.* 695), *affirmed.*

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Wills and Channell, JJ.) on a case stated by the East Kent Quarter Sessions on the hearing of an appeal from an order made by the respondents, the justices of Ramsgate, under section 11, sub-section 4, of the Licensing Act, 1902 (51 W. R. 695).

The appellant, G. H. Bushell, was the tenant of a fully-licensed public-house known as the "Coach and Horses," Ramsgate, under a licence which, unless renewed, would have expired on the 5th of April, 1903.

At the general annual licensing meeting for Ramsgate held in February, 1903, the appellant applied for a renewal of his licence. The justices required the production of a plan of the premises, and at the adjourned meeting in March they renewed the licence and at the same time ordered that the appellant should close the back entrance to the premises with a substantial gate, to be kept locked, except for the purpose of delivering beer, coals, or other goods, or for private use by the tenant or his household. This back entrance gave access to the premises from a public passage leading out of a back street. Immediately inside the entrance was a passage leading to the bar.

The appellant, being dissatisfied with this order, appealed to quarter sessions.

Section 11, sub-section 4, of the Licensing Act, 1902, under which the licensing justices purported to act, is as follows:

"On any application for the renewal of a licence for the sale by retail of intoxicating liquors to be consumed on the premises, the licensing justices may require a plan of the premises to be produced before them, and to be deposited with their clerk, and, on renewing any such licence, they may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed, but any such order shall be subject to an appeal to a court of quarter sessions, as provided by the Alehouse Act, 1828, and, if any such order for structural alteration is made and complied with, no further requisition for the structural alteration of the premises shall be made within the next five years. If the licensed person makes default in complying with any such order, he shall, on summary conviction, be liable to a fine not exceeding twenty shillings for every day during which the default continues."

On the hearing of the appeal before the quarter sessions it was proved that intoxicating liquor was sold and consumed in the bar, bar parlour, and club room, but that no intoxicating liquor was sold at or near the back entrance or in the passage leading thereto. No evidence was given that any intoxicating liquor was consumed at the back entrance or in the passage leading thereto, but it was admitted that there was nothing to prevent such consumption, and that the back entrance and passage were in fact used by customers for entering and leaving the premises. It was proved that it entailed extra work on the police to exercise the supervision necessary to secure the proper conduct of the business so long as the back entrance remained unclosed.

It was contended by the appellant that the respondents had no jurisdiction to make the order, on the ground that it was not an order for an alteration in that part of the premises where intoxicating liquor was sold or consumed.

The quarter sessions held that the justices had jurisdiction to make the order under the Act, and dismissed the appeal.

On the hearing of the special case, the Divisional Court affirmed the decision of the quarter sessions.

The appellant appealed to the Court of Appeal.

J. Eldon Bankes, K.C., and *G. F. Hohler,* for the appellant.—The power to order alterations under sub-section 4 of section 11 of the Licensing Act, 1902, is expressly limited to alterations "in that part of the premises where intoxicating liquor is sold or consumed." A distinction is to be observed between this sub-section and sub-section 2. That sub-section forbids the making of alterations in licensed premises without the consent of the licensing justices. There the phraseology is much wider: "Any alteration in any licensed premises for the sale by retail of intoxicating liquors to be consumed thereon, which gives increased facilities for drinking, or which affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises or any street or other public way, shall not be made without the consent of the licensing justices."

Dickens, K.C., and *J. W. W. Weigall,* for the respondents, were not called upon to argue.

COLLINS, M.R.—This is an appeal from a judgment of the Divisional Court, affirming a decision of quarter sessions on an appeal from licensing justices. The question is whether the licensing justices had jurisdiction, under section 11, sub-section 4, of the Licensing Act, 1902, to order a certain alteration to be made in licensed premises in respect of which an application had been made for a renewal. The justices, as they had the power to do, under that sub-section, required a plan of the premises to be produced and deposited with their clerk. This was done, and the plan showed that the premises had a means of access from a back street through an open passage, as well as the proper front entrance in the main street. The justices, thereupon, on renewing the licence, made an order which, while remedying the evil arising from the house having two entrances, involved the least alteration in the premises and the smallest inconvenience to the occupier. Instead of making any more drastic order, they required the appellant not to allow the back entrance to be used except for the purpose of delivering goods or by the members of his family. It is said that this order was outside their jurisdiction.

By sub-section 4 of section 11 of the Licensing Act, 1902, "On any application for the renewal of a licence

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

for the sale by retail of intoxicating liquors to be consumed on the premises, the licensing justices may require a plan of the premises to be produced before them and to be deposited with their clerk, and, on renewing such licence, they may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed." The justices, as I have said, on renewing the licence, made the order which I have mentioned, thinking that the alteration which they directed was one reasonably necessary to secure the proper conduct of the business. The quarter sessions thought that the order made by the licensing justices was reasonable, if it was within their power, and they held that it was within their power, and they dismissed the appeal brought to them subject to this case. The Divisional Court affirmed the decision of the quarter sessions.

In order to understand sub-section 4 of section 11 of the Licensing Act, 1902, it is necessary to look at the whole section. The side note of the section, which I think it is permissible to refer to, though it does not form part of the statute itself, is as follows: "Control of justices over structure of licensed premises." Sub-section 1 says that a person intending to apply for a new licence shall deposit with the clerk to the licensing justices a plan of the premises in respect of which the application is to be made. Then sub-section 2 is as follows: "Any alteration in any licensed premises for the sale by retail of intoxicating liquors to be consumed thereon, which gives increased facilities for drinking, or conceals from observation any part of the premises used for drinking, or which affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises or any street or other public way, shall not be made without the consent of the licensing justices . . . and, if any such alteration is made . . . without such consent as aforesaid, a court of summary jurisdiction, on complaint, may by order declare the licence to be forfeited, or direct that, within a time fixed by the order, the premises shall be restored to their original condition." Sub-section 3 deals with the rights of owners of premises when a licence had been forfeited. Then comes sub section 4, which I have read.

I think that sub-section 2 and sub-section 4 must be read together. Sub-section 2 applies where premises are already licensed, and it says that certain alterations, which it describes, shall not be made without the consent of the justices. Sub-section 4 applies where a renewal of a licence is being asked for, and it gives the justices the power to order certain alterations to be made. One of the alterations not to be made is a thing which clearly exists in the premises in this case. The mischief which the Legislature desired to prevent or to control was the doing or allowing something which might give increased facilities for drinking, or which might conceal from observation any part of the premises used for drinking, or which might affect the communication between the part of the premises where intoxicating liquor was sold and any other part of the premises or any street or other public way. Clearly that mischief exists in this case. In my opinion, sub-section 4 is a provision enabling the justices to order to be done when granting a renewal of a licence that which, under sub-section 2, they might order to be done in a case where there was a licence subsisting. One of the things which they may order under sub-section 2 is the refraining from making any alteration in the means of access to the premises. And, in my opinion, when, under sub-section 4, they are considering what alterations they shall require to be made in the premises at the time of renewing a licence, they are justified in taking into consideration the means of access thereto. I have come to the conclusion that the justices were clearly acting within their jurisdiction in making the order which they have made. The appeal will therefore be dismissed.

ROMER and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Speechly, Mumford, Rodgers, & Craig*, for *Edward Wotton*, Ramsgate.

Solicitors for the respondents, *Kingsford, Dormas, & Co.*, for *A. B. Burrows*, Ramsgate.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — March 2, 3.

DUNLOP PNEUMATIC TYRE CO. (LIMITED) AND PNEUMATIC TYRE CO. (LIMITED) v. DAVID MOSELEY & SONS (LIMITED) AND INDIA RUBBER TYRE AND REPAIRING CO. (a.)

Patent—Infringement—Combination patent—Sale of constituent parts—Intention to infringe.

If the manufacture and sale of an article, which is a constituent part of a patent consisting in a particular combination, are not in themselves unlawful as infringing the patent, they do not become so by reason of the sale being to a person whom the vendor knows intends to infringe the patent.

Townsend v. Haworth, 12 *Ch. D.* 831n, 48 *L. J. Ch.* 770n, *followed.*

Decision of Swinfen Eady, J. (ante, *p.* 189), *affirmed.*

This was an appeal from a decision of Swinfen Eady, J. (reported *ante*, p. 189, [1904] 1 Ch. 164).

The plaintiffs were the proprietors of the Welch patent 14,563 of 1890, for "improvements in rubber tyres and metal rims or felloes of wheels for cycles and other light vehicles," and of the Bartlett patent 16,783 of 1890, for "improvements in tyres or rims for cycles and other vehicles."

The patents were combination patents, the Welch patent being claimed as "4. A rubber or elastic tyre having the form of a saddle or arch in section lined with canvas in combination with two wires or sufficiently inelastic cores for securing the same to the rims or tyres substantially as herein described"; and "9. A rubber or elastic tyre having the form of a saddle or arch in section provided with endless wires or cores fitted or vulcanized within each side for the purpose of securing the same to the rims in combination with an inflatible inner tyre or tube substantially as described and shown with reference to figs. 15 and 18 of the drawings"; and "10. A rubber or elastic tyre having the form of a saddle or arch in section, lined with canvas and provided with endless wires or cores for covering, protecting and securing an inflatible inner tube or tyre substantially as herein described"; and the Bartlett patent being claimed as "1. The combination of a grooved rim or metal tyre and an arched tyre of indiarubber or other flexible material held in the groove by the pressure of an inflated tube within the arch which forces its edges against the side of the groove substantially as described"; and "2. Tyres or rims for cycles and other vehicles," consisting of "the outer tyre of

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

indiarubber or other elastic material," and "a metal tyre or rim," and "an air-tight tubular chamber," combined and arranged substantially as described and shown in the drawings.

The defendants David Moseley & Sons (Limited), who were rubber manufacturers, and did not supply rims, wires, or inner tubes, did not make or sell either of the above combinations, but they had for many years made and sold loop-edge covers with pockets for the insertion of wires which the plaintiffs alleged could only be used for the Welch combination, and beaded-edge covers which the plaintiffs alleged could only be used for the Bartlett combination. The plaintiffs brought the present action for an injunction to restrain the defendants David Moseley & Sons (Limited) from infringing the said patents by making, selling, and offering to sell beaded-edge and other tyres, and to restrain the defendants the India Rubber and Tyre Repairing Co. from selling those articles when made by and sold to it by the other defendants.

Swinfen Eady, J., dismissed the action.

The plaintiffs appealed.

T. Terrell, K.C., C. A. Russell, K.C., Graham, and *Walter*, for the appellants.—The defendants David Moseley & Sons made these covers, which can only be intended to be used for the purposes of our patents, and sold them to the other defendants, who put together the tyres and rims. If the same shop sells the covers, tyres, and rims it is an infringement, even if they are not put together. The defendants have practically sold the covers in one shop and the tyres and rims in another, and we submit that that is an infringement of our patents. The *dictum* of Pearson, J., in *United Telephone Co.* v. *Dale*, 32 W. R. 428, 25 Ch. D. 778, at p. 782, that "if there was a patent for a knife of a particular construction, and an injunction was granted restraining a defendant from selling knives made according to the patent, and he was to sell the component parts so that any schoolboy could put them together and construct the knife, surely that sale would be a breach of the injunction," is directly in point here. The defendants have in effect taken the pith and marrow of our patent. The learned judge in the court below was of opinion that as the sale of the cover was in itself lawful, Moseleys were entitled to sell it without inquiring into the intentions of the purchaser (see *Townsend* v. *Haworth*, 12 Ch. D. 831*n*, 48 L. J. Ch. 770*n*), but we submit that this is not so. Moseleys, by selling the covers to the other defendants, in fact invited them to infringe our patents: *Innes* v. *Short & Beal*, 15 Rep. Pat. Cas. 449. By what they did, Moseleys became joint tortfeasors in the other defendants' infringement, and the intention to take part in a tort is of consequence: *Merryweather* v. *Ninan*, 8 T. R. 186; *Betts & Drewe* v. *Gibbins*, 2 A. & E. 57; *Adamson* v. *Jarvis*, 4 Bing. Rep. 66. The courts distinguish between cases where an obviously illegal act was done, and a case in which an illegal act was committed but the person joining in it might not have known that it was illegal.

Clarke v. *Newsam*, 1 Ex. Rep. 131; *Dunlop Pneumatic Tyre Co.* v. *Neal*, 47 W. R. 632, [1899] 1 Ch. 807; *Sykes* v. *Howarth*, 12 Ch. D. 906, 27 W. R. Dig. 147; *Lister* v. *Leather*, 8 E. & B 1004, 7 W. R C. L. Dig. 62; *Parkes* v. *Stevens*, 17 W. R. 846, 8 Eq. 358; and *Harrison* v. *The Anderston Foundry Co.*, 1 A. C. 574, 25 W. R. Dig. 174, were also cited.

Cripps, K.C., Eve, K.C., and *Leigh Clare*, for David Moseley & Sons (Limited), and

Macnaghten, K.C., and *Romer*, for the India Rubber and Tyre Repairing Co., were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—We have heard this case at considerable length, and in my judgment it is really covered by authority. I have no doubt that the decision of Swinfen Eady, J., ought to be affirmed. Having regard to the whole course of this action both before Swinfen Eady, J., and upon the hearing of this appeal, there can be no doubt that the real question which was intended to be raised by the plaintiffs was this: Whether the selling of an article intended to be used for the purpose of infringing a patent is an infringement of the patent. In my judgment it is not.

I think, perhaps, the best way of dealing with this case would be to take the very short statement of the facts as it appears in the judgment of Swinfen Eady, J. He says, "Generally there is no dispute as to the facts with regard to what the defendants Messrs. Moseley are doing. They are making and selling what is known as the cover—that is, the outer detachable cover, and they are selling it with a lining suitable for the insertion of wires, so that the cover as sold by them is adapted for use in the manner described in Welch's specification, but not necessarily for use solely in that manner. They are also making and selling a cover with beaded edges, but without pockets for wires, which cover is capable of being used in the manner described in Bartlett's specification, the beads or lugs of the cover engaging in the inturned angle of the rim." There we have a short statement of the facts. In my judgment our conclusion ought to be the same in this case; whether or not, Swinfen Eady, J.'s, conclusion of fact is right when he says that these covers, of which complaint is made, are adapted for use in the manner described in these specifications, but are not necessarily solely for use in that manner; and he repeats the same conclusion of fact when he says: "Most of the covers would probably ultimately be used in one or other of these methods"—that is to say, the Welch or the Bartlett method—"I am of opinion that those are not exhaustive of the purposes to which the covers may be put, and that they would be useful for other purposes in connection with other tyres, as Mr. Beaumont pointed out."

Now, it is quite plain here that what the plaintiffs are alleging is that there has been an infringement by one or other of these defendants, and that that infringement has been constituted by the sale of these covers, which are constituent parts of one or other of the methods patented in the combination patents which are known as the Welch patent and the Bartlett patent. I am of opinion that the sale of these covers cannot be said to amount to or be evidence proving an infringement of one or other of these letters patent. In truth and in fact, veil it how you like, the plaintiffs do not complain of any infringement of these patents in which they say that the defendants, or one or other of them, have taken part as actors. In truth and in fact, all that they complain of is the sale of these covers, which sale, it is said, the defendants must have known was a sale to a person intending to commit an infringement of one or other of these patents, as the case may be.

In my judgment the authorities show conclusively that on those facts there would be no infringement by the defendants of these letters patent. Our attention has been called to the judgment of Sir George Jessel in the case of *Townsend* v. *Haworth*, which is reported in 12 Ch. D., in the notes to a case of *Sykes* v. *Howarth*. The case of *Sykes* v. *Howarth* itself begins on p. 826, and the report of the judgment of Sir George Jessel in *Townsend* v. *Haworth*, to which I am going to refer, appears in the notes to the report of *Sykes* v. *Howarth*. There Sir George Jessel says: "You cannot make out the proposition that any person selling any article, either organic or inorganic,

Decision of Divisional Court ([1903] 2 *K. B.* 92, 51 *W. R. Dig.* 73) *reversed.*

This was an appeal by the defendants from the judgment of the Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ.), reversing the judgment of the deputy judge of the Oxford County Court ([1903] 2 K. B. 92, 51 W. R. Dig. 73).

The action was brought to recover two sums of £30 12s. and £12 16s., being the respective amounts paid by the plaintiff to the defendants as premiums on two policies of insurance.

In April, 1889, a suggestion was made to the plaintiff by an agent of the defendant insurance company that he should effect an insurance with the defendants upon the life of his mother, and he in consequence signed a proposal for such an insurance. In the proposal form the pecuniary interest in the life insured was stated to be "Son, for funeral expenses."

The plaintiff's mother was residing with him as his housekeeper; his father was alive, but he was paralyzed and unable to earn any money, and would not be in a position, in the event of his wife predeceasing him, to pay for her funeral expenses.

On the 29th of April, 1889, the defendants issued to the plaintiff a policy on the life of his mother for £10 4s. at a premium of 6d. per week. Subsequently the plaintiff was induced by the defendants' agent to effect a second policy with the defendants upon his mother's life, and on the 18th of May, 1891, the defendants issued the second policy for £18 12s., at a premium of 1s. a week.

The proposal form for this policy was said to be signed by the mother, but the plaintiff stated that the policy was effected for his benefit, and the premiums were paid by him. The mother in giving her evidence denied that she had signed the proposal form.

The plaintiff was induced to take out both policies on the direct assurance of the defendants' agent that the policies would be valid.

In 1902 the plaintiff, being informed that the policies were void for want of insurable interest, brought an action in the Oxford county court to recover the premiums paid by him under the two policies during the preceding twelve years, amounting to £43 8s.

The following were the questions put to the jury by the learned judge and the answers given by them: (1) Had the person for whose benefit the assurance was really made a real pecuniary interest under either policy?—Yes. (2) Did the agent in either case make a statement which was false in fact? (If so, what was it?)—No. (3) Did the agent in either case know that what he was saying was untrue?—No. (4) Was either policy, or were both, taken out in consequence of what the agent had said?—Yes. (5) Did the agent in either case represent that the policy had been a good one?—Yes. (6) Were the agents in what they did, or was either of them, guilty of any fraud, and, if so, in what respect?—No. Judgment was given for the defendants, on the ground that the first policy was not void, as the plaintiff had an insurable interest in reference to his mother's funeral expenses, which would practically fall on the plaintiff, as her husband would not be in a position to pay them, and with regard to both policies that, even if they were void for want of insurable interest, the premiums could not be recovered back, the representation of the agent as to the validity of the policies being a representation as to a matter of law and having been innocently made. On appeal by the plaintiff, the Divisional Court held, as to the first policy, that the mere prospective moral duty upon the plaintiff of paying for his mother's funeral expenses did not constitute an insurable interest; that the two policies were on the same footing, both having been taken out by the plaintiff; and that, as the policies were effected and the premiums paid in reliance upon a statement made by the defendants' agent, the plaintiff was entitled to assume that the latter would have a knowledge of insurance law, and that, therefore, the parties were not *in pari delicto*, and the premiums could consequently be recovered back.

From this decision the defendants now appealed.

Sir E. Clarke, K.C. (*S. T. Evans, K.C.*, and *J. J. Parfitt* with him), for the defendants.—The first policy effected by the plaintiff was valid, as owing to the fact that he would under the circumstances have to bear the funeral expenses of his mother, he had an insurable interest in her life: *Barnes* v. *London, Edinburgh, and Glasgow Life Insurance Co.*, [1892] 1 Q. B. 864, 40 W. R. Dig. 100. The second policy on its face appears to be a valid policy, taken out by the mother. But even if both policies are illegal the plaintiff cannot recover the premiums he has paid in respect of them, as both parties were *in pari delicto*: *Howard* v. *Refuge Friendly Society*, 54 L. T. 644, 34 W. R. Dig. 41. It is true that in the case of *British Workman's and General Assurance Co.* v. *Cunliffe*, 18 Times L. R. 425 and 502, it was held that the premiums paid could be recovered, but in that case the agent was guilty of fraud. In the present case no fraud has been proved or even suggested. The representation made by the agent was *bonâ fide* and innocent, and therefore the parties are *in pari delicto*. An innocent misrepresentation on a question of law is not sufficient to give the plaintiff a right to get back the premiums he has paid; in order to entitle the plaintiff to recover there must be misrepresentation of some material fact or an act of fraud. The plaintiff is, therefore, not entitled to succeed.

He cited *West London Commercial Bank* v. *Kitson*, 32 W. R. 757, 13 Q. B. D. 360; *Kearley* v. *Thomson*, 38 W. R. 614, 24 Q. B. D 742; and *Rashdall* v. *Ford*, 14 W. R. 950, L. R. 2 Eq. 750.

Montague Shearman, K.C. (*Cecil Walsh* with him), for the plaintiff.—The first policy was illegal. The plaintiff had no insurable interest in his mother's life, as there was only a moral and not a legal obligation on his part to pay for her funeral expenses. The second policy was clearly illegal, as it was taken out admittedly by the plaintiff in his own interest, and this was not disclosed. The jury have found as a fact that the plaintiff took out the policies and paid the premiums, relying on the representation of the agent that the policies were legal and valid. That representation amounts to a misrepresentation of fact, and the plaintiff is therefore entitled to recover back the premiums he has paid in consequence of that misrepresentation. Even if the misrepresentation was not as to a matter of fact, but only on a question of law, still the plaintiff is entitled to recover, as he was entitled to assume the agent would know the general law as to insurance, and therefore the parties were not on the same footing.

COLLINS, M.R.—This is an appeal from the Divisional Court. The plaintiff had effected, through an agent of the defendant company, two insurances on the life of his mother. He continued to pay the premiums for some years, until in point of fact the amount paid in premiums exceeded the amount insured. In that condition of circumstances he bethought him that the policy was really illegal, and that he had a right to recover back the premiums. As regards the first policy effected, and assuming, though without deciding the matter, that the plaintiff was not entitled to take out the policy on his mother's life with regard to her funeral expenses, and

assuming him to have taken out such policy and to have paid the premiums thereunder, there remains the question whether he can recover those premiums on the ground that there has been a total failure of consideration. That depends upon what the nature of the transaction was which resulted in his paying money to another person. Assuming, as I do, that the transaction was an illegal transaction, the plaintiff is in this position, that he has paid money to another person upon an illegal bargain, and that being so the question is, can he recover it back? The second policy was effected by the plaintiff in his own interest and without the mother's knowledge. The jury have found that the agents represented that both the policies would be valid, and that they were taken out by the plaintiff in consequence of what the agents said, and that the agents did not know that what they were saying was untrue. The learned county court judge on these findings held that the representation of the agents as to the validity of the policy having been innocently made, the money could not be recovered back.

It is perfectly clear law that if one of two parties to an illegal contract pays the other party money, that money cannot be recovered back. That rule was applied by my brother Mathew in *Howard* v. *The Refuge Friendly Society*, the head-note of which is this: "J. H. effected with the defendant company two policies of insurance on the life of his father J. H., in which he had no insurable interest; according to the policies the premiums were to be paid by weekly payments. J. H., the son, continued to make these weekly payments for some years. J. H., the father, had at first no knowledge of the insurances effected on his life, but when he became aware of them he objected to them being continued, and gave notice to that effect to the company. J. H., the son, then gave notice to the defendants that the policies were at an end, and claimed the return of the amount of the premiums. The defendants refused to pay, and J. H., the son, brought his action for their recovery, and the county court judge gave judgment for the plaintiff. The defendant appealed. Held, on appeal, that under the circumstances of the case the policies were wagering policies, and consequently the premiums paid in respect of them could not be recovered."

Now, the plaintiff in the first place was a party to an illegal contract, and therefore *primâ facie* he is debarred from recovering any money paid under that contract to the other party. But it is contended that by reason of what happened between him and the agents, he is relieved from that rule of law. What was said by the agents in this case, to begin with, was a representation not of fact, but of law—a statement of opinion that the policies were valid. That seems to me to be a statement not of fact, but a statement of the law, the general law of the land in relation to insurance, and the jury have found as a fact that that statement was made innocently. It seems to me that unless you can introduce some circumstances of oppression or fraud or difference in the position of the parties which created in the person who made the statement some fiduciary relationship to the plaintiff so as to make it inequitable for the defendants to insist upon enforcing the bargain which they had made with the plaintiff, he is in the position of a party to an illegal contract and must submit to the loss of whatever he has paid under that contract. Now the jury have not found that the plaintiff's relations to the agents were such as to bring him within that class of cases where money has been obtained from another person by fraud, duress, or oppression of some kind, but they have found that the statement made by the agents was an innocent statement of what the agents believed to be the law. There is no evidence of fraud or oppression, and there is certainly no finding of fraud or oppression, and we cannot assume it. All we have is that the party, whether he knew it or not, was a deliberate party to the contract, and was under no misapprehension as to the nature of the contract which he was making, though he may not have known what the law was. Nevertheless what he was intending was clearly a contract forbidden by law, with the consequence that the money paid under it cannot be recovered back. Under these circumstances the plaintiff cannot, in my judgment, recover back the money paid. There is the clear authority of this court for that proposition in *British Workman's and General Assurance Co.* v. *Cunliffe*. In that case the divisional court decided that money could be recovered back where a person had paid premiums on the statement of an agent that the policy would be valid. This court affirmed that decision, but on the ground that the statement made by the agent on which the person seeking to recover back the money paid had acted was fraudulently made, and they expressly put it on that ground. To that extent this court certainly qualified, or at the least did not adopt, the ground of the judgment of the divisional court. It seems to me that both on the general law and on authority the plaintiff in this case has failed to establish his right to recover back the premiums, and, therefore, the appeal must be allowed.

ROMER, L.J.—I am of the same opinion. Assuming that the two policies were void because they were illegal, it is clear that the plaintiff cannot recover the premiums that he had paid, unless he can make out that he was not *in pari delicto* with the defendants. Can it, however, be said on his behalf that he has established that? He relies in support of that contention on the statement made by the agents when the policy was effected. Now, as to that statement, in my opinion it is clear that there was no misstatement of fact on the part of the agents. It is further clear that there was no fraud of any kind. This is not a case of the oppressor and the oppressed, nor is it a case where any advantage has been taken by a clever man over an ignorant man. The agents appear, like the plaintiff, to have forgotten or to have mistaken the law. It is clear that the agents, as appears from the findings of the jury, believed that the policies were good; and so had the plaintiff. Both parties in that respect were equally guilty in their being ignorant or mistaken in the law. Unless you can say that the statement made by the agents put the defendants in respect of their agents' acts in a worse position than the plaintiff, the parties were on an equal footing with regard to the transaction. I do not think that a statement of fact on the law in such a case does make that difference.

This is a case where both parties ought to know the law, and both parties are contracting on an equal footing, both being presumably of equal intelligence. We cannot, in my opinion, hold as a principle that the agents of an insurance company must be treated as being under a greater obligation to know the law than the persons they approach for the purpose of effecting policies with, unless there is any special evidence to the contrary. Here no case of fraud can be imputed; in fact no case of fraud was raised against the defendants, nor can it be said that they were in any way bound to appoint agents with some special knowledge of law. Under these circumstances it appears to me that for the purposes of this case both the plaintiff and the defendants' agents must be taken to have been *in pari delicto*, and the

defendant company cannot stand in a worse position than their agents. I therefore agree that on these grounds this appeal must be allowed.

MATHEW, L.J.—I am of the same opinion. It is clear that this was an illegal contract, and a contract of a kind prohibited by law for grave reasons. Now, it being an illegal contract, it is said by the plaintiff that its illegality ought not to be set up against him because of the representation that the policy was a valid policy. That representation, no doubt, may be inferred from what passed, but it was innocent, and it was a representation as to the law, and I do not intend, for the first time in this court, to hold that a representation as to the law is on the same level as a representation of a question of fact. Here there is no ground whatever for imputing either to the agents or to the defendant company any intention to mislead the plaintiff. For these reasons I am of opinion that this appeal must be allowed.

Appeal allowed with costs.

Solicitors for the plaintiff, *Esson & Mallam*, for *George Mallam & Son*, Oxford.

Solicitor for the defendants, *J. M. Storer*, for *E. T. Hatt*, Oxford.

High Court of Justice.

Chan. Div.
Buckley, J. } April 15.

In re LETHEBY & CHRISTOPHER (LIMITED). JONES'S CASE. (a.)

Company — Articles of association — Construction — Transfer — "Usual common form" — Address of transferor—Number of share—Immaterial details.

A provision in the articles of association of a limited company that transfers of shares shall be in writing and in the usual common form, means that the transfer shall be in that form in all material respects; and a transfer which omits details usually inserted, such as the address of the transferor or the number of the share, but which details are, under the circumstances of the case, immaterial, may, nevertheless, comply with the provision.

Motion.

This was a motion that the above-named company might be ordered to rectify their register by registering a transfer which they objected to as not being in proper form.

The company was incorporated in 1900 with a capital of £6,000, divided into 6,000 shares of £1 each.

Article 25 of the articles of association was as follows: "25. Subject to the restrictions of these presents, any member may transfer all or any of his shares, but every transfer must be in writing, and in the usual common form; and must be left at the office of the company, accompanied by the certificate of the shares to be transferred, and such other evidence (if any) as the directors may require to prove the title of the intending transferor."

By article 28 the directors might, in their discretion, and without assigning any reason, refuse to register the transfer of any share (not being a fully paid-up share) to any person whom they should not approve as transferee, or the transfer of any share, whether fully paid up or not, on which the company had a lien.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Among the subscribers to the memorandum of association was Miss E. V. Isley, who was therein described as of Dorman's Park Hotel, Dorman's Park, Surrey, spinster, and who subscribed for only one share. This share was subsequently allotted to her as fully paid up, and was numbered 5,998. Miss Isley's address, as above stated, was also on the share register.

Under the articles of association E. J. Jones, the applicant of the motion, who also had subscribed for one share, was appointed one of the first managing directors of the company. He was subsequently dismissed from this position, and he brought an action for wrongful dismissal against the company which was compromised, one of the terms of the compromise being that he should transfer his share to the company or their nominee.

The applicant having subsequently purchased from Miss Isley her share, she executed a transfer thereof to him dated the 24th of March, 1904. This transfer did not contain the address of Miss Isley or the number of the share transferred. Miss Isley, however, had only the one share above-mentioned.

On the 29th of March, 1904, the applicant sent the transfer and the certificate of the share to the company with a letter as follows: "Enclosed herewith please find certificate No. 8 for one share in your company, No. 5,998, together with transfer duly executed by Miss Edith V. Isley to myself; and I shall be glad to receive a new certificate to myself at your convenience." Miss Isley was described on the certificate as of "Dorman's Park, in the county of Surrey."

The directors refused to register the transfer, upon the ground that in not giving the address of the transferor or the number of the share transferred, it had not complied with the articles of association.

The applicant thereupon made this motion.

Astbury, K.C., and *Hohler*, for the applicant.

Beddall, for the company.—The transfer is not in the usual or common form. It is the universal custom to give the address of the transferor upon the transfer. All companies adopt the precaution of giving notice of a transfer deposited for registration to the transferor, and hence the address of the transferor is material. It is also the invariable custom to give the numbers of the shares transferred in the transfer.

BUCKLEY, J.—I have no doubt that the intention of the company in agreeing to the compromise of January, 1904, was to get rid of Mr. Jones as a shareholder, but unfortunately they forgot that as soon as he sold his share it was competent to him under the articles to buy others. He obtained from Miss Isley a transfer of a share and sent it in for registration. The directors held a board meeting on the 4th of April, 1904, and thought proper to defer the matter. The Companies Act, 1862, s. 25, provides that the court may rectify the register of shareholders if there has been unnecessary delay. There has been such delay here. This being a fully paid-up share, the directors can, under the articles of association, only refuse to register if they have a lien on it, which is not the case. Section 22 of the Companies Act provides that shares shall be transferable. It is important that this free right of transfer should be preserved. Miss Isley, then, had a right to transfer this share to the applicant, provided that she complied with article 25, which requires the transfer to be in writing and in "the usual common form." The transfer is in writing. It is said that it is not in the usual common form because the transferor is not described as of any particular address, and the share is not described by any denoting number. Miss Isley subscribed the

memorandum of association, and her address is given there, as also on the register of members; and the certificate which was sent to the company with the transfer contained the address also. There was not the smallest doubt who the transferor was, or which was the share transferred, for she held only one share. In my judgment, in the circumstances of this case the absence of these particulars was wholly immaterial. The absence of the number was held immaterial in *Ind's case, In re International Contract Co.*, 20 W. R. 430, L. R. 7 Ch. 485; *Bishop's case, In re Financial Insurance Co.*, L. R. 7 Ch. 296n; and *East Gloucester Railway Co. v. Bartholomew*, L. R. 3 Exch. 15, 16 W. R. Dig. 59. The number is directory only, and if there is no other share, or if a wrong number being given it is clear what share is meant, the share may be dealt with. A transfer is not the less in common form because it omits immaterial details. Article 25 means that the transfer must be in common form in all material respects. It does not mean that the transfer shall be invalid if the i's are not dotted or the t's are not crossed. Under the circumstances I think that Mr. Jones is entitled to have the transfer registered, and I make the order asked for. As a matter of form I allow Miss Isley to be joined as co-applicant.

Application granted.

Solicitor for the applicants, *A. W. Bartlett.*

Solicitor for the company, *G. H. Daniell.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) March 2.

WING *v.* EPSOM URBAN DISTRICT COUNCIL. (*a.*)

Practice — Justices—Nuisance on premises—Complaint heard before three justices at petty sessions—Order signed by one justice only—Objection against order—Validity—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 14—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55). *ss.* 96, 251.

An order was made by three justices at petty sessions under section 96 of the Public Health Act, 1875, *requiring the appellant to abate a nuisance on his premises. The order as drawn up and served on the appellant was signed by one justice only.*

Held (allowing the appeal), that the order as drawn up and served on the appellant ought to have been signed by two justices, as that was the form of the order indicated by section 96 of the Act of 1875, *and having been signed by one justice only was bad.*

Case stated by a court of quarter sessions for the county of Surrey upon a question as to whether or not an order dealing with a nuisance made by justices at petty sessions at Epsom, under section 96 of the Public Health Act, 1875, was bad by reason of its being signed by one justice only.

The appellant had been summoned by a sanitary inspector before the petty sessions to answer three complaints alleging the existence of a nuisance on premises of which he was the owner within the meaning of the Public Health Act, 1875, and the lessee of certain premises within the respondents' district.

On the hearing of the summonses, both parties being then present the orders now in question were made. The complaints were adjudicated upon by three justices, who ordered the abatement of the nuisances within a specified time. Orders in writing in the terms of the adjudication were drawn up, but were signed by one of the justices only who were present at the hearing.

The appellant appealed to quarter sessions on the ground that the orders were bad, by reason of their having been signed by one justice when they should have been signed by two.

The court of quarter sessions overruled the objection, but stated a case.

Low, K.C., and *W. Mackenzie*, for the appellant.—The orders are bad and ought to be quashed, because of section 251 of the Public Health Act, 1875. A complaint under the Act must be heard by two or more justices, and by section 96 the justices when satisfied of the existence of the alleged nuisance shall make an order. By section 14 of the Summary Jurisdiction Act, 1848, justices are required to draw up such an order, which must by inference be signed by the two or more justices who heard the complaint. Otherwise there is nothing on the face of the order to show that the complaint was heard and the order drawn up by a competent court.

Avory, K.C., and *S. G. Lushington* (*Swinbourne-Hanham* with them), for the respondents.—The orders do not require to be signed by more than one justice. The appellant was present when the orders were made by the justices, and the original orders were duly delivered to the clerk of the peace. Each of the orders was served on the appellant requiring him to do the necessary work within a certain time, and as delivered to the clerk of the peace was signed by one of the three justices only. What the appellant appeals against is the verbal order made by the justices. When the appellant gave notice of his appeal to the sessions the orders had not be drawn up. All that section 14 of the Summary Jurisdiction Act, 1848, requires is that the decision, verbally expressed by the justices, shall be put into writing, so that the decision or order may be properly recorded. The only purpose for which it is required to be signed is for verification. And for that purpose one signature is sufficient. A person can be summoned for disobeying an order to be complied with, for example, within twenty-four hours, although no formal order at the time he was summoned had been drawn up. Therefore the signature of one justice does not render these orders insufficiently signed and on that account bad.

Lord ALVERSTONE, L.C.J.—I confess that if I could have seen my way to have given a decision in this case in favour of the respondents I should be glad, as there appears to me to be no merits in the appellant's case. An important legal principle, however, is involved, and I must decide the question raised in accordance with what I understand to be now settled law. I understand that the orders have to be drawn up and served, so that if there appears to be any objection to the order, that objection can be raised. If Mr. Avory, for the respondents, had satisfied me that the magistrate's signature to the order was merely, as he contended, put thereto for the purpose of verification, or that the order need not be drawn up and served, so that the verbal decision by the justices who adjudicated on the case should render the appellant liable for disobeyance to their order, I should have come to a decision against the appellant, for, as I have said, there appears to me no merits in his appeal. But the words of section 96 of the Act of 1875, and the other statutory provisions to which during the argument we have been referred, make it quite clear that this appeal must succeed on a technical legal ground. The form of the orders given

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

for abatement or prohibition of nuisances (Form C in Schedule 4 to the Act) recites the whole proceedings and indicates in the plainest way that the orders ought to be signed by two justices, and the conclusion I have come to, therefore, is that, reading section 96 with the form of the order, there is a clear indication that the order was to be signed by two justices, and that it ought to have been signed by two justices here, and having been signed by one only it is bad. Therefore this appeal must be allowed.

WILLS and KENNEDY, JJ., concurred.

Appeal allowed, but without the costs of the appeal from the quarter sessions. the court declining, after hearing argument, to interfere with a statement of the justices of quarter sessions in the case that if the appeal was allowed the costs below were to be paid the appellants.

Solicitors for the appellants, *Spencer, Gibson, & Son.*

Solicitors for the respondents, *Lyell & Co.*, for *E. G. Wilson*, Epsom.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) Feb. 3.

STILES *v.* GALINSKI.
NOKES AND ANOTHER *v.* CORPORATION OF ISLINGTON (No. 2). (*a.*)

Local government—Metropolis—Public health—Lodging-house—Validity of bye-law—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 94, *sub-section* 1 (d) (e).

Two borough councils, acting under the power conferred upon them by section 94 *of the Public Health (London) Act*, 1891, *made a bye-law with respect to lodging-houses in their respective boroughs, requiring the landlord of any such house in the first week in April in every year to cause every part of the premises to be thoroughly lime-washed. "Lodging-house" was defined as a house which is let in lodgings or occupied by members of more than one family. "Landlord" was defined in the first case as the person who receives or is entitled to receive the rack-rent of a lodging-house, and in the second case as the person entitled to receive the profits arising from the letting of the lodging-house.*

Held, that the bye-law in both cases was bad, as it contained no provision that the landlord, before he became liable to a penalty for a breach of the bye-law, should receive notice that the bye-law had not been complied with.

Held, further (by Lord Alverstone, L.C.J., *and* Kennedy, J., Wills, J., *dissenting), that the bye-laws were not unreasonable, in so far as they required the lime-washing to be done in the first week of April.*

STILES *v.* GALINSKI.

This was a case stated by F. Mead, Esq., metropolitan police magistrate.

At the Thames police-court on the 23rd of June, 1903, an information was preferred by the appellant against the respondent for that the respondent, being the landlord of a lodging-house, 166, Stepney-green, did not, in the first week of the month of April last, cause every part of the premises to be cleansed, contrary to the bye-laws in such case made and provided. The information was heard on the 30th of June, when the magistrate dismissed the summons, subject to this case.

The facts stated in the case were as follows:

The appellant is a sanitary inspector and inspector of lodging-houses under the council of the Borough of Stepney. The respondent is the landlord within the meaning of the bye-laws hereinafter referred to of the lodging-house in question, which is within the Borough of Stepney and is registered under the bye-laws.

Evidence was given that on the 18th of March, 1903, the appellant visited the house and found the rooms and staircases dirty. He again visited the house on the 14th of April and he found the same state of dirt, so that it was clear that no cleansing had been done during the first week of April.

On the 11th of June, 1902, the council of the Borough of Stepney, under section 94 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), made bye-laws which have been duly allowed by the Local Government Board with respect to houses let in lodgings.

Section 94 of the Public Health (London) Act, 1891, provides that (1) every sanitary authority shall make and enforce such bye-laws as are requisite for the following matters (that is to say)—(*d*) For enforcing drainage for such houses and for promoting cleanliness and ventilation in such houses; (*e*) for the cleansing and lime-washing at stated times of the premises. Section 114 provides that all bye-laws made by any sanitary authority under this Act shall be made subject and according to the provisions with respect to bye-laws contained in sections 182 to 186 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and set forth in the first schedule to the London Act. Section 182 above referred to provides that no bye-law made under this Act by a local authority shall be of any effect if repugnant to the laws of England or to the provisions of this Act. Bye-law 1 provides that, unless the context otherwise requires, the following words and expressions have the meanings hereinafter respectively assigned to them (that is to say): "Lodging-house" means a house or part of a house which is let in lodgings or occupied by members of more than one family. "Landlord" in relation to a lodging-house means the person (whatever may be the nature or extent of his interest in the premises and whether he resides on the premises or not) who receives or is entitled to receive the rack-rent of a lodging-house. "Keeper" in relation to a lodging-house means the person (whatever may be the nature or extent of his interest in the premises) by whom or on whose behalf such lodging-house is let in lodgings or for occupation by members of more than one family, or who for the time being receives or is entitled to receive the profits arising from such letting, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such house or part of a house were let at a rent. "Lodger" in relation to a lodging-house means a person to whom any room or rooms may have been let as a lodging or for his use or occupation, or who, not being a member of the family of such person, may occupy or use any such room or rooms by permission of the person to whom the same may be let. Bye-law 10 provides that every lodger shall cause all solid or liquid filth or refuse to be removed once at least in every day from every room which has been let to him and shall once at least in every day cause every vessel, &c., for such filth, &c., to be thoroughly cleansed. Bye-law 11 provides that in every case where a lodger is entitled to the exclusive use of any staircase, landing, or passage in such house, such lodger shall cause every part of such staircase, &c., to be thoroughly cleansed from time to time as often as may be requisite. Bye-law 13 provides that the keeper shall cause every common passage or staircase

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

in such house to be thoroughly cleansed from time to time as may be requisite. Bye-law 14 (the one in question) provides that the landlord shall in the first week of the month of April in every year, and at such other times as the condition thereof may render it necessary, cause every part of the premises to be cleansed. He shall at the same time, subject to the proviso of the bye-law, cause every area, the interior surface of every ceiling and wall of every water-closet and the interior surface of every ceiling and wall of every room, staircase, and passage in the house, to be thoroughly lime-washed. The above bye-laws apply equally whether the lodging-houses are registered or not. The magistrate was of opinion that so much of the first clause of bye-law 14 as requires the annual cleansing by the landlord was invalid on the following grounds: (*a*) Being *ultra vires*; (*b*) being repugnant to the laws of England; (*c*) being repugnant to the provisions of the Public Health (London) Act, 1891; (*d*) being unreasonable. He therefore dismissed the summons.

George Elliott, for the appellant.

R. C. Glen, *Clavell Salter*, and *Rayner Goddard*, for the respondent.

The following cases were cited: *Nokes* v. *Corporation of Islington* (*No.* 1), *ante*, p. 399, [1904] 1 Q. B. 610; *Kruse* v. *Johnson*, 46 W. R. 630 [1898] 2 Q. B. 191; *Parker* v. *Inge*, 17 Q. B. D. 584, 35 W. R. Dig. 141; and *Lancaster* v. *Barnes District Council*, 46 W. R. 623, [1898] 1 Q. B. 855.

At the close of the arguments in this case the court reserved judgment until they had heard the arguments in the next case, which raised the same questions.

NOKES & ANOTHER *v.* CORPORATION OF ISLINGTON (No. 2).

This was a case stated by T. D'Eyncourt, Esq., metropolitan police magistrate.

A complaint was preferred by James Jarvis Jordan, sanitary inspector, on behalf of the mayor, aldermen, and councillors of Islington, against Walter Frederick Nokes and George Augustus Nokes, the appellants, for that they, being the landlords as defined by the bye-laws of the borough made under the Public Health (London) Act, 1891, with respect to houses let in lodgings or occupied by members of more than one family of a lodging-house at 9, St. Clement-street, Barnsbury, within the borough, did not in the first week of the month of April of the present year cause every part of the premises to be cleansed, contrary to the said bye-laws.

The magistrate, sitting at the Clerkenwell police-court on the 17th and 24th of June, 1903, convicted the appellants, and fined them 10s. and two guineas costs.

At the hearing the following facts were admitted or proved:

The appellants are auctioneers and house agents, and are the landlords within the meaning of the bye-laws of the premises referred to in the complaint, and did not in the first week of the month of April of the present year cause every part of the premises to be cleansed as required by the bye-laws. The house in question contains ten rooms, and was not cleansed in the first week of April according to the bye-law. Some of the rooms were white-washed and papered in December, 1902, and the rest of the cleansing was not carried out till May, 1903. It would take two men from a week to a fortnight to cleanse such a house in accordance with the bye-law. The builder who was employed by the appellants had orders to cleanse fifteen other registered lodging-houses at the same time as these premises, and five other houses belonging to the appellants, and he stated that he was of opinion that he could not have carried out the cleansing of all these houses during the first week of April. He did not, however, receive his orders to cleanse these premises until some time in April, and did not commence until the beginning of May. Other evidence was given to the effect that, with one or two weeks' notice, an almost unlimited supply of such labour as was necessary for complying with the bye-law could be obtained during the first week of April.

Upon the evidence the magistrate came to the conclusion that, if it was necessary that the cleansing should be carried out in any one week, the first week in April was the most suitable, having regard to the condition of the labour market and all other matters.

Bye-law 1 provides that "landlord" in relation to a house or part of a house which is let in lodgings or occupied by members of more than one family means the person (whatsoever may be the nature or extent of his interest in the premises) by whom or on whose behalf such house or part of a house is let in lodgings, or for occupation by members of more than one family, or who for the time being receives or is entitled to receive the profits arising from such letting, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such house or part of a house were let at a rent.

Bye-law 17 provides that the landlord of a lodging-house shall, in the first week of the month of April in every year, cause every part of the premises to be cleansed.

The bye-law makes further provision for lime-washing the ceilings and walls of the premises.

It was contended on behalf of the appellants that the bye-law was unreasonable and *ultra vires*, and therefore invalid in that it was practically impossible that all such houses could be cleansed in the space of one week.

The magistrate was of opinion that, although there might be some difficulty in complying with the bye-law, yet as there was no impossibility in so doing the bye-law was not so unreasonable as to be invalid, and he accordingly convicted the appellants.

Clarke Williams, for the appellants.

Courthope-Munroe, for the respondents.

Lord ALVERSTONE, L.C.J. — Nobody can have listened to the argument in these cases without being struck with the extreme importance of the point that has been raised. Holding, as I do, that the bye-law in both of these cases is unreasonable, I wish expressly to point out that we are not interfering with the discretion of the local authorities to the extent to which it has been suggested by counsel who supported the bye-laws. In the first place, I recognize that on practical questions where a power is given to a public authority to make bye-laws within the ambit of the power given them, as, for instance, in this case, for the cleaning and whitewashing of premises at stated times, their discretion ought not lightly to be interfered with, especially where bye-laws have been sanctioned by a public department and particular duties and times for performing them have been enforced. It is only where we clearly see that some legal principle is interfered with that we ought to hold that bye-laws are unreasonable, and, therefore, I am not quite sure that we are all agreed as to the grounds upon which we think these bye-laws are unreasonable. As Lord Russell of Killowen, L.C.J., pointed out in *Kruse* v. *Johnson*, bye-laws are not to

be set aside except upon strong grounds, and it is not to be assumed against them that they would be construed unreasonably. On the other hand, as I pointed out in the previous case of *Nokes* v. *Corporation of Islington* (*No.* 1), if they necessarily involve that which is unreasonable, it is our duty to do so. Now, taking the *Stepney case* first, the objection that I take to bye-law 14, and the ground upon which I think that it is unreasonable is that it includes or may include a class of people who are not legally or morally responsible for the observance of the bye-laws, and makes those persons liable for penalties without properly safeguarding them as regards notice. Now, the word "cause" in the bye-law is the word that gives rise to the difficulty. If "cause" could be construed to mean "take reasonable steps," the difficulty would not have arisen, but I think that "cause" does not mean merely "take reasonable steps," but means "shall see that the thing is done." Therefore the bye-law provides that the person upon whom the duty is cast is to see that the work is done. That person is the landlord. Now, "landlord" in these bye-laws includes, in relation to a house or part of a house which is let in lodgings or occupied by members of more than one family, the person, whatever may be the nature or extent of his interest in the premises, and whether he resides on the premises or not, who receives or is entitled to receive the rack-rent of a lodging-house. I think there would be less objection to the bye-law if it were confined to the person who really had the personal management of the house. It seems to me that the objection to the bye-law is that a person who may have taken an agreement from a responsible agent, and who intends letting the house in lodgings, would be held to be liable on the ground that he was entitled to receive the rack-rent. I see no objection to a bye-law which puts the responsibility upon the landlord, even though he may be the man who is merely entitled to receive the rent, but I think that such bye-law ought to provide that, in the case in which there is some person who is liable or may be liable to the landlord to fulfil the obligation imposed by the Act, the landlord himself should not be made liable to a penalty without first having received notice that the bye-law has not been complied with. Therefore I come to the conclusion that the bye-law in each of these cases is bad, because it does not provide that the landlord shall, before becoming liable to a penalty, receive notice that the bye-law has not been fulfilled.

Now with regard to the second case counsel for the respondents raised a point, which, if he could have made it good, would have differentiated this case from the *Stepney case*. He said that under the bye-law in the parish of St. Mary Islington the definition of "landlord" is narrower than in the *Stepney case*, and corresponds with the definition of "keeper" in that case. To a certain extent I agree that that is so, but I still think that even with the narrower definition of "landlord" it is not sufficiently precise to exclude the difficulties to which I have already referred. It seems to me that this bye-law does still render it possible that it might be construed, without being unreasonable, to include the person who gets the profit—that is to say, the person who ultimately receives the money, though he may not, in fact, be in touch with the lodging-house in the same way as the ordinary keeper is. I think, therefore, that this bye-law is also bad. I think these bye-laws require remodelling from the point of view, not of relieving the landlord from being responsible if he does not see the work is done, but of giving him reasonable and proper notice before he can be charged with the breach of the bye-law simply because the house had not been cleansed by a particular day.

I now come to that part of the case which has given me more difficulty, and upon which I am not quite sure that we are all agreed. Speaking for myself only, I should not have been disposed to interfere with the finding on the ground that the period taken was the end of the first week in April. The Public Health (London) Act, 1891, s. 94, says that bye-laws are to be made "for the cleansing and lime-washing, at stated times, of the premises." Undoubtedly I think that does mean fixed dates about when the work should be done or by which time it should have been done. As regards the objections to the particular time mentioned in the bye-law, I can well imagine that a fortnight at the end of April or the beginning of May would remove them, but I should not have been disposed to interfere on that ground because it seems to me that the time when the work is to be done is exactly one of those things in which the knowledge and experience of the local authority ought to prevail, unless some grave objection so serious as to amount to an objection in law, or some strong unreasonableness prevails. Although I have been very much impressed by the suggestion that the first week in April will very often be an inconvenient time for the work to be done, still there may be other considerations known to the local authority arising from the class of lodging-houses or the class of people who inhabit them which may counterbalance the inconvenience. Had it rested with me I should not have been disposed to hold, and I do not hold, that these bye-laws are bad because of that particular week being fixed upon, but, for the reason which I have stated, as to no notice being given to the landlord. I think these bye-laws must be held to be unreasonable, and that being so, the appeal in the first case must be dismissed, and the appeal in the second case allowed.

WILLS, J.—I entirely agree with, and adopt as part of my judgment everything that my lord has said, except with regard to the question about the work having to be done in the first week in April; but I should like to add a few observations of my own.

It seems to me that an initial mistake has been made in these bye-laws by trying to make the same hard-and-fast rule apply to two perfectly different classes of houses. A series of regulations which may be suitable to a common lodging-house are quite inapplicable to the very large class of houses which are brought within the operation of these bye-laws by reason of the inclusion in the definition of lodging house of "houses occupied by members of more than one family." In the West End of London, where we are told similar bye-laws apply, a very large number of houses are so occupied as to bring them within that definition. Everybody knows it is a common practice for a medical man to let off one or two rooms to other medical men for use either as consulting-rooms only or as both consulting and living rooms. That causes those houses to become lodging-houses within this definition, and in such a case the application of the bye-laws seems to me to be unreasonable to the last extent. Take, for instance, the very large area which is owned by the Duke of Portland where many houses, the rack-rent of which he receives, are sub-let in this manner. To hold that he was liable because every one of these houses is not thoroughly cleansed and lime-washed from top to bottom during the first week in April would impose upon him an absolutely intolerable burden against which all good common-sense and all instincts of fair play rebel. If the

bye-laws were confined to houses occupied in the same kind of way as common lodging-houses are, there would be very much more to be said in their favour; but even in that case I agree with my lord that unless the person who is most liable is a person who from his position and his relation to the property ought to know exactly what his tenants are doing and in what state they are keeping the house, it would be unfair to make him liable without his having had notice of what is taking place.

I feel bound to protest against part of the argument of counsel put forward in support of the bye-laws—namely, that although they might be considered harsh and unjust if they were applied all round, yet the local authority must be trusted only to put the law in motion in such cases as it would be reasonable to do so. In the first case the local authority are not the only persons who are entitled to put the law in motion; every subject of the Crown is entitled to do so; secondly, I do not like legislation which is felt to be so unfair if applied all round that it can only be justified by saying that in particular cases it will not be enforced. I think that that is as bad a ground upon which to defend legislation as one could well have.

Now I pass from that part of the case to the question about the first week in April. I feel fully the force of a great deal my lord has said, but I am unable to agree that this particular week must be taken to be a proper period merely because it is fixed by the local authority, if it leads in particular instances, which are not chimerical at all, to an almost preposterous state of the law. In the *Islington case* it is said that the work which was required to be done would take a couple of men ten days to a fortnight to do. Having regard to the fact that Easter does very commonly fall in the early part of April so as to embrace part of the first week in the Easter holidays there would in some years be only two or three days in which to do the work. I do not think that a bye-law which can have that operation has received the full consideration of its applicability to practical purposes that it ought to have received. For the reasons that I have mentioned I am of opinion that the bye-law in the *Stepney case* cannot be sustained.

With regard to the *Islington case* it has been attempted to meet some of the difficulties by putting a more modified meaning on the word "landlord," and by providing for the exemption from the operation of the bye-laws of certain cases which it seems reasonable should be exempted. Even that modified definition of "landlord" is open to objection, and I quite agree in the criticisms which my lord has passed upon that and upon other parts of these bye-laws. What I have said about the first week in April, of course, applies to both cases.

KENNEDY, J.—I have come to the same conclusion, but with great reluctance from one point of view—namely, that it is the health of the helpless which is very largely protected by these bye-laws, and I cannot help thinking that a great many of the difficulties that have been pointed out would not arise in practice if the intentions of the framers of these bye-laws were loyally carried out I confess, at the same time, that I am unable to see how the bye-law in either case can be supported. I think this is unfortunate, because one knows perfectly well that persons who do not want to face liabilities which they ought to incur, can by keeping property in an insanitary state, create many difficulties for those who have to see to the carrying out of these bye-laws by employing intermediate agents who are the only persons in touch with the tenants. I can quite understand that it is very difficult to frame bye-laws which shall, on the one hand, really make the person who received the profits arising from these properties responsible, and which, on the other hand, shall not cause the possible injustice of a person being made liable to penalties without any notice that the person who manages the property has infringed the bye-laws. As regards the question as to the work being done in the first week in April, speaking for myself and with great respect to my brother Wills, I cannot help thinking that local authorities who know the local needs, and who express the desires of the community by representation, and who must be taken to know their business, ought not to be lightly interfered with in matters purely of management and routine such as this is. The magistrate in the second case has found the first week in April not to be unreasonable, and I should not be inclined to interfere with any period which the local authority, who are the appointed representatives of the ratepayers, have chosen to fix upon.

In the second case I think it is impossible to accept as satisfactory in the sense of reasonableness the definition there of "landlord," though I can understand the local authority thinking it arguable that "landlord" there did mean the person who was really in touch with the tenant.

Appeal in first case dismissed.

Appeal in second case allowed.

Solicitors for the appellant in first case, *C. V. Young & Co.*

Solicitor for the respondent in first case, *G. Vandamm.*

Solicitors for the appellants in second case, *Young & Cooper.*

Solicitor for the respondents in second case, *A. M. Bramall.*

House of Lords.

From C. A. (England). } Dec. 17.

WEST HAM UNION v. LONDON COUNTY COUNCIL. (a.)

Poor law—Settlement—Addition to parish—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61)—*Poor Law Act,* 1879 (42 & 43 *Vict. c.* 54).

Where a pauper has acquired a settlement in a parish, and subsequently by an order of the Local Government Board, made under the Divided Parishes and Poor Law Amendment Act, 1876, *as amended by the Poor Law Act,* 1879, *a part of an adjoining parish has been added to the former parish, the identity of the original parish is not destroyed, and the pauper's settlement is not lost.*

R. *v.* Tipton Inhabitants. 3 *Q. B.* 215, *and* St. Saviour's Union *v.* Dorking Union, 46 *W. R.* 309, [1898] 1 *Q. B.* 594, *distinguished.*

Decision of the Court of Appeal (50 *W. R.* 275, [1902] 1 *K. B.* 562) *affirmed.*

Appeal from an order of the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.) (50 W. R. 275 [1902] 1 K. B. 562), affirming the decision of the King's Bench Division (Darling and Channell, JJ.) (49 W. R. 443, [1901] 1 K. B. 720).

The following facts appeared in the case stated for the opinion of the court: Elizabeth Heritage, a pauper lunatic, was born in Stevenson-street, Canning

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Town, in the parish of West Ham, in the West Ham Union, on or about the 11th of February, 1852, and resided in that parish for about seventeen years until the month of August, 1888, which rendered her irremovable from the parish. By an order of the Local Government Board dated the 24th of August, 1886, it was ordered that all that part of the parish of Wanstead which was included in the borough of West Ham should cease to be part of that parish, and should be amalgamated with the parish of West Ham. The address at which the pauper lunatic so resided was situate in the parish of West Ham as constituted previously to the date of the said order, and not in any part of the parish of Wanstead. Heritage left the parish of West Ham in the month of August, 1888, and did not therefore acquire a settlement in any other parish. She was afterwards found in the hamlet of Ratcliff, in the Stepney Union, in the county of London, and was sent therefrom to the Claybury Lunatic Asylum of the respondents. Two justices adjudged her to be settled in the parish of West Ham. This was quashed at quarter sessions, but restored by the Divisional Court, and affirmed by the Court of Appeal.

Avory, K.C., and *C. C. Hutchinson*, for the appellants.

Reg. v. *Tipton Inhabitants*, 3 Q. B. 215, and *St. Saviour's Union* v. *Dorking Union*, 46 W. R. 309, [1898] 1 Q. B. 594, were referred to.

Macmorran, K.C., and *Daldy*, for the respondents, were not heard.

Earl of HALSBURY, L.C.—This case, it appears to me, may be decided without reference to any of the cases which have been previously decided. Whether, if those cases came in actual review before your lordships, you would affirm the principle which seems to have guided them, or would take the view which Cockburn, L.C.J., and Blackburn, J., both expressed, that the case upon which they all really depended had been decided upon a very narrow—obviously in their view a too narrow—construction of the Act of Parliament, is a matter which it is unnecessary to consider with reference to a case which really does not raise the same question. I have no doubt that what Cockburn, L.C.J., and Blackburn, J., both felt was that in a question of this sort, which was in those days constantly arising, it was a very inconvenient thing to have different rules laid down by the courts from time to time thereby putting the overseers in great difficulties; and for that reason there was a reluctance to interfere with rules which were supposed to be once established. I am not certain that this consideration is so important now, because controversies between parishes are now very seldom litigated in these matters; but, be that as it may, I only mention it in order to point out that your lordships are perfectly free, if the question ever does come in a distinct form before you, to consider those cases which, after all, only began in the year 1842, and may or may not be held to have established a rule which it would be wrong to depart from now.

At all events, this is the first case of this class which has ever come before a Court of Appeal, and it appears to me that the answer to the ingenious argument which has been presented to us is that none of the circumstances upon which the other cases have been decided exist here. One can see that where a parish has disappeared—in this sense, that it has been broken up into four or five different parishes—it would be difficult to say that the settlement in the parish still continued, because the parish which once existed, and in which the pauper had obtained a settlement, no longer exists, and you could not say that he belonged to A, B, C, D, or E, because no such parish existed as that in which he got his settlement, and the mere appropriation of his settlement to some one of the new parishes would be, or ought to be, legislation, and not decision. But, be that as it may, in this case the pauper was settled in West Ham, and now claims a settlement in West Ham; and what is to prevent his having it? Is there no identity in the parish by reason of the same course of administration continuing, the same liabilities upon its inhabitants, the same duties to be performed by the officers of the parish? There is no doubt that everything that would constitute identity in an administrative body exists here, and it is upon the liability of that same administrative body that the pauper makes his claim. What is the answer to it? Not that there is any real change in the administration, not that there is any change in the very place where the pauper's settlement was obtained, but that something has been added to the parish afterwards—and that, it is said, is to make the whole difference in the rights and liabilities of the parish to which the addition has been made, so as to deprive the pauper of his rights under the Act of Charles II. and those Acts which succeeded it—among others, the right not to be removed and sent to some other place. I am wholly unable to follow reasoning which suggests that this parish has changed its identity. It is the same parish in all the things which constitute identity of an administrative body; and the fact that a small part has been added to it so as to bring that part within the area of that which is the unit for administrative purposes seems to me not in the smallest degree to interfere with the identity of that which is really the same parish which existed before. It would, indeed, be only an attempt at logic run mad to suggest that by reason of an addition to a parish it ceased to be the same parish, and became a new feature, created by the mere fact of that addition. I am quite sure that nothing in the Act of Parliament which gave authority to make the addition to, or to change the boundary, of the parish could ever have contemplated that the effect would have been to change the whole legal liabilities, or, indeed, as Mr. Avory very frankly and boldly admitted, if it arose on the question of a debt contracted by the parish of West Ham, it would be a good plea, apart from legislative remedy, to say that the parish had ceased to exist, and therefore the creditor cannot recover and must lose his debt. That would be indeed reducing the matter to an absurdity.

I therefore move your lordships that this appeal be dismissed with costs.

Lord SHAND.—I am of the same opinion, and as I entirely concur in the reasons for the judgment which have been expressed by my noble and learned friend on the woolsack, and, indeed, with the reasoning of all the judges before whom the case has come—the judges in the Divisional Court and the judges in the Court of Appeal—I have really nothing to say except that I think there is identity of parish here, although an addition has been made to it to some extent.

Lord DAVEY.—I wish to speak with every respect which is due to a judgment of the Court of Queen's Bench delivered so long ago as the year 1842 in the case of *Reg.* v. *Tipton Inhabitants*. I do not find it necessary for the decision of this case to say whether the reasoning upon which the decision in that case was founded is altogether satisfactory to my mind or not, because I think it is no authority for the decision of this case. This case is quite different in its circumstances and facts, and what was said in the case of *Reg.* v. *Tipton Inhabitants* is no authority for the decision of this case. Nor do I think that the *Dorking case* is any authority for this case. If we

were considering the case of Wanstead, the *Dorking case* might be an authority, because a piece has been cut out of the old parish of Wanstead and added to the parish of West Ham, and in that respect it would bear some resemblance to the *Dorking case*. But here we have to deal with a case, not where a piece has been cut out of West Ham, but where a piece has been added from the parish of Wanstead to the parish of West Ham; and in that respect I think that the case is not governed by the *Dorking case*.

I think the true test is that which has been suggested by the Master of the Rolls—namely, Has the parish in which the pauper had a settlement lost its identity? In the case of *Reg.* v. *Tipton Inhabitants* I can quite understand that the parish of Halesowen had ceased to exist. It had been divided into some half-dozen or more parishes—I think fifteen, at all events several smaller parishes—no one of which could claim to be the original parish of Halesowen. But in the present case I see no ground whatever for saying that the parish of West Ham has lost its identity. A parish does not lose its identity by the mere alteration of its boundary; it does not lose its identity because a piece has been added to it, or, as I think, because a piece has been taken away from it. It must be a question in each case whether what has been done has destroyed the identity of the parish for such purposes; and it appears to me to be entravagant to say that if the boundary between two parishes is rectified by drawing a give-and-take line, so that each parish has a bit added to it and loses a bit which is added to the next, those two parishes therefore have lost their identity, or that a pauper with a settlement in either of those parishes loses his settlement.

In accordance with what I have said it may be that a case similar to the *Dorking case* may some day come before us, and if it does I will examine it with an open mind; but I am bound to say that the principle upon which I decide this case, and which appears to me to be applicable to this case, is one which would lead to the conclusion that the *Dorking case* was not founded on pure reasoning; and, indeed, I do not think that the *Dorking case* would have been so decided had not the judges—erroneously, as I think—thought it followed from the decision in *Reg.* v. *Tipton Inhabitants*.

Lord ROBERTSON.—I entirely agree, on the grounds which have been stated by my noble and learned friend on the woolsack.

Appeal dismissed.

Solicitor for the appellants, *F. E. Hilleary.*

Solicitor for the respondents, *W. A. Blaxland.*

Court of Appeal.

From Chan. Div.
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) Feb. 19.

In re CHAPMAN (DECEASED).
STEELE PERKINS *v.* CHAPMAN AND OTHERS. (*a.*)

Will—Construction—Forfeiture clause—Marriage of a son or daughter prohibited within certain degrees—Applicable after death of testator—Alienation or bankruptcy—Words of futurity.

A testator devised all his real and personal estate to trustees upon trust for sale, and to be divided, after certain payments, among his children, sons and daughters (other than A., a daughter), in equal shares; he then inserted a clause to the effect that if any child should contract a marriage with any person of any degree of kindred, unless more remote than third cousin, and also in the case of a daughter, without the previous written consent of the trustees or trustee of his will, then he or she should forfeit his or her right to the share in his trust estate. Subsequently the plaintiff, another daughter, married her first cousin, and on her father's death claimed to be entitled to a share in his trust estate.

Held (*by* Vaughan Williams *and* Stirling, L.JJ., Cozens-Hardy, L.J., *dissenting*), *that there was sufficient in the will to show that the testator intended that these acts of forfeiture should take effect only after his death, and as the plaintiff had married within the prohibited degrees during the lifetime of the testator, she had not forfeited her interest in his trust estate.*

Metcalfe *v.* Metcalfe, [1891] 3 *Ch.* 1, 40 *W. R. Dig.* 280, *discussed and distinguished.*

Decision of Kekewich, J., *reversed.*

This was an appeal from a decision of Kekewich, J. The facts were as follows:

The plaintiff was one of the daughters of the testator, Edward Chapman, and she claimed to be one of the residuary legatees under his will.

The question at issue was whether the plaintiff, who in the testator's lifetime had married her first cousin, C. Steele Perkins, and with the sanction or subsequent consent of the testator, had forfeited her share, right, title, and interest in the trust estate of the testator, and the income thereof.

Edward Chapman, by his will, dated the 24th day of March, 1881, after bequeathing certain pecuniary legacies, and the interest in his business, devised and bequeathed all his real and personal estate unto certain trustees (one being his wife, who was also one of the defendants) upon trust for sale and conversion, to pay to his widow during her life or widowhood £250 per annum, and also until his youngest son (another of the defendants) should attain twenty-five, then until his wife should die or remarry, appropriate to each of his sons or their issue £125 per annum, and in respect of each daughter and their issue (except his daughter Alice Eliza) £100 a year, and he further directed that at the date of distribution, the said investments should be divided into as many shares as the number of his sons and daughters (other than his daughter Alice) who should die before the date of distribution leaving children living at the date of distribution, children to take their parents' share; then follow certain provisions, which are immaterial, and then comes the material clause in question: "And I declare that if any son or daughter of mine shall do or suffer any act . . . under any statutes of bankruptcy . . . or if he or she shall contract any marriage forbidden by me as hereinafter expressed, then and in any such case his or her share, right, title, or interest of, in, and to my said trust estate and the income thereof shall thenceforth cease and determine, and my said trust estate shall thenceforth go and be held in such manner as the same would have been held if he or she had died before me without leaving any child or children living at my death. And I declare that the marriages forbidden by me are in the case of son or daughter marriage with a person of any degree of kindred unless more remote than third cousin, and also in the case of a daughter marriage contracted without the previous written consent of the trustees or trustee for the time being of this my will, or if more than two of a majority of them."

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

In the year 1880, shortly before the date of his will, the testator's daughter Alice Eliza had married her cousin G. C. Steele Perkins, a brother of the plaintiff's husband.

Thereupon the testator inserted this clause expressly excluding her, and after the marriage of the plaintiff in 1886 was estranged from both his daughters, but subsequently became reconciled to both, making, however, no alteration in his will.

The testator died on the 23rd of December, 1902, and his will was proved on the 14th of January, 1903; he left considerable property.

The defendants were the trustees of the will in lieu of those originally appointed.

Between the date of the will and the testator's death the plaintiff lived on terms of great intimacy with her father, and she and her husband were constant visitors at his house, the plaintiff's husband acting as medical adviser to the testator.

The plaintiff took out an originating summons to have the matter determined whether she had forfeited her right to her share in the testator's estate by her marriage, and also claimed to be entitled to have paid to her the yearly sum of £100 until the date of distribution mentioned in the testator's will.

Kekewich, J., held that the plaintiff, having married within the prohibited degrees, had forfeited her right and share in the testator's trust estate, and also that of her children.

The plaintiff appealed.

Upjohn, K.C., and *E. Clayton*, for the appellant.—There are two clauses defining the marriages which are forbidden. The language of the forfeiture clause itself must be looked at, and there is no authority which extends this. There is a great difference in saying that the clause in one event is retrospective and in another event not: *In re Metcalfe, Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1, 40 W. R. Dig. 280. The true way of looking at the will is to give it its proper ordinary construction, unless there is authority which constrained the court to the contrary. No such authority can be found. If an unnatural construction is put upon this class of cases, there is, as Bowen, L.J., said, "a counter check."

Levett, K.C., and *Iselin*, for the respondents.—The argument for the appointment assumes that the will speaks from the death, not only with regard to the property, but with regard to everything else: *Bullock* v. *Bennett*, 3 W. R. 291, 7 De G. M. & G. 283, shows that is not the effect of section 24 of the Wills Act. [VAUGHAN WILLIAMS, L.J.—A man may make a will and use such words relating to the future, as mean from the time of his death.]

They referred to *Ancona* v. *Waddell*, 27 W. R. 186, 10 Ch. D. 157; and *Trappes* v. *Meredith*, 20 W. R. 130, 7 Ch. App. Cas. 248.

Upjohn, K.C., in reply.—If marriage takes place in the lifetime the testator could have given effect to the clause by a codicil. [VAUGHAN WILLIAMS, L.J.—You mean forfeiture in respect of the marriage takes effect from the will.] It is a matter purely of construction, and the respondents' contention is too wide.

He cited *Forth* v. *Chapman*, 1 P. W. 663.

W. A. Russell, for the trustees.

VAUGHAN WILLIAMS, L.J.—The question which we have to determine is, really, from what date the forfeiture clause in this will speaks. Now, it was decided in *Bullock* v. *Bennett* that the 24th section of the Wills Act had no application except with regard to the will speaking as to the property, and everyone would agree, therefore, that in this case no argument whatsoever can be founded upon the 24th section of the Wills Act. Therefore we are left in the same condition as we should have been before the Wills Act. Now I go a step further than the decision in *Bullock* v. *Bennett*. There was an old rule before the Wills Act as to the time from which a will should speak with regard to personalty, and that rule was that it should speak from the death of the testator. And as it was decided in *Bullock* v. *Bennett* with regard to section 24, that rule applied only to the property comprised in the will. Therefore we have to look at this will, and see from what date it speaks. But, having said that, I rather feel that the true proposition is nevertheless that where you have got the date of the will, either on the will, or possibly ascertained by evidence, when a testator uses words of futurity, *primâ facie* I should read those words as speaking from the date of his making the will, and not from the date of his death. That may be a strong presumption, but if there is a presumption one way or the other, I think that is the more likely presumption. I do not think that matters. We are entitled and bound to take this will, and look at it, and construe its clauses, and see from what date the testator intended the words of futurity in this particular clause of this particular will to speak. It seems to me that we have ample evidence here to show that this testator intended that these acts of forfeiture should be acts of forfeiture occurring after his death. I need not go through all the clauses again. We have heard very cogent arguments about them, but, speaking shortly, the two instances of user of words (there are a great many more than two), but the two instances of user of words in this particular clause indicating that the testator intended that the acts of forfeiture should be acts of forfeiture after his death, which struck me most as I heard them read, were the words "then and in any such case his or her share, right, title, and interest of, in, and to my said trust estate and the income thereof shall thenceforth cease and determine," and the other words are the words relating to the consent of the trustees. Here we have one forfeiture clause, and one has this provision. It is: "And I declare that if any son or daughter of mine shall do or suffer any act whether by way of alienation, charge, or otherwise, and including any act under any statutes of bankruptcy"—those are the alienation and bankruptcy forfeitures—"or if he or she shall contract any marriage forbidden by me, as hereinafter expressed, then and in any such case"—then come the words of forfeiture. At the end of that clause, he says: "I declare that the marriages forbidden by me are in the case of a son or daughter"—then he describes the marriages—"and also in the case of a daughter contracted without the previous written consent of the trustees or trustee for the time being of this my will." I think, as I have said, that that is amply sufficient to show that the testator meant that the acts of forfeiture should take place after his death. Now, if that is so, there is an end of the case, because when one arrives at that construction, the necessary result has been determined.

But I want to say a word or two about the cases. We have had our attention called to *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1, 40 W. R. Dig. 280. That is a case decided in the Court of Appeal by Lindley, Bowen, and Fry, L.JJ. Lindley, L.J., began his judgment by saying: "The first question on the appeal is whether the language of this forfeiture clause has any application to a bankruptcy, which took place before the death of the testator. If we only look at the words of the clause, there would seem to be a difficulty in construing it so as to include a bankruptcy" commencing "before the testator's death"—that is, before the will came into

operation. Now, in my judgment, Lindley, L.J., meant that the words of the will were such as to lead to the conclusion that the testator intended only acts of forfeiture occurring after his death, and there were various things pointing to this intention by the testator, some of them resembling very much the matters to which I have called attention in the present will.

Take, for example, the provision that the "trustees or trustee" (that means the trustees or trustee of that will) "shall upon such act or default, or upon such operation of law as aforesaid, pay or apply." Having come to that conclusion, then the court proceeded to ask themselves, whether the decision in *Trappes* v. *Meredith*, 20 W. R. 130, 7 Ch. App. Cas. 248, applied, a decision which I understand to be one that relates exclusively to the particular act of forfeiture constituted by alienation, or by an act of bankruptcy, and they held that notwithstanding the date from which the will was intended to speak, they were bound by the decision of the Court of Appeal in *Trappes* v. *Meredith*, overruling, as he was then, Vice-Chancellor James from holding that, never mind when that particular act of forfeiture took place, whether antecedently to the date from which the forfeiture clause was to speak, or subsequently to it, it was an act of forfeiture which would have deprived the legatee of the benefit of the estate. I do not think that that decision ought to be applied to anything else but that particular act of forfeiture. I think myself that if that particular court had had to deal with this case, they would, as far as I can judge from their judgments, have arrived at the same conclusion that I have arrived at. The result is that I think that this will does refer to marriages which occur after the death of the testator as being the marriages upon which the forfeiture is to take place. Secondly, I think there is nothing in *Metcalfe* v. *Metcalfe* which applies to such a case. I think *Metcalfe* v. *Metcalfe* applies only to the particular act of forfeiture with which the court had to deal there. I think, therefore, that this appeal should be allowed.

STIRLING, L.J.—I am of the same opinion, but I confess I have felt very great difficulty in dealing with the case. In this case the testator, having conferred benefits on his children, sons and daughters, has introduced a forfeiture clause upon which the whole question turns. The acts which are to occasion forfeiture are of two classes. The first is that case in which "any son or daughter of mine shall do or suffer any act." [His lordship read the bankruptcy clause.] The second clause is that if the son or daughter shall contract any marriage forbidden by the testator as afterwards expressed in the will, and the effect of the commission of any such act is that "in any such case his or her share, right, title, and interest of, in, and to my said trust estate, and the income thereof, shall thenceforth cease and determine, and my said trust estate shall thenceforth go and be held in such manner as the same would have been held if he or she had died before me leaving any child or children living at my death." Now, if there were no authority bearing on the question, I should have said that the language of the gift over with reference to the share, right, title, and interest thenceforth, which means from the occurrences of any such event as mentioned in the prior part of the clause "shall thenceforth cease and determine, and my said trust estate shall thenceforth go and be held in such manner as the same would have been held," would be strong to show that the testator was referring to the occurrence of such event after his death, but it appears to me that as regards acts of alienation, including bankruptcy, it is not open to me to come to that conclusion. In the case of *Metcalfe* v. *Metcalfe* there was equally strongly language which seemed to point to and deal with acts of forfeiture occurring after the testator's death, yet it was the view of the Court of Appeal, it may be a view taken reluctantly, that the forfeiture clause applied to acts done in the lifetime of the testator.

Therefore it appears to me that with reference to that portion of the forfeiture clause I am not at liberty to say that the events there contemplated were merely events occurring after the death of the testator. Now, what is the ground of the decision in that case, and in those cases which preceded it? It appears to me that the ground is that a somewhat unnatural construction is put on the language of the will in order to give effect, as Lindley, L.J., put it, "in such cases to the obvious intention of the testator, which is to secure the personal enjoyment by the legatee of the property left by the will." I have now to turn to the other class of cases in which the testator prescribes that a forfeiture shall take place, that is "in case any son or daughter shall contract any marriage forbidden by me, as hereinafter expressed in the will." Now, what are the events? —the marriages which are forbidden. The testator says, "And I declare." [His lordship read the clause referred to above, and continued:] Now, it is said that we ought to follow the decisions with reference to the bankruptcy cases, and that it is as obvious on the face of the will that the intention of the testator was that a child contracting a forbidden marriage should be deprived of the benefits which were otherwise intended for that child as the intention which I have already referred to in the case of alienation, that the child should enjoy personally the property given by the will. I think not. The testator provides not merely for the contracting of marriages within a certain degree, but also, in the case of a daughter, marriage without the previous written consent of the trustees or trustee. It is said that it would be an extraordinary result in this case that a son or daughter who in the lifetime of the testator contracted a marriage within the prescribed degrees of kindred is not to forfeit the benefits of his estate, while a child who after the death of the testator did so would forfeit it. Well, that is a forcible observation, but it seems to me another observation which is made, and which has no less force, is this, that a daughter who upon the terms of this will, within the lifetime of the testator, contracted a marriage without his consent would not forfeit any benefit, while in the case of a daughter who contracted such a marriage after his death without the written sanction of the trustees would forfeit. Looking at this peculiarity in the clause, I see no sufficient reason why in construing the will so far as it relates to forfeiture in the event of marriage, we should not follow the language of the will as fairly construed, and therefore I think that the daughter who did marry in the lifetime of the testator within the forbidden degree should be entitled to share.

COZENS-HARDY, L.J.—Although I have the misfortune to differ from my lord and Stirling, L.J., as to the way this appeal should be decided, I entirely agree as to the principles which ought to be applied. *Primâ facie* a will speaks from the date of the execution except as to the property comprised in it, but there may be sufficient context to show that this rule is not applicable. It is a matter of construction whether a particular clause is intended to speak and operate from the death and not from the date of the execution of the will. My doubt is simply whether there is in this particular will sufficient context to justify such a conclusion. The clause has been read

before, and I will not read it again. I will only say this, that it is one clause of forfeiture; and it strikes me as a strange result to hold that as to part it is retrospective, and as to part not.

We are asked to read the clause as though it were "If any son becomes bankrupt after the date of this my will, or marries a first cousin after the date of my death, then there shall be a forfeiture." I cannot accept this view. Being bound, as we are, to hold that a bankruptcy or alienation after the date of the will would bring that forfeiture clause into operation, it seems to me that we ought to arrive at the same result in the case of a marriage after the date of the will and before the testator's death. If, therefore, it rested with me, I should be disposed to say that Kekewich, J.'s, view was correct.

Appeal allowed.

Solicitors for the appellant, *Ward, Perks, & McKay.*

Solicitor for the respondents, *John F. Child.*

From Chan. Div.
(Vaughan Williams and Stirling, L.JJ.) } Dec. 19.

In the Matter of THE SAFETY EXPLOSIVES (LIMITED). (*a.*)

Solicitor and client — Solicitor's lien — Company in liquidation—Sale of company's property—Deeds in solicitor's possession — Proof — Secured creditor — Amendment or withdrawal of proof—Inadvertence—Bankruptcy Act, 1890 (53 & 54 *Vict c.* 71), *s.* 8—*Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *Schedule I., clause* 8.

A solicitor to a company in course of being wound up was a creditor of the company to a large amount for costs, for which he proved in the company's winding up, but without disclosing any security held by him against the company. At the time he held a lien for this amount upon certain documents and title deeds belonging to the company. On the sale by the liquidator of a portion of the company's property, the solicitor, who was employed for the purpose, and to whom the purchase-money had been paid, handed over the title deeds to the purchaser without informing the liquidator that he did so without prejudice to his lien, retained the sum due to him from the company and handed over the balance. No arrangement of any kind had ever been made between the parties, but the liquidator was aware that the documents were in the solicitor's possession. On an application by the solicitor to be allowed to withdraw or amend his proof,

Held, that, under the circumstances, he was not entitled to do so, as he had not proved inadvertence, and also had allowed the liquidator to alter his position on the assumption that the solicitor had no lien.

This was an appeal from an order of Buckley, J.

The facts were as follows:

The Safety Explosives (Limited) was a company formed for the manufacture of explosives. Messrs. Cox & Lafone acted as the solicitors for the company from the date of its incorporation, and conducted for the company several conveyancing matters connected with the company's properties, and also some actions and litigious matters in which the company was engaged.

In 1902 the company went into liquidation and was wound up by a compulsory order. At the date of the commencement of the winding up of the company there was a large sum due to the company's solicitors from the company for costs and disbursements. The solicitors were not at the time aware of the exact sum to which the company's debt to them amounted, but had in their possession as the solicitors of the company the title deeds of the freehold and leasehold properties of the company, and some of the letters patent of and documents conferring patent rights in the company and other documents.

On the 2nd of September, 1902, the company's solicitors received from the official receiver notices convening a meeting of the creditors of the company, together with a form of proof of debt, which the solicitors immediately handed to their clerk, Mr. H. A. Moore, with instructions for him to do what was necessary. He at once proceeded to have the bills of costs and cash account of the company's solicitors against the company made out, and with them prepared and filled in the forms of proofs of debts with one of his principals for the amount due from the company, and attached the bills of costs to the form of proof. At the time he was quite unaware that his principals held in their possession the title deeds of the properties and some of the patents belonging to the company, and having placed the form of proof as prepared before one of his principals, it was sworn to and returned to him under the impression that it was perfectly in order. The various properties of the companies were in December, 1902, offered for sale by the liquidator by private treaty, and the only tender received was accepted, the price being £3,600. Subsequently the liquidator made inquiries of the company's solicitors with regard to the terms under which the company's leasehold properties were held, and in relation to the other properties of the company; he was also fully aware that the company's solicitors held the company's title deeds.

On the 4th of February, 1903, the purchase of the company's property was completed, and the balance of the purchase-money, amounting to £2,840, was received by the company's solicitors for the vendor. They informed the liquidator by letter of the completion of the purchase, and the receipt of the said sum of £2,840, and the title-deeds were handed over to the purchaser. They did not inform the liquidator they had handed over the title-deeds without prejudice to their lien.

Out of this sum the company's solicitors retained £824 12s. 5d. in respect of the lien, which they alleged they held as security for the debt due from the company on the deeds and patents in their possession, and they forwarded to the liquidator a cheque for the balance.

On the 23rd of September, 1903, the liquidator first gave notice to the company's solicitors that their security had been surrendered, and he asked for payment of the sum of £824 12s. 5d. which was being retained.

Messrs. Cox & Lafone, after further correspondence, applied to the court to amend their proof of debt by inserting therein the particulars of the security on the property of the Safety Explosives (Limited) which they held at the date of the commencement of the winding up of the company and the date of the proof, which security consisted of their lien as the solicitors of the company upon the title-deeds of the freehold and leasehold properties of the company and certain of the letters patent then in their possession, or in the alternative to withdraw their proof and rely on their security.

The application was made in reliance on clause 8 of the first schedule to the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), which provides that a secured creditor, if he proves his debt without valuing his security and votes in respect of the whole debt,

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

"shall be deemed to have surrendered his security unless the court is satisfied that the omission to value the security has arisen from inadvertence."

Buckley, J., held that inadvertence was proved, and that inasmuch as the schedule formed part of the Act itself he had no alternative but to give liberty to amend or withdraw as asked by the summons, and he held, further, that the creditor who proved inadvertence was to be restored to the same position as he would have been in if no mistake had ever been made without regard to what might have taken place in the liquidation proceedings.

From this the liquidator appealed.

H. Reed, K.C., and *E. O. Simpson*, for the appellant.—There was no reference to this lien except in one letter referring to certain policies. The defendants must either put forward their proof and waive their security or withdraw their proof and rely on their security. Buckley, J.'s, order was erroneous—first, because the order would not help the defendants; and, secondly, because the position of the parties having been altered, this order never ought to have been made at all. An order will not be made when it is illusory nor when the position of the parties has been changed. Negligence in omitting to read a document because you think it is not important is not inadvertence. The order is wrong, because it allows the defendant to withdraw his proof and rest on his security, and it throws on the liquidator the burden of proof that the sum of £800 odd was not a security, but a debt. It is not shown in the affidavit of the defendant what inadvertence was.

They referred to *In re Henry Lister & Co. (Limited)*, 40 W. R. 589 [1892] 2 Ch. D. 417; and *In re Newton*, 45 W. R. 63, [1896] 2 Q. B. D. 403, at p. 406.

Gore-Browne, K.C., and *Muir Mackenzie*, for the respondents.—The plaintiff has argued against arguments that have not been raised. [VAUGHAN WILLIAMS, L.J.—What is the actual order?] The actual order is to amend the proof. [VAUGHAN WILLIAMS, L.J.—It is impossible for us to deal with this matter unless we see that the position of the liquidator has been altered, which we do not know.] The defendants claim the £800 in respect of their lien on these properties; there was a lien over everything affixed to the soil. The defendants do not allege that the parties came together; the liquidator had express notice of the lien. The defendants should be allowed to amend their proof as they may be advised.

They referred to section 8 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), and the following cases: *Ex parte Clarke, In re Burr*, 40 W. R. 608, 41 W. R. 116; and *In re Piers, Ex parte Piers* v. *Read*, 46 W. R. 207, 475, [1898] 1 Q. B. 627. [VAUGHAN WILLIAMS, L.J.—*In re Hawkes, Ackerman* v. *Lockhart*, 46 W. R. 445, [1898] 2 Ch. D. 1.]

H. Reed, K.C., replied.

VAUGHAN WILLIAMS, L.J.—In my judgment this appeal ought to be allowed. I do not think an order ought to be made allowing these creditors to amend or withdraw their proof. I must not be understood at all as saying that they could not withdraw their proof for the purposes of correcting an inaccurate statement in it. I do not suppose the liquidator would have any objection to its being withdrawn with that object. But in my judgment they ought not now to be allowed to withdraw their proof for the purpose of relying on their lien. It is admitted that they wish to amend or withdraw their proof for the very purpose of justifying their claim to the £800 by virtue of their lien, and it is also admitted that there was not any express bargain made between them and the liquidator that they should retain the benefit of their lien. What, then, have we to do in such a case as this? We have first to apply clause 8. [His lordship then referred to the clause, and continued:] I do not desire to depart in the slightest degree from what I said in *Ex parte Clark, In re Burr*, 40 W. R. 608, as to what constitutes inadvertence. I there mentioned, amongst things which could not constitute inadvertence, a case in which a creditor, feeling the advantages and disadvantages of stating and valuing his security, elected not to prove for his whole debt. That is not exactly the present case. But, speaking for myself, I have been left by the affidavit of Mr. Cox in a state of great uncertainty as to the circumstances under which he failed to mention his security in his proof. The proof is in that part of Mr. Cox's affidavit in which he deals with the matter at paragraph 5. It seems Mr. Moore placed before him the proof to swear, and a general form of proxy, and that he swore the proof and signed the proxy, "In doing so I had the most perfect confidence." [His lordship read the paragraph.] I can only say that it is quite consistent with the statement that he was unaware that the proof purported to state that his firm had no security for the debt, and that he remembered at that moment the fact that his firm had the security. Now if he remembered the fact that the firm had the security, he may well have been quite unaware of the statement in the proof that they had none, and yet have thought that it was not worth while to trouble about the security because the company's assets were likely to yield 20s. in the £ for the creditors, and that, if necessary, there would be quite time enough to amend the proof by stating the security and its value. There is nothing in the affidavit which excludes the possibility of that state of mind on the part of Mr. Cox. And if that was his state of mind it would not be true to say that he omitted to state the security by "inadvertence" within the meaning of clause 8. Buckley, J., has arrived at the conclusion that the omission of the security from the proof was by "inadvertence," but his attention does not appear to have been called to the fact that the statements in the affidavit are open to the comment which I have made upon them. On the other hand, it should be said that the later affidavit of Mr. Cox, although he does not mention the state of the company's assets as the reason for omitting to value the security, shows conclusively that this frame of mind continued down to the time of his swearing the proof, by this, that he continued to take the view that 20s. in the £ would be paid to the creditors. I do not think that he has satisfied the onus which was clearly on him of showing that the omission was caused by "inadvertence." But I will deal with the case, apart from these considerations, upon the assumption that the omission was due to "inadvertence." But if it was so, what was the state of things? Here were solicitors to whom a debt is due from their clients, the company, and they are relying upon a lien on documents of the company which arose during the time of their retainer by the company, not by the liquidator. In the course of the liquidation it became necessary to realize the company's assets, Messrs. Cox & Lafone acting as solicitors for the liquidator in the matter of the realization. They put in a proof which negatived their having any lien for their debt, and allowed their client to invite tenders for the sale of the whole of the assets, including those portions of the property the title deeds of which they hold. They allowed their client to do that without in the slightest degree warning him that, when he came to realize that part of the property, the title deeds of

which they held, there would be a difficulty in carrying out the contract in its entirety unless 20s. in the £ was paid to them in respect of their bill of costs. I can only say that such conduct on the part of this solicitor was perfectly consistent with the proof which he had put in on behalf of his firm, a proof which was of course within the knowledge of the liquidator. After these tenders had been sent out, on the 4th of January, a letter is written by the liquidator to Messrs. Cox & Lafone, in the answer to which there is an allegation of their lien although it is limited to their policy of insurance. As a matter of fact this policy of insurance is included in the property which was ultimately sold, although not apparently in terms, at all events in the form of tenders which had been sent out, but the document does not in any way refer either to the proof or to the lien as if it would in any way interfere with the carrying out of the contract. It is suggested that it is impossible that the liquidator should in that state of things and after the receipt of that letter have acted upon the assumption that the proof as put in was in accordance with the facts and in accordance with the position taken up by Messrs. Cox & Lafone. I do not agree as to that. I can well conceive the liquidator receiving that letter without in the slightest recalling that there was such a lien set up by these gentlemen as would interfere with the carrying out of the contract between the parties. It seems to me that the solicitors here were actuated all the way through by the confident feeling that 20s. in the £ would be paid, and under those circumstances they did not call the attention of the liquidator to the fact that they were insisting upon this lien which would stand in the way of the realisation. Now the sale took place and the deeds were handed over by the solicitor to the purchasers. The obvious duty of the solicitors, if they meant to rely upon this, was that before they handed over the deeds to call the attention of the liquidator to it, and ask him whether there was any objection (notwithstanding their being handed over) to their claim, but nothing of that sort took place. In that state of things the sale went through, and they were handed to the purchaser. The solicitors now come to us saying "Give us leave to amend our proof." I think that leave ought not to be given. I think it ought not to be given because the solicitors' object in amending the proof is to set up a state of things which is inconsistent with their own proof that was on the file at the time of the carrying through of this purchase, and is inconsistent also with their own action at the time of the sale. Counsel for the respondents did not deny the proposition that you ought not to allow the amendment of a proof if the position of the parties has been altered after that proof has been put upon the file, and while it is continued there, if the liquidator has altered his position on the basis of that proof being there. But they draw this distinction, saying, "It is not sufficient to show that the liquidator has acted in a manner which is not consistent with the claim made, but you must show that he so acts because the proof was on the file." I do not agree with that. It seems to me if one man allows a state of things to continue and another acts in a way which can be supported if that state of things existed, but could not be supported unless that state of things does exist, that you ought not to allow acts done in that way to prejudice or alter a state of things which existed at the time when he was so acting. It seems to me it would be wrong to throw upon the liquidator the obligation to show that he relied upon the proof. Whether the proof was actually present in his mind or not, he was dealing with the property upon the basis that there was no lien at all upon it. I think the whole conduct of the solicitors, apart from the letter of the 6th of January, was such as to induce him to suppose that there was no lien which a solicitor could enforce which could stand in the way of the sale and purchase, and I think that under those circumstances we ought not to allow the solicitor now to amend his proof. Therefore, in my opinion, this appeal should be allowed, first, on the ground that Mr. Cox has not satisfied the onus which was upon him of showing this proof was sworn by inadvertence. I have no doubt it was sworn by inadvertence as far as Mr. Cox was aware of it, but I am not satisfied myself that Mr. Cox had not present to his mind that his firm had that security. Secondly, I am of opinion that he ought not to be allowed to amend in a case where the trustee has acted in a way which was consistent with the facts mentioned in the proof, but which would be inconsistent with the suggestion which is now sought to be made. I think under these circumstances leave to amend ought not to be given, and that this appeal should be allowed.

STIRLING, L.J.—I think I am of the same opinion. The first point that has to be considered is whether the court is satisfied that the omission to value the security claimed by the creditor took place by inadvertence. Now, for the reasons which have been given by my learned brother, the evidence appears to me, as it does to him, to be very unsatisfactory, but I am not prepared to say that inadvertence has not been made out. Though I agree with my lord's criticism of the affidavit I prefer to rest my decision on the ground that the granting of leave to amend or to withdraw a proof is not a matter of right, but is subject to the control of the court, and ought not to be given in a case where in the interval between the proof being carried in and the evidence as to the varying of it, the position of all parties, and of the liquidator in particular, has been altered.

Now what took place here was this. The creditor in the present case is a solicitor, and he had been a solicitor to the company which is being wound up, and he had due to him costs to the amount of over £800 in respect of his services which were provable in the winding up. He had in his office certain deeds and documents belonging to the company, and the liquidator appointed in the winding up appointed him also as his solicitor, and amongst other things on which he was called to advise upon by the liquidator was the sale of the property of the company. The property consisted of various elements. First of all there was a patent; secondly, came freeholds and leaseholds, on which were plant and machinery, I understand fixed and movable; and lastly there was stock-in-trade.

Now, that being the state of things, the solicitor had a lien on the documents which belonged to the company for the debt due to him by the company. I cannot help thinking there has been some misapprehension between the parties as to the nature of the solicitor's right. I should have imagined (of course from what I see here, though I cannot say definitely it was so) that there would be stated the security on the deed to which the deed and documents relate, but I need not say that is an entire misapprehension. The solicitor's lien simply entitled him to retain those documents in his hands until he receives payment of what is due to him as solicitor.

Now, that being so, the solicitor advised the liquidator with reference to this sale, and it seems to me it was his duty plainly to tell the liquidator what rights he had in respect of these documents. He ought to have told him "You have to sell this property, but you must remember we cannot complete this sale without our fees, and I shall not part with the deeds unless and until I am paid all that is due to

me from the company." Then the solicitor would have been in a position to consider what he should do, and it might be a most important thing, indeed it would be a most important thing to consider how he should sell the property. The patent, for example, which as I understand was in the possession of the solicitor, would undoubtedly affect the title to the assets of the company. The title of the leaseholder would be again affected by the lease. As regards the fixed plant, the machinery and stock-in-trade, that would be entirely unaffected. Now, that question has arisen, not only in selling estates, but in winding up companies, and what I should expect to be done is this. That either an arrangement should be made as between the solicitor and liquidator by which the deed would be parted with if the parties were unable to come to arrangements between themselves; or that the matter must be brought before the court in some shape or form that is best, as in some cases it might be, that the sale should go on practically unaffected without the title deeds being produced at all, or these documents being affected. The liquidator gets simply an order to put them up with conditions such as will dispense with him handing over to the purchaser the deeds to which the purchaser would otherwise be entitled to. That is all. It sometimes happens a portion of a sale is allowed to go on on the ground that the solicitor directs a certain amount of the purchase-money should be set aside to meet the claim, but that is by a matter of arrangement, and between the parties themselves, or an arrangement under the direction of the court. No arrangement of any kind is admitted to have been made here. The sale was ready to take place of the whole of the property both where the title-deeds were withheld and where they were not. The sale took place and is completed, and the solicitor hands over to the purchaser the deeds of one lot, and having done that seeks to retain the amount of his lien. Now he comes to the court and asks it to assist him in making good his claim and that he may be allowed to withdraw and amend his proof. I think, under the circumstances, he should not be allowed to do so, and the appeal will be allowed.

Appeal allowed.

Solicitors for the appellant, *Helder, Roberts, & Co.*, for *W. H. Clarke*, Leeds.

Solicitors for the respondent, *Cox & Lafone.*

From K. B. Div. (In Bkcy.) (Vaughan Williams, Romer, and Stirling, L.JJ.) } Oct. 30; Nov. 20; Dec. 11.

In re SOLOMONS.
Ex parte THE BANKRUPT. (*a.*)

Bankruptcy—Misdemeanour of bankrupt—Discharge—"Special reasons"—Discharge suspended—Application for re-hearing refused—Right of bankrupt to apply—Practice—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 11, *sub-sections* 9, 10, 12—*Bankruptcy Act,* 1890 (53 *&* 54 *Vict. c.* 71), *s.* 8, *sub-sections* 1, 2.

Upon an application for a discharge under section 8 *of the Bankruptcy Act,* 1890, *by a bankrupt who has been convicted of an offence against section* 11 *of the Debtors Act,* 1869, *the court has a discretion, and may take into consideration as "special reasons" for granting the discharge, the circumstances under which the offence was committed.*

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

This was an appeal from a decision of Mr. Registrar Linklater dated the 11th of August, 1903, refusing an application to review, rescind, or vary an order of discharge dated the 27th of June, 1899.

The facts were as follows: A receiving order was made against the bankrupt in November, 1898, and an order of adjudication in bankruptcy on the 15th of December in the same year. The official receiver published his report in February, 1899, in which he stated that the debtor's bankruptcy was greatly due to his unjustifiable extravagance in living, and that he, knowing himself to be insolvent, had not kept proper books of account, and had still persisted in carrying on his trade, and also was guilty of misconduct in having accepted bills, in relation to his property, for the benefit of another person and himself, drawn so as to represent trade bills, and accepted as such by him.

Having applied for his discharge on the 28th of February, 1899, it was refused, and on the 14th of March the registrar made an order suspending his discharge for five years from the 17th of January, 1899.

On the 6th of March, 1899, an order was made by the court for the trustee to prosecute the debtor under sub-sections 9, 10, and 12 of section 11 of the Debtors Act, 1869 (32 & 33 Vict. c 62), for falsifying the books of his account intending to conceal the true state of his affairs. The order was carried out, and the bankrupt prosecuted at the Central Criminal Court and found guilty.

The Common Serjeant, who tried the case, ordered it to stand over till the next sessions, and meanwhile the bankrupt was kept in custody for four weeks, when the Common Serjeant, thinking he had been sufficiently punished, bound him over in a sum of £50 to come up for judgment when called upon.

The trustee later applied to vary the order of discharge under section 8 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), but the registrar refused his discharge.

The two sub-sections 9 and 10 of the Debtors Act, 1869, under which the debtor was convicted are as follows: Section 11. "Any person adjudged bankrupt . . . shall in each of the cases following be deemed guilty of a misdemeanour . . . that is to say (*inter alia*), (9) If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals, destroys, mutilates, or falsifies, or is privy to . . . any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law." Sub-section 10 is substantially the same.

On the 3rd of April, 1900, a fresh application was made by the bankrupt to the registrar to rehear his application for discharge, when he alleged that all the facts were not fully before the court when his application was refused, and that Wright, J., had held there was no fraudulent preference upon an application by the trustee to have a payment by the bankrupt to a creditor set aside, the transaction which he had tried to conceal in his books.

This application was on the 30th of April refused by the registrar, and on the 22nd of June his appeal therefrom was dismissed, when no person appeared for the official receiver.

On the 11th of July, 1901, the registrar again refused his application for a rehearing of his application for discharge, and on the 26th of May, 1903, another application was made by the bankrupt for a day to be fixed for the rehearing, and to amend the order of the 27th of June, 1900, and this was again

refused; on appeal it was referred back to the registrar to enable him to go through the evidence supplied by the bankrupt in support.

On the 11th of August, 1903, the registrar came to the conclusion that no "special circumstances" existed which would justify him granting the bankrupt's discharge under sub-section 2 of section 8 of the Bankruptcy Act, 1890, and that he ought not rehear the bankrupt's application on that account.

The Bankruptcy Act, 1890, s. 8, sub-section 1, provides as follows: "A bankrupt may, at any time after being adjudged bankrupt, apply to the court for an order of discharge, and the court shall appoint a day for hearing the application . . ."; and sub-section 2: "On the hearing of the application the court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs (including a report as to the bankrupt's conduct during the proceedings under his bankruptcy), and may either grant or refuse an absolute order of discharge. . . . Provided that the court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, or the principal Act, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the court otherwise determines . . ."

The bankrupt appealed.

Oct. 30.—*H. Reed, K.C.*, and *A. H. Carrington*, for the bankrupt.—Section 8, sub-section 2, of the Bankruptcy Act, 1890, was intended to give the court a discretion in proper cases, such as an application for a discharge, when the facts proved are not serious; that is, is this offence of such a kind as for the court to say that this man shall not trade again? There are special reasons in this case, lapse of time and good conduct of the bankrupt, which are not sufficient to justify a refusal of an application for discharge.

They cited the following cases: *In re Tobias & Co.*, 39 W. R. 399, [1891] 1 Q. B. 463; *In re Freeman, Ex parte Freeman*, 7 Morrell 38, 38 W. R. Dig. 16; *In re Lloyd, Ex parte Lloyd*, 6 Morrell 297, 38 W. R. Dig. 16; *Ex parte Hill, In re Bird*, 32 W. R. 177, 23 Ch. D. 695, 32 W. R. Dig. 17; *In re Stevens, Ex parte Board of Trade*, 47 W. R. 61, [1898] 2 Q. B. 495; *In re Richards, Ex parte Evans*, 10 Morrell 136; *Herbert* v. *Sayer*, L. R 5 Q. B. 965.

VAUGHAN WILLIAMS, L.J.—We are of opinion that a *primâ facie* case for hearing this matter has been made out, and we think it desirable to deal with those circumstances ourselves; we think, therefore, we had better adjourn this matter for three weeks, that notice should be given to the official receiver, and a notice put in the newspapers to allow of any creditors to come in.

Nov. 20.—*Sir E. Carson, S.G.*, and *Muir Mackenzie*, for the official receiver.—An advertisement has been issued, and the official receiver received notice of the appeal. Under the Act of 1869 the Court of Bankruptcy had no discretion at all, they were bound to refuse the discharge, but by sub-section 2 of the Bankruptcy Act, 1890, "unless for 'special reasons' the court otherwise determines . . ." The "special reasons" there referred to must be special reasons existing at the time of the order of discharge, and the court cannot get rid of the fact of the conviction. [VAUGHAN WILLIAMS, L.J.—A refusal of discharge is in no sense a part of a punishment for a crime]. The Legislature found this state of things under the law prior to 1890, afterwards it was their intention that under the Act of 1869 a bankrupt should be placed in a position, in the interests of the community, so as to prevent him from trading, if he is convicted of a misdemeanour under that Act, and where there is a conviction, strong facts must be found to permit such a man to trade after. This is not one of the cases specially provided for in the Act, and about this particular matter the court can only affix conditions as to the discharge, and only for special reasons. The Legislature has intended that when a man has been convicted, unless he can show "special reasons," the court ought not to allow him his discharge. Whatever this man's motives, the Legislature has said that the crime of which he was convicted was a criminal offence, and that he should be deprived of his certificate of discharge. [VAUGHAN WILLIAMS, L.J., read Lord Alverstone's judgment.] The offence is the concealment in the books, and there are no cases where a bankrupt has ever got his discharge who has committed a criminal offence under this section. His subsequent conduct after the refusal of the order of discharge is of no account; his conduct in relation to his bankruptcy alone would constitute special circumstances.

H. Reed, K.C., and *A. H. Carrington*, for the bankrupt.

VAUGHAN WILLIAMS, L.J.—We have already said that we think a day ought to be named for rehearing this case ourselves, instead of sending it back to the registrar, and we will now give our reasons for thinking why we should fix a day. What we have to consider with regard to this section is the meaning of the words "special reasons" in the proviso at the end of the sub-section 2. [His lordship read the sub-section.] We have to consider what is the meaning of those words. So far as the language is conclusive, there is no limitation put on "special reasons," but it is left to the discretion of the court to say what constitutes "special reasons." I am very anxious not to say anything more than is necessary, nor to fetter any court hereafter as to the construction they may put upon the term "special reasons," but the contention of the Solicitor-General was that you could not take into consideration any of the circumstances under which the offence was committed, nor the conduct of the bankrupt after his discharge had been refused, and regard that in the light of special circumstances. I do not think it is necessary to deal with the second contention of the Solicitor-General. I heard, and am greatly impressed with his argument that to say that the good conduct of a man after his bankruptcy constituted a special reason was to say that a man by abstaining from doing anything that was wrong, what may be called good conduct, created a special circumstance under the section. I do not think it is for us to decide that, although I feel the force of the Solicitor-General's argument. I will deal with the other contention advanced by the Solicitor-General—that is, that given a conviction, one could not take into consideration as a special reason the object of the offender when he committed the offence. I think you can. The very fact that the Common Serjeant, who tried the case, dealt with it in the way he did is a special circumstance, which ought to be taken into consideration. Can it, then, be said that because the learned judge so deals with an offence as to shew that in his opinion it was not comparatively a grave instance of the offence under the section, a bankrupt can say at once, "Give me my discharge now," or to wait a short time and then say, "Give me my discharge now." I think not. When once you have got the fact that there are circumstances in connection with the offence, which go in mitigation of the offence, you have a special circumstance, but it is very right that there should be a period of probation. The intention of the Legislature is, that a

man who has been made a bankrupt, and who has been guilty of misconduct under section 11, sub-sections 9 and 10 of the Debtors Act, 1869, should not be allowed to exercise his rights of trading immediately. It is quite right, therefore, that in such a case an immediate discharge should not be granted, even though special circumstances may exist. A period of probation is necessary always, during which, if the bankrupt behaves badly, he would forfeit all chance of taking advantage of the mitigating circumstances which were present when the offence was committed. On the other hand, if a sufficient time has elapsed to enable one to form an opinion whether to allow such a man to trade would be dangerous to the public, then, if his conduct is of such a description as to show he is not likely to be dangerous, then I think his discharge should be granted. I think this was the view taken by Lord Alverstone in the Court of Appeal on this very matter. I do not think that he was deciding then that mere good conduct for a period of time would constitute a special reason. Under these circumstances I think a day ought to be named. I am not expressing any opinion as to what should be our judgment in regard to whether the order should now be varied. But there are special reasons existing in this case by means of what happened at the trial, and also by the light thrown on the debtor's conduct in respect of the very transaction which constituted the basis of Wright, J.'s, decision when he convicted him, that the object was not, as the trustee and official receiver at one time obviously thought, the fraudulent preference of a particular creditor. If we think that the period of probation has expired, we could fix a day, probably, to hear the application to vary, but we will ourselves dispose of the question by hearing the appeal from the refusal of the registrar to vary the order of discharge, and the onus will lie on the appellant.

ROMER, L.J.—I think that the case is so confused, and the circumstances are so peculiar, that we ought to hear the debtor's application for a discharge ourselves and dispose of the matter. Personally I desire to say that, as at present advised, I am not in doing so to be supposed to hold that the good conduct of a bankrupt in commerce since his bankruptcy would in itself, apart from other considerations, form a "special reason" within the meanng of sub-section 2 of section 8 of the Bankruptcy Act, 1890. I do not think it good or advisable to try and put a construction on what are "special reasons"; but in hearing an application for a discharge on the ground of "special reasons," and in deciding what should be done upon it, I think the court cannot disregard the conduct of the debtor, at any rate in the bankruptcy, and especially with reference to the act of misdemeanour of which he may have been guilty.

STIRLING, L.J.—I should like to add that, in my judgment, in any view of the case there are special reasons in this case. First, there is the mode in which the learned judge dealt with the case of misdemeanour, and to that I think great weight ought to be attached. But it does not rest there alone, because the circumstances under which the misdemeanour of which the bankrupt was found guilty was committed have been investigated, and have been adjudicated by Wright, J., and the conclusion to which he came on that occasion tends to corroborate the accuracy of the judgment which the learned judge who tried the case formed at the hearing. In these circumstances it seems to me there are special reasons. I must also add this: that I do not forget that both these facts were before this court on the 22nd of June, 1900, when an application to fix a date for rehearing had been made before the learned registrar, and refused by him, and the court affirmed that decision. I do not think that that amounted to a decision by this court that there were no special circumstances in this case.

The record of the judgment which we have from the registrar's book seems to prove the contrary, because it seems to me to have been simply a decision that, although there were, or at any rate might be, special circumstances in the case, the time had not arrived when they ought to be taken into consideration by this court or by the court which had jurisdiction to hear the application. Three years have elapsed since then, and I am not prepared to say that sufficient time has not elapsed. I desire to say no more, leaving the rest of the circumstances under which the present application is made to be considered when we hear the argument.

Appeal allowed.

Dec. 11.—Application for discharge came on for rehearing.

Reed, K.C.—The bankrupt has since his conviction endeavoured to redress the past.

Affidavits of witnesses in reference to his good conduct were read.

Muir Mackenzie, for the official receiver.

VAUGHAN WILLIAMS, L.J.—We are of opinion that the bankrupt ought not to be refused his discharge for ever, yet the report of the official receiver has certainly disclosed matters which tell very heavily against the debtor in this case; and the order suspending his discharge for five years was made independently of the offence of which he was subsequently convicted, and we cannot in dealing with this question regard this fact of no account, therefore we think it desirable under the circumstances that his discharge should be suspended for one year beyond the five.

ROMER and STIRLING, L.JJ., concurred.

Solicitors for the appellant, *Ralph Raphael & Co.*

Solicitor for the official receiver, *Solicitor to the Board of Trade.*

High Court of Justice.

K. B. Div. (Channell, J.) — Feb. 23.

LORD LUDLOW *v.* PIKE. (*a.*).

Landlord and tenant — Tithe — Agreement to pay additional sum by way of tithe—Legality of agreement—Tithe Act, 1891 (54 & 55 *Vict. c.* 8). *s.* 1 (1).

An agreement whereby a tenant agrees to pay by way of further rent "so much as the landlord shall pay for tithe rent-charge" comes within the prohibition enacted by section 1 (1) *of the Tithe Rent-charge Act,* 1891, *and is therefore void.*

Point of law raised on the pleadings.

The following are the facts of the case:

The plaintiff's predecessor let to the defendant a farm at the yearly rent of £255, and also by way of further rent-charge so much as the landlord shall pay for the tithe rent-charge on such premises. The plaintiff brought an action to recover £127 10s., being six months' rent, and the defendant paid into

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

court £117 10s., and pleaded that the balance £10 11s. 9d. in respect of rent-charge could not be recovered by the landlord as it was void under section 1 (1) of the Tithe Rent-charge Act, 1891. That section is as follows: "Tithe rent-charge as defined by this Act issuing out of any lands shall be payable by the owner of such lands, notwithstanding any contract between him and the occupier of such lands; and any contract made between an occupier and owner of lands after the passing of this Act for the payment of the tithe rent-charge by the occupier shall be void."

The question for the opinion of the court was whether the clause in the lease came within the section.

Foote, K.C. (*Garland* and *Foa* with him), for the plaintiff.—This clause does not come within the section. The Act was passed to prohibit the occupier paying the tithe rent-charge to the tithe owner. It did not prevent the landlord transferring the burden of the tithe rent-charge to the occupier by agreement.

He cited *Davies* v. *Fitton*, 2 Dr. & W. 223, and *Beadel* v. *Pitt*, 13 W. R. 287.

Moyses, for the defendant, was not called upon to argue.

CHANNELL, J.—There may be a good many reasons why the Legislature should not have prohibited contracts of this nature, but I have, sitting here, to deal with the words of the Act and to see whether the words in the lease come within the language of the section. Now, the agreement here is to pay an additional sum for rent equal to the amount of the tithe. That puts on the tenant the burden of the tithe, giving him, on the one hand, the benefit of any reduction if the price of corn should fall, and making him pay an additional sum if the price of corn should rise. I think that comes within the prohibition enacted by the statute. I confess I do not quite see why the Legislature should have forbidden a contract of this kind.

The object of the Act would have been attained without that prohibition, but it is sometimes convenient to go beyond what is absolutely necessary in order to ensure that the particular object in view shall be attained. But whatever the reason of the prohibition it is there, and in my opinion this agreement clearly comes within the words of the section. With regard to the authorities I think that *Davies* v. *Fitton* is directly in point. In that case the Lord Chancellor of Ireland drew a distinction between a covenant to pay an exact amount of tithe, whatever it may be, and a covenant to pay a sum assessed as compensation for having to pay tithe, and expressed his opinion that the latter covenant would be perfectly good. The case of *Colbron* v. *Travers*, 12 C. B. N. S. 4, is to the same effect.

In my opinion, therefore, this agreement comes within the express words of the statute, and there must be judgment for the defendant.

Judgment accordingly.

Solicitors for the plaintiff, *Rowcliffes, Rawle, & Co.*, for *Pinniger, Callaway, & Pinniger*, Westbury.

Solicitors for the defendant, *J. T. Rossiter*.

K. B. Div. (Channell, J.) Feb. 22.

PARKER AND ANOTHER v. LONDON COUNTY COUNCIL. (*a*.)

Public authority, action against — Tramway system acquired by county council—Public undertaking or commercial enterprize—Acquired and carried on with funds provided by the rates—Accident to passenger—Time within which action must be brought—Public Authorities Protection Act, 1893, *s.* 1 (a).

The defendants, a local authority, acquired under an Act of Parliament power to purchase and work the undertaking of a tramway company with funds provided out of the rates. The plaintiffs received personal injuries owing to the alleged negligence of the defendants' servants, whereby the tramcar on which they were travelling collided with another tramcar. In an action to recover damages commenced more than six months after the accident, the defendants pleaded that the action could not be maintained by reason of the provision in section 1 (a) *of the Public Authorities Protection Act*, 1893.

Held, that the local authority could avail themselves of the protection afforded to public authorities, and that the action, therefore, not having been brought within six months, was barred.

Case stated by order of a master for the determination of a point of law raised by the defendants.

The question for decision was whether the Public Authorities Protection Act, 1893, availed the defendants, as common carriers, in their defence to an action for damages for personal injuries sustained by the plaintiffs by the alleged negligence of the defendants' servants. The defendants were, under the London Tramways Act, 1896, proprietors of the tramways, and the plaintiffs, mother and son, were passengers on one of their tramcars from Tooting to Westminster. Another tramcar of the defendants was coming from Blackfriars to Tooting, and the drivers of each car endeavoured to get first on to a single tramway line. In doing so the cars collided and the plaintiffs thereby received the injuries they claimed damages for.

Section 1 of the Act provides that "Where . . . any action . . . is commenced . . . against any person for any act done in pursuance . . . of any Act of Parliament or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect: (*a*) The action . . . shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in the case of the continuance of injury or damage within six months after the ceasing thereof."

The plaintiffs issued the writ in this action on the 12th of January, 1903, against the defendant county council to recover damages for personal injuries received as above stated on the 16th of June, 1902. The accident took place during the electrification of the line, when two lines were placed so close together that if two cars passed at that point a collision must ensue. It was admitted for the purpose of having this preliminary point of law decided that it should be taken that the collision was caused by the negligence of the drivers of the cars, or one of them, in getting the cars into the position in which they came. The defendants by virtue of certain private and local Acts of Parliament had acquired the tramways of, among other companies, the London Tramways Co., and at the time of the accident were carrying on the enterprise

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

in relation to the tramways with funds provided out of the rates.

The defendants contended that they were exonerated from liability here because in carrying on the workings of the tramways the provisions of the Public Authorities Protection Act, 1893, applied in their favour, and that inasmuch as the plaintiffs had not commenced proceedings within six months after the negligent act complained of, the action was barred by the limitation imposed by section 1 (*a*) of that statute.

The question of law raised was now argued.

Moyses, for the plaintiffs.—The defendants *qud* carriers of passengers for profit are engaged in a commercial enterprize, and are therefore not within the provisions of the Act of 1893, and cannot rely on the defence given to public bodies. Therefore the action is not barred: *Corfus* v. *London and Brighton Railway Co.*, 5 A. & E. 547; *Palmer* v. *Grand Junction Railway Co.*, 4 M. & W. 749.

Daldy, for the defendants.—It is assumed here that the accident was caused by the negligence of one or both of the drivers of the defendants' tramways. Therefore the claim is based on the "neglect or default" of the servants of the county council. The council was working the line under powers granted them for that purpose by Act of Parliament, and the necessary funds were provided by the rates. It follows that if the plaintiffs succeed the damages they recover and the costs that the council would in that case have to pay must be borne by the rates, and the county council are under a statutory obligation not to do anything negligently whereby expenses would be thrown on the ratepayers. The defendants here are not a commercial company, but a municipal body. Therefore we have all the elements necessary to constitute the council, as the tramways authority, a public authority as distinguished from a commercial company. It follows that they are entitled to the protection given by the Act of Parliament to public bodies against whom a claim is made based on neglect or default in carrying out a public duty. [*Attorney-General* v. *Margate Pier and Harbour Co.*, 48 W. R. 518, [1900] 1 Ch. 749; *The Ydun*, [1899] P. 236; 47 W. R. Dig. 166; *Ambler & Sons (Limited)* v. *Bradford Corporation*, [1902] 2 Ch. 585, 51 W. R. Dig. 43; *Mackey* v. *Tolworth Joint Isolation Hospital District Board*, [1900] 2 Q. B. 454, 48 W. R. Dig. 99; *Edwards* v. *St. Mary, Islington*, 37 W. R. 347, 22 Q. B. D. 338; *North Metropolitan Tramways Co.* v. *London County Council*, 46 W. R. 554, [1898] 2 Ch. 145, were referred to.] The proviso in section 1 (*a*) does not avail the plaintiffs by enlarging the time within which the action can be commenced: *Carey* v. *Bermondsey Borough*, 20 Times L. R. 2.

Moyses replied.

CHANNELL, J.—I confess that during a considerable portion of the argument I was inclined to think that there were grounds upon which I could decide the question raised in favour of the plaintiffs, but I have come to the conclusion that the matter is concluded by authority, and that whatever my personal opinion may be on the facts, I am bound by the principle laid down in *The Ydun* to give my judgment for the defendants. The facts here were that the London County Council, under the combined operation of several Acts of Parliament, obtained the powers to acquire, and when acquired to work, certain tramways, and in particular the tramway to Tooting on which this accident arose, which was alleged to be due to the negligence of one or other of the tramcar drivers. The question which thus arises is whether an action would lie which had not been commenced within six months after the accident, and that depends on whether or not the defendants are a body to which, in relation to their tramway undertaking, the Public Authorities Protection Act applies. The case decided by Kekewich, J., of the *Attorney-General* v. *Margate Pier and Harbour Co.* shows that the tramway company from whom the defendants had purchased the undertaking would not have been protected by the statute under similar circumstances, since they were clearly a commercial company, and none the less so because they carried on their undertaking under statutory powers. The present case is different, inasmuch as the defendants carry on the enterprize as a municipal body. It is a general principle, when things have to be paid for out of the rates, that the ratepayers must bear their own burdens, and must not leave such things unpaid and thus shift the liability to some future date, to be borne possibly by other ratepayers made liable under a subsequent assessment. That principle might have been the reason why this protection was given to public authorities by the Legislature, so that as nearly as possible those who while in office incurred a liability might be the body against whom proceedings to recover damages might be instituted. However that may be, I do not rest my decision on that ground. No doubt when that Act was passed the Legislature did not contemplate the case of municipal bodies carrying on commercial enterprizes of this kind, but all that I am called on to decide here is the effect of the words that the Legislature used. If the matter had been left open for me to decide what was the intention of the Legislature, and how the words they used should be construed in a case like the present, I should, I think, have been inclined to say that on the true construction of the section the defendants would have been protected from consequences of negligence in the course of the construction of the tramways, but they would not be protected from the consequences of their servants' negligence in carrying on the work in relation to the working of the trams after the construction was completed. I think, apart from the authorities, there might well have been a good deal to be said in such an argument. But, as I have before said, the case is covered by authorities, and particularly by the case of *The Ydun*. In that instance a municipal corporation had become a harbour authority with power to take tolls from ships entering the harbour. The harbour-master was negligent. In an action to recover damages from the corporation for the consequences of that negligence it was held that the corporation, in carrying out their duties in respect of the harbour, were protected by the Public Authorities Protection Act, and in that case, as here, the defendants claimed exemption from liability on the ground that the action had not been commenced in time.

Therefore my judgment must be for the defendants, as I hold they are entitled to claim the protection afforded public authorities by the statute.

Judgment entered accordingly for the defendants on the point of law, with the costs of the argument.

Solicitor for the plaintiffs, *Henry I. Sydney.*

Solicitor for the defendants, *W. A. Blaxland.*

K. B. Div.
(Wills and Kennedy, JJ.) Jan. 22.

CHAPMAN v. WINSON. (a)

Principal and agent—Commission—"When and if the purchase is completed by private treaty."

The defendant, who was desirous of selling a house, entered into an agreement with the plaintiff that if the latter introduced to him a person who should become the purchaser of the house, he, the defendant, would pay the plaintiff as and by way of commission a certain sum "when and if the purchase is completed by private treaty." The plaintiff introduced a purchaser who was accepted by the defendant, and a contract to purchase was signed and a deposit paid. The purchaser was unable to carry out the contract, and it was agreed between her and the defendant that he should release her from the contract in consideration that he should retain the deposit, and this was accordingly done.

Held, that the plaintiff was entitled to his commission, as the purchase was "completed by private treaty" so far as he was concerned.

Appeal by the plaintiff from the decision of his Honour Judge Austin, sitting at the Bristol County Court.

The action was brought to recover certain commission.

In June, 1902, the defendant was trying to sell the Full Moon Hotel, particulars of which he gave to the plaintiff, who knew a lady who was a likely purchaser.

On the 8th of September, 1902, the defendant gave the plaintiff the following commission note: "If your friend is named and introduced within one week, and becomes the purchaser of the above hotel, you shall be paid as and by way of commission a sum of £50 when and if the purchase is completed by private treaty."

The lady was thereupon introduced to the defendant by the plaintiff, and on the 11th of September, she signed a contract agreeing to purchase the hotel from the defendant for the sum of £2,000, and by way of deposit she paid the defendant the sum of £200.

Subsequently she found she would not be able to complete the contract, and an arrangement was come to between the defendant and herself whereby it was agreed that the defendant should release her from the contract, and that he should retain the deposit of £200, and this was accordingly done.

The plaintiff thereupon brought this action, claiming that he was entitled to his commission.

The learned county court judge gave judgment for the defendant, being of opinion that in construing the commission note he was bound to give some effect to the words "when and if the purchase is completed by private treaty," and that as the purchase went off through no fault of the defendant, and was never "completed" in the ordinary meaning of the word, the plaintiff was not entitled to recover commission.

From this decision the plaintiff now appealed.

J. A. Hawk, for the plaintiff.—The decision of the learned county court judge is wrong. The meaning of the words "when and if the purchase is completed by private treaty" is that if the plaintiff introduces a purchaser by private treaty, and that intending purchaser enters into a contract to purchase the house, then the plaintiff is entitled to be paid his commission. The plaintiff did in fact introduce a purchaser who was willing to buy, and who did in fact enter into a contract to buy, and paid the deposit money in respect thereof. He is therefore entitled to his commission, and the fact that the defendant released the purchaser from her contract does not deprive the plaintiff of his right.

He cited *Grogan & Co* v. *Smith*, 6 Times L. R. 427, 7 Times L. R. 132; and *Passingham* v. *King*, 14 Times L. R. 39, 392.

Brook Little, for the defendant.—The learned county court judge was right in deciding that the plaintiff was not entitled to his commission. The meaning of the words "when and if the purchase is completed by private treaty" is that the purchase must be completed in the sense of the purchase-money being handed over and the deed of conveyance signed. In the present case this never took place, and the plaintiff has not, therefore, earned his commission.

WILLS, J.—In this case the point we have to decide is one of some difficulty, because these words "when and if the purchase is completed by private treaty" are not as clear as they might be, and I can quite understand two persons arriving at quite opposite conclusions as to what their true meaning is.

In construing a sentence it is a good general rule that, unless you are driven to a contrary conclusion, you should construe the words according to their grammatical meaning. Now, in the sentence we are construing here, the words "private treaty" attach to the word "completed," and the plaintiff is stated to be entitled to be paid a certain sum as and by way of commission when the purchase is completed in a particular way—namely, by private treaty, and I think the words "by private treaty" are meant to exclude sale by auction. If the word "completed" here means completed in the ordinary legal sense—namely, by the execution of the deed of conveyance and the handing over of the balance of the purchase-money—then I cannot see that there is any meaning in the words "private treaty" as attached to the word "completed." I think the word "completed" is used, not in its technical, but in its grammatical meaning, and I think the parties to the commission note intended to use the word in that sense. In my opinion the purchase was completed by private treaty, for if the vendor is bound by the contract to sell, and the purchaser is bound to buy, and the purchaser is accepted by the vendor, then the purchase is completed so far as the agent is concerned. I am of the opinion that the meaning attached to the words "when and if the purchase is completed by private treaty" by the learned county court judge is not their true meaning, and therefore this appeal must be allowed.

KENNEDY, J.—I entirely agree. I do not see how there can be any answer to the reasonable meaning my brother Wills has placed upon these words. It would not be fair to take these words out of the order in which we find them, and read them as if they ran "when and if the purchase by private treaty is completed." If the parties had intended the words to have been so read it would have been very easy for them to have written them so.

Appeal allowed.

Solicitor for plaintiff, *W. G. Card*, for *E. Woodhouse Veale*, Bristol.

Solicitors for defendant, *Darley & Cumberland*, for *F. J. Tarr & Son*, Bristol.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

K. B. Div.
(Wills and Kennedy, JJ.) Jan. 20.

BARRATT v. GREAT NORTHERN RAILWAY CO. (a.)

Railway—Goods consigned by shippers for carriage over several companies' lines under their special contract with railway company—Goods lost by fire while on rail—Privity of contract—Alternate rates—Owners' risk—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.

Where two or more railway companies agree together to carry through goods at a special rate in consideration that the goods are conveyed at owners' risk on their respective lines, and goods are lost or damaged, the sender has no cause of action, although the loss or damage to the goods occurred through the negligence of one of the companies other than that to which the sender or his agent consigned the goods on these terms.

Appeal by the defendant railway company from a verdict and judgment entered for the plaintiff with £40 damages at the trial of the action before his Honour Judge Baugh Allen, sitting at the Bingham County Court.

The facts, so far as material, were these: The plaintiff, a nurseryman, carrying on business at Radcliffe-on-Trent, purchased a large number of plants and shrubs in Belgium and consigned them to England by Messrs. Wilson, Sons, & Co. (Limited), who shipped them from Antwerp to Hull. There the shippers handed the plants for carriage from Hull to Radcliffe-on-Trent to the North-Eastern Railway Co. and the Great Northern Railway Co. at the lower through rate in pursuance of a contract entered into by Wilsons (Limited) with the North-Eastern Railway Co. in January, 1895, whereby it was agreed that all goods to which the alternative rates applied delivered by Messrs. Wilsons should be carried at the lower rate in consideration of that firm relieving the company and all companies and persons over whose lines the goods might pass from all liability for loss and damage except upon the proof that the loss, damage, &c., arose from wilful misconduct on the part of the company's servants.

While the shrubs were being carried by the Great Northern Railway they were destroyed by fire. At the trial the defendant company pleaded that, there being no evidence of wilful misconduct, they were protected by the terms of the special contract, and that there was no case to go to the jury.

The judge ruled otherwise, and the jury found that the defendants were negligent and assessed the damages at £40.

The defendants appealed.

Lush, K.C., and *Dwyer*, for the defendants.—The plaintiff cannot recover damages in this case, because if there was no contract between the defendants and the plaintiff there was no breach of duty, and, therefore, an action based on negligence—that is, a breach of duty—cannot be maintained. On the other hand, if there was a contract it was one to carry the plaintiff's goods at owner's risk, and the plaintiff has failed to show that "the loss or damage arose from wilful misconduct," which would under the contract alone make the defendants liable. The Great Northern Co. must be taken to have agreed with the North-Eastern Railway Co. to make terms in its name as one of the carrying companies that would be involved in the through carriage of goods from Hull to Radcliffe. They accepted their proportion of freight based on the lower rate under the contract. That contract binding them to accept less than otherwise would have been charged, they are entitled to the benefit against liability which was the consideration for reduced rates given by that contract.

W. H. Stevenson, for the plaintiff.—The judge was quite right in entering judgment for the plaintiff, because, assuming there was no contract *inter partes*, a railway company to whom goods have been consigned for carriage are guilty of a tort if they are damaged in the company's care by the negligence of the company's servants: *Foulkes* v. *Metropolitan Railway Co.*, 28 W. R. 526, 5 C. P. D. 157. Assuming that there was a contract with the North-Eastern Railway Co., that does not prevent the plaintiff suing the defendants, for there was no privity of contract between the plaintiff and the defendants. The defendants seek to avoid liability on the ground that the goods were consigned under a special contract at a lower rate at owner's risk. Before they can rely on that defence they must show that this was a special contract within the provisions of section 7 of the Railway and Canal Traffic Act, 1854, and *Peek* v. *North Staffordshire Railway Co.*, 11 W. R. 1023, 10 H. L. C. 473, is an authority against such a contention. Should this court find in favour of the plaintiff on the main question, there should be a new trial, because then the verdict of the jury must be taken as to whether the want of care that caused the loss amounted to wilful misconduct or only to negligence on the part of the defendants. Until that question is answered the defendants cannot rely on the proviso in the contract.

Lush, K.C., replied.

WILLS, J.—This is a case of very considerable importance, and it has been very completely argued, but I have come to a very clear opinion myself that the defendants are entitled to judgment, and that there is no question which necessitates the sending of the case down for a new trial.

One point I think I have already disposed of, and that is this. Mr. Stevenson wanted to make out that he would be entitled to a new trial, because he had not asked the jury at the trial to find there was wilful misconduct, and that, if he got a second trial and submitted that question to the jury, he would get a verdict. I have no doubt he would get a verdict on that or on anything else he elected to suggest to them, provided it was against the railway company; but clearly he is not entitled to such an indulgence as that. The question is, whether, on the facts known to us, and the course the case took at the trial, the defendants are entitled to judgment. No question was raised there about wilful misconduct, and therefore it does not arise here.

Now, the only difficulty in the case arises upon the question of whether there is evidence of a contract, or whether a contract has been established between the Great Northern Railway Co. and the present plaintiff. That depends upon establishing two agencies. As to one there is no difficulty. Nobody can doubt that Messrs. Wilson were agents of the plaintiff to make the contract they did with the North-Eastern Co., and the only matter about which there is any possibility of difficulty is, whether the North-Eastern Railway Co. are shown to have been the agents of the Great Northern Co. in making this contract with respect to the goods that were to be carried over the railways of both companies. One knows by this something of the regular course of railway business and railway management, and, to begin with, it is almost an impossibility that in the present day one railway company should make a bargain professing to control the rates and the proceeding of another railway company unless there was some such arrangement

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

between them as would allow that to be done. We know, in point of fact, that the business of the country could not be carried on for a day unless these arrangements were made by which one railway company agrees with another to have goods carried on terms that are convenient to themselves and to the sender over all parts of their systems and over all systems in the country; and therefore it does not want a great deal of evidence to show that it is in the highest degree antecedently probable. It seems to me that there is abundant evidence to show it. There was one charge here—one through rate. That rate was collected, and habitually collected, by the Great Northern Co. They certainly were in business relations with the North-Eastern Railway Co., and they were certainly aware of the charges which the North-Eastern Co. were making for the carriage through. They were aware also, and they must have been aware that the North-Eastern Co. was charging the cheaper rate—the owner's risk rate—in respect of the goods it was in the habit of sending to this gentleman over their line; and under these circumstances it is quite impossible to suppose that they themselves were receiving anything but the owner's risk rate. How did they become liable to carry the goods for that smaller rate? Only by virtue of this agreement; and there seems to me to be abundant evidence that this agreement was acted upon in its entirety with the knowledge, concurrence, and consent of the Great Northern Co. If so, the Great Northern Co. have allowed the North-Eastern Co. to make this contract in its name as one of the carrying companies that would be involved in the carriage of the through goods, and having done so they were bound by it, and are therefore entitled to the benefit of it.

The agreement is constituted by two letters dated the 8th of January, 1895, which refer to all traffic that is to be sent by Messrs. Wilson. There are two rates and the North-Eastern Co. mention their two rates and they say the reduced rate is adopted when the sender agrees to relieve the company and all other companies or persons whose lines the goods may pass from liability, loss, or damage, except in the case of wilful misconduct. That is agreed to; and Messrs. Wilson write that they do agree to relieve the North-Eastern and all other companies and persons over whose lines the goods may pass of such liability. What would be the value of that, if, as is suggested, there were no contracts with the subsidiary or following lines? It would be nothing, because the state of things would arise which Mr. Stevenson so earnestly contended for—namely, that a person who for years has taken the benefit of these rates should whenever a loss occurred be able to turn round and say, "Oh, no, I have taken the benefit of this. I have got the full benefit of it for years, and having got that I will now turn round and get damages out of the company on the footing that there is no contract between us at all." That is not, I think, honest or straightforward; on the contrary it is not well founded.

Then Mr. Stevenson raised another difficulty, because he says that under the Railway and Canal Traffic Act, 1854, it is necessary that on each particular occasion when goods are sent by a company there should be a special contract relating to those particular goods. I think it is going back to the year when railways were first invented to suppose anything of that kind can be necessary, or that it is consistent with the universal course of business. When people are constantly sending goods by a railway, and wish to avail themselves of the owner's risk rate, they do what is done here, they enter into a general contract and request that all their goods shall be sent at owner's risk rate, where there is one, and why that is not a perfectly good special contract I do not know. If I am right in saying that the North-Eastern Co. may be treated as the agents of the Great Northern Co. in making this contract it is just as good a special contract as if it were addressed in terms to the Great Northern Co.

But Mr. Stevenson's quiver is not yet quite exhausted; he has another objection—that the company must prove that there were two rates, and that the difference between them was not an unreasonable one under the circumstances. They did show undoubtedly that there were two rates, and whether the plaintiff knew at the time this took place or not seems to me quite immaterial. The defendants are entitled to the benefit of the plaintiff's conscience. He was stating that he knew, and what he knew to be true was very good evidence in the case whenever he learnt it. Having admitted that there were two rates, I do not think it is possible, whatever may be suggested on his behalf by Mr. Stevenson, to do him the injustice of believing that for a moment he would have suggested he was not perfecely aware that these things were being carried at the lower rate on the owner's risk. There is the clearest evidence of it, and it is impossible to believe that any man who had been twenty years in the trade could have been ignorant of that.

Then it is said it should be shewn there were corresponding advantages to the consignor which would make the condition reasonable. I fail to see that any question of that sort was raised, and I cannot believe that it was raised. It would have been perfectly futile if it had been raised, and the judge would have known at once that that which was acquiesced in by the trade all over the country was reasonable. It often happens at *nisi prius* that things are taken for granted as to which nobody would have been wild enough to raise a question. It is quite clear that the question would have passed at the trial as an admitted thing that there were two rates, and there was no objection to the lower rate on the ground of its not giving corresponding advantages. Therefore it would be really absurd to send the case for a new trial on a point as to which it is quite clear no question was raised, and as to such, also, if any question had been raised the answer would have been given that there was.

For these reasons I come to the conclusion that the defendants were, in my judgment, clearly entitled to succeed in the court below.

KENNEDY, J.—I agree. I think there was such negligence that, if that were a proper question for the jury, they might be so far justified in finding a verdict in favour of the plaintiff, and it would not be right that we should in any way interfere with the verdict if that were the real question. But I agree with my learned brother that the appellants ought to succeed in this, that while the matter is not free from difficulty, it appears to me it is impossible to contend that the goods were carried by the Great Northern Co. except on the terms of the contract which was unquestionably made (I leave for the moment out of sight any statutory question under the Railway and Canal Traffic Act), so far as a contract could be made, by the persons who were authorized by the plaintiff himself to negotiate and arrange for the transmission of the goods from Hull by the railway—namely, Messrs. Wilson. There are cases in which an action may be properly brought, and may be successfully brought. I care not whether upon a breach of duty or breach of an implied contract for damage to goods, although no expressed contract can be proved at all; but what is the only legitimate inference from the facts here is this—that the Great Northern Co. carried these things because they received them from a railway company that had contracted for both

lines. Therefore the only inference is that they took them in that way in a train which would be made up, I think, of vehicles belonging to both companies, and that they were being carried by them under an arrangement made on behalf of both companies. The jury would not be justified in finding that Messrs. Wilson were not authorized to enter into a contract that would bind them. Apart from any statutory question that is clear. It would be difficult to put any other version on the facts, because one must bring one's general knowledge to bear in these matters with regard to things that we must take notice of. These arrangements are made, we know, and in this particular case there was an allegation in the evidence before the judge and jury that arrangements were made by which Messrs. Wilson were to send over the whole distance and were to contract for the carriage on behalf of the plaintiff. Although I am going to agree with my learned brother in the result, I must frankly own, after having so much care given to the case by counsel on both sides, that I felt considerable difficulty in saying, although Messrs. Wilson must have intended to make a contract to cover both lines for the plaintiff, and were justified in doing so, whether in fact the contract was so made, as to be a contract to bind the Great Northern Co. to the plaintiff and the plaintiff to the Great Northern Co. with regard to the carriage and the limitation of risk. On the whole I think that a contract was made with all the companies with their authority as if it were joint carriers for the whole route, a contract which was a special contract. There is no doubt about that in one sense, because it is a contract and not a notice to the whole world of the terms of carriage. It is a contract made by the North-Eastern Co. with Messrs. Wilson specially. Then that contract is divided into two parts. There is the general contract which is quite common to that large trade, no doubt, but they make a contract which goes back as far as 1895, that is to apply to all goods consigned by them in the absence of any other arrangement. Then when the time comes for particular goods to go they send that particular note or order that the goods are to be sent for them with special tickets as to the place they are to be sent to, but all are under the contract which is not a general notice of rates by the railway company to the world, but a special contract with Messrs. Wilson, and signed by them. I think that the Railway and Canal Traffic Act is satisfied where there is a company which has the authority of sub-carriers or joint-carriers over whose lines the goods will go, if that company makes a contract for all, because it is one carriage of a set of goods for the common interest of all, and it actually passes over property of each and is in vehicles of the two companies which go jointly to make up the train. I see nothing in the Railway and Canal Traffic Act which obliges me to say there should be more than that. I think that is the only practical course. Many people would not know over how many lines their goods would travel. If there is a shipment of goods the contract applies to all the companies over whose lines the goods have to go.

I think there was evidence of negligence here, but not sufficient for the plaintiff to succeed, because of the terms of the special contract. Mr. Stevenson pressed for a new trial to try the question of wilful misconduct. There are no doubt cases where wilful misconduct approaches negligence very closely. He allowed the case to go to the jury, and by their verdict he must stand.

Appeal allowed.

Solicitor for the railway company, *R. Hill Dawe.*

Solicitors for the plaintiff, *J. H. Lee & Watts*, for *J. A. Simpson*, Nottingham.

Court of Appeal.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) April 26.

OWENS v. P. & A. CAMPBELL (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Wharf—Steamship lying alongside wharf—Fireman—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

The applicant, who was a seaman on the ship's articles, was employed as a fireman on board a passenger steamer, which made daily trips from Cardiff to places in the Bristol Channel. On the evening of the 20th of August the steamer arrived at Cardiff, and was made fast to a landing-stage outside the docks, where she remained until the following morning. She was timed to leave Cardiff at 8.15 a.m. on the 21st of August. At 8.17 a.m. on that day, while she was still made fast to the landing stage, with the gangways still out, the applicant, while attending to the boilers, was injured by the bursting of one of the boiler tubes. In proceedings to assess compensation under the Workmen's Compensation Act, 1897,

Held (*by* Collins, M.R., *and* Romer, L.J., Mathew, L.J., *dissenting*), *that the applicant was not at the time of the accident employed "about" the landing-stage, and therefore not about a factory within section 7 of the Act, his employment having no connection with the purposes for which his employers had the use of the landing stage.*

Appeal from an award of compensation under the Workmen's Compensation Act, 1897, by his Honour Judge Owen sitting at the Cardiff County Court.

The following were the agreed facts: (1) The accident in respect of which the claim was made took place on the 21st of August, 1903, on board the steamship *Cambria.* She was a passenger steamboat, which in the summer season made daily trips from Cardiff to Ilfracombe and other places on the Somerset and Devonshire coasts. (2) The applicant was a fireman in the employment of P. & A. Campbell (Limited) on board *The Cambria*, and his average weekly earnings were 32s. (3) *The Cambria* came into Cardiff at 7.35 p.m. on the evening before the accident, and was made fast to the landing pontoon which is at the head of the Cardiff Drain and outside the entrance to the docks. The pontoon is a wooden landing-stage which rises and falls with the tide, and by means of which the passengers land from and embark on the vessels. (4) *The Cambria* remained afloat from the time that she came in until about 8.30 p.m., when she was left dry on the mud. (5) She was made fast to the pontoon by ropes, and she continued to be made fast by the same fastenings until she left the pontoon. (6) The engine fires in the vessel were left in all night, and the applicant, early on the morning of the accident, went on board the vessel to perform his usual duties as a fireman. (7) The vessel was afloat about 1.30 a.m. on the morning of the day of the accident, and was timed to leave Cardiff for Ilfracombe at 8.15 a.m. (8) At 8.17 a.m., whilst the applicant was attending to the boilers, a tube in one of the boilers burst, and he was severely scalded on the face and arms. (9) The gangways from the vessel to the pontoon had been out (that is, connecting the pontoon with the vessel) for some time before the accident happened, and at the time that it happened practically all the passengers going by her were on board

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the vessel. (10) The main and auxiliary engines of the vessel had been worked before the accident happened. (11) The passengers on board *The Cambria* were after the accident transferred to the steamship *Ravenswood*, which left Cardiff at about 8.30 a.m. (12) It was whilst *The Cambria* was moored to the pontoon for the embarkation of passengers that the accident happened. (13) The applicant was a seaman on the ship's articles and engaged on his duties as a seaman at the time of the accident. (14) The applicant was still suffering from the effects of the accident and was unable to work.

The applicant filed a request for arbitration to assess compensation under the Workmen's Compensation Act, 1897, and the employers in their answer denied their liability to pay compensation upon the ground that the employment of the applicant was not an employment to which the Act applied.

The county court judge held, upon the authority of *Griffin* v. *Houlder Line*, *ante*, p. 323, [1904] 1 K. B. 510, that the applicant was within the Act, and he made an award for a weekly payment to him of 16s.

The employers appealed.

J. A. Simon, for the employers.

Gatehouse (*Albert Parsons* with him), for the applicant.

Cur. adv. vult.

April 26.—COLLINS, M.R.—This is an appeal from the decision of the judge of the Cardiff County Court, who held that the injured workman was entitled to compensation under the Workmen's Compensation Act, 1897. The employers thereupon brought this appeal. The workman was a fireman employed in a passenger steamer which made daily trips from Cardiff to Ilfracombe and other places in the neighbourhood. Upon the occasion in question the vessel had been lying during the night at a wharf which was outside the docks at Cardiff, and it was timed to start on the following morning at 8.15 from Cardiff with passengers. As stated in the judge's notes, the applicant was a seaman on the ship's articles and engaged on his duties as a seaman at the time of the accident. What the applicant was doing on the occasion of the accident is also stated in the notes: "The engine fires in the vessel were left in all night, and the applicant early on the morning of the accident went on board the vessel to perform his usual duties as a fireman. The vessel was afloat about 1.30 a.m. on the morning of the day of the accident, and was timed to leave Cardiff for Ilfracombe at 8.15 a.m. At 8.17 a.m., whilst the applicant was attending to the boilers, a tube in one of the boilers burst, and he was severely scalded on the face and arms." The man, therefore, had signed on as a seaman and was employed as a seaman at the time of the accident, and he met with an accident arising out of his employment while he was attending to the boilers.

It was contended on behalf of the employers before the county court judge that they were not liable to pay compensation under the Act, as *primâ facie* a seaman employed in a ship is not within the Act, because a ship is not a factory, and the owners are not the undertakers within the meaning of the Act. The county court judge held, upon the authority of *Griffin* v. *Houlder Line*, *ante*, p. 323, [1904] 1 K. B. 510, that the Act applied. In that case the ship was in a dock, and a seaman was employed in clearing out a hold for the reception of cargo when he met with an accident. We held, upon the authority of *Raine* v. *Jobson*, 49 W. R. 705, [1901] A. C. 404, that, as the ship was in a dock, and as the dock was a factory, the seaman was at the time of the accident employed in a factory, and that, therefore, notwithstanding that he was a seaman, he came within the Act. We held that the fact that he was a seaman did not exclude his rights as a citizen under the Act, the ship being in a dock and therefore in a factory. No doubt in that case the workman was physically in a factory. The question is whether that decision governs the present case. In the present case neither the ship nor the man was in a dock. No doubt the ship was lying alongside and using a wharf, and at the time of the accident it had not completely ceased to use the wharf; and the wharf was a factory within the Act. So far as the employers were using the wharf for the purposes for which a wharf is designed for use they were "undertakers" in respect thereof, having the actual use or occupation thereof. How does that entitle the applicant to relief under the Act? That depends upon section 7 of the Workmen's Compensation Act, 1897. That section enacts that "this Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a . . . factory." A wharf is for this purpose a factory. Therefore the applicant has to show that he was employed by the undertakers on or in or about a wharf. That appears to me to be the only material question. Upon the facts here, can this fireman, in discharging his ordinary duties as a fireman, be properly described as being employed on or in or about a factory? Clearly he was not employed "on" or "in" a factory. Was he employed "about" a factory? We have frequently laid it down, and it is well settled, that the word "about" as used in section 7 has in it the meaning of physical proximity. It also carries with it the meaning of employment upon the business of the factory. So far as the workman is employed in relation to the purposes for which the employers have the use of the wharf, he can be said to be employed by the undertakers about the wharf. But in dealing with these cases it must not be forgotten that we are dealing with what may be called constructive factories, and we must keep clearly before our minds the nature of the factory in respect of which the employers are the undertakers and the purposes for which that factory is used. The mere fact that a man is employed by the occupier of a factory in juxtaposition to the factory will not make him employed "about" a factory within the meaning of section 7. Take this instance. The occupier of a factory is being driven home from the factory by his coachman, and at a distance of, say, fifty yards from the factory the coachman meets with an accident. The coachman would be, no doubt, employed by the occupier of the factory, and therefore by the undertaker, and at the time of the accident he would be employed near the factory; but he would not be employed on or in or about the factory within the meaning of section 7, because his employment does not concern the factory at all. It was a mere accident that he was injured near the factory. No doubt some cases come near the line, but a line, however fine, must exist, and a case must lie on one side or other of the line. The injured man in the present case was a seaman engaged at the time of the accident in discharging his ordinary duties in attending to the boilers of the ship, and his work had no connection with the purposes for which the wharf was occupied. The county court judge held that the case came within the decision in *Griffin* v. *Houlder Line*, and that the Act applied. Upon the facts here the ship was clearly not in a dock, and for the reasons I have given the employment was not on or in or about a wharf. The case, therefore, does not come within the Act, and the appeal must be allowed.

ROMER, L.J., read the following judgment: I am

of the same opinion. It is admitted that the landing-stage is a "factory" within the Act. But by the steamer being moored alongside and using the stage for the purposes of passengers and goods being taken into and from the ship, it did not become part of the wharf, or become itself as a whole a "factory." Nor, in my opinion, did every man upon and employed in the service of the ship become by the circumstances above referred to at once and of necessity employed on, in, or about a factory. No doubt a man ordinarily employed in the ship may, by the particular work he has to do while the ship is moored, be employed on, in, or about the landing-stage, and so come within the Act. But whether he is so employed must depend on the special circumstances of his employment. I can only say that in the circumstances of the present case, which the Master of the Rolls has stated and which are not in dispute, I come to the conclusion that the man was not employed on, in, or about the landing-stage, and so is not within the Act. I gather that the point on which we are deciding this case was not sufficiently brought to the attention of the learned county court judge, but the point is open to the appellants, and I think, therefore, that the appeal succeeds.

MATHEW, L.J., read the following judgment: I regret to be unable to agree with the opinions of the Master of the Rolls and Romer, L.J., but it seems to me that the grounds upon which we are asked to allow the appeal are less satisfactory than the reasons for its dismissal. If the accident had occurred while the applicant was employed on a vessel moored to a wharf in a dock, he would be entitled to the protection of the Workmen's Compensation Act, 1897, for the dock would be a factory within the meaning of the Workmen's Compensation Act, 1897, and the Factory and Workshop Act, 1901, and the applicant in the course of his employment would be "on or in or about" the factory: see *Raine* v. *Jobson* and *Griffin* v. *Houlder Line*. But, because *The Cambria* was moored to a wharf outside a dock, it was argued that the employment of the workman was one to which the Act did not apply. The wharf, it was agreed, was a factory, but it was said that, though he might be protected while passing near to and over the wharf to the steamer, he lost the benefit of the Act when he reached the deck of the steamer. From that time, it was argued, he could not be said to be working in or on the wharf, and was therefore outside the Act. It would follow that a workman going to the ship by the only approach to the wharf to do some necessary repairs, and sustaining an injury when close to the wharf on the shore side, would have no claim for compensation. It appears from the evidence that the applicant's employers had, for the purposes of their business as owners of *The Cambria*, the actual use and occupation of the wharf within the meaning of the Act of 1901, section 104. The vessel made daily trips from Cardiff to places on the neighbouring coast and back. On arriving at Cardiff she was brought under steam to the wharf and placed in her berth. She was fastened by ropes to the wharf, and remained fastened until her next voyage. Passengers coming on board and leaving passed over the wharf. Early on the morning of the accident the applicant came on board to attend to his ordinary duties as fireman. Steam was got up and the main and auxiliary engines were worked. At 8.17 the passengers were all on board and the steamer was on the point of departure. The applicant was standing by the boilers when a tube burst and he was badly scalded. In my view the evidence shows that the appellants could not have made the wharf available for their business without the assistance of such a workman as the applicant. He was on the steamer for a purpose directly connected with their use of the wharf, and I have come to the conclusion that in the course of his employment he was at the time of the accident employed "about" the wharf within the meaning of section 7 of the Act of 1897. If, as was assumed upon the argument of this point, the employment of the fireman was one to which the Act applied, the general intention of the Legislature must be admitted to be that there should be a right to compensation. The language of section 7 seems to me to permit effect to be given to the intention in the case of the applicant. I find nothing in the Act to suggest that the Legislature meant to distinguish between the rights of workmen of the same class or to show that while workman A was within the Act, workman B, under similar, if not the same, circumstances, was intended to be left unprotected. I therefore come to the conclusion that the appeal on this point fails.

Appeal allowed.

Solicitors for the applicant, *Smith, Rundell, & Dods*, for *Meyrick & Davies*, Cardiff.

Solicitors for the employers, *Steadman, Van Praagh, & Gaylor*, for *W. H. Brown*, Bristol.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) April 13.

DYER v. SWIFT CYCLE CO. (LIMITED). (*a*.)

Master and servant—Employers' liability—Accident—Compensation—Factory—Building exceeding thirty feet in height in which more than twenty persons are employed—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1901 (1 *Ed.* 7, *c.* 22), *s.* 105, *sub-section* 2.

A building which exceeds thirty feet in height and in which more than twenty persons, not being domestic servants, are employed for wages, is not constituted a factory for the purposes of the Workmen's Compensation Act, 1897, *by virtue of section* 105, *sub-section* 2, *of the Factory and Workshop Act*, 1901.

Appeal from an award of his Honour Judge Rentoul, sitting at the City of London Court, in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a workman who was injured by an accident whilst he was in the employment of the Swift Cycle Co. (Limited) at their premises, which they used for showing, selling, and repairing bicycles. The premises consisted of a building more than thirty feet in height, in which more than twenty persons were employed for wages by the company in their business. There was no machinery or plant worked by mechanical power on the premises. The question was whether the premises were a factory within the meaning of section 7 of the Workmen's Compensation Act, 1897.

The learned judge made an award in favour of the applicant, being of opinion that the case was brought within the Workmen's Compensation Act by virtue of section 105, sub-section 2, of the Factory and Workshop Act, 1901, which provides as follows: "The provisions of this Act with respect to notice of accidents and the formal investigation of accidents shall have effect as if . . . (*b*) any building which exceeds thirty feet in height and in which more than twenty persons, not being domestic servants, are

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

employed for wages, were included in the word 'factory.'"

The employers appealed.

W. Addington Willis, for the employers.—The award cannot be supported. The premises are not a factory within the definition contained in section 7 of the Workmen's Compensation Act, 1897. That definition consists of three limbs. The first is a factory within the meaning of the Factory and Workshop Act, 1901. The second is a dock, wharf, quay, warehouse, machinery, or plant to which any of the provisions of the Factory and Workshop Act are applied. The third is a laundry worked by mechanical power, which may be disregarded for the present purpose. The premises do not come within the first limb, for they are neither a "textile factory" nor a "non-textile factory" within section 149 of the Act of 1901, inasmuch as no steam, water, or other mechanical power is used in them. Neither has the applicant brought them within the second limb, for it was not suggested on his part that they were a warehouse. The suggestion was that they were somehow brought within the definition by section 105, sub-section 2, of the Act of 1901. That sub-section, however, does not extend the definition, but merely provides that certain provisions of the Act shall have effect as if the buildings therein described were included in the word "factory."

A. Cairns, for the applicant.—It may be admitted that the premises do not come within the definition of either textile on non-textile factory. But they are either a warehouse to which some of the provisions of the Factory and Workshop Act are applied, and therefore a factory within the Workmen's Compensation Act, or they are brought within the definition as being a building more than thirty feet in height in which more than twenty persons are employed for wages.

COLLINS, M.R.—The facts in this case are not in dispute, and the learned judge of the City of London Court arrived at two conclusions on admissions. The place where the applicant was employed was a building which exceeded thirty feet in height and in which more than twenty persons, not being domestic servants, were employed for wages, but in which no machinery was used. The question which the learned judge had to determine was whether the applicant, when he met with the accident, was employed in a factory. It was contended in the first place that the premises came within the definition of "factory" in the Workmen's Compensation Act as being a non-textile factory under the Factory and Workshop Act, 1901. The judge found that the premises did not come within the definition of non-textile factory, because there was no machinery in them. But it was contended, in the second place, that, though the premises did not come within the definition in the Workmen's Compensation Act as being directly a factory within the Factory and Workshop Act, yet they were brought within the definition by reference to section 105 of that Act. The judge accepted that contention, and came to the conclusion that the premises were a factory. But section 105 really negatives the idea that the premises were a factory. It says that certain provisions are to have effect as if any building which exceeds thirty feet in height and in which more than twenty persons, not being domestic servants, are employed for wages were included in the word "factory." That is tantamount to saying that such a building is not a factory. It merely enacts that certain provisions of the Act, which provisions have no relation whatever to the Workmen's Compensation Act, are to have effect as if the building were a factory. We have therefore to come back to the definition of "factory" in section 7 of the Workmen's Compensation Act, which runs as follows: "'Factory' has the same meaning as in the Factory and Workshop Act, 1901." The premises in question are excluded from that category. Then it continues: "and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1901." These premises are not within the class of places there mentioned; they are not a dock, nor a wharf, nor a quay, nor machinery, nor plant. And no evidence was given at the hearing to show that they were a warehouse. We can only deal with the case on the facts which were before the learned judge. In my opinion the applicant has failed to make out that the premises were a factory for the purposes of the Workmen's Compensation Act, and I think the learned judge was wrong in the ground on which he decided the case. The appeal will therefore be allowed.

ROMER and MATHEW, L JJ., concurred.

Appeal allowed.

Solicitors for the employers, *Gibbs, White, & Strong.*

Solicitors for the applicant, *Lovett & Liddle.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Feb. 19, 20, 22; March 30.

In re DENTON'S ESTATE.

LICENSES INSURANCE CORPORATION AND GUARANTEE FUND (LIMITED) *v.* DENTON. (*a.*)

Mortgage—Guarantee—Principal and surety—Covenant by mortgagor and surety to pay mortgage debt—Surety's liability limited—Covenant by mortgagor alone to insure debt against loss—Contract with insurance office—Co-surety.

In a mortgage D. joined with the mortgagor in a joint and several covenant for repayment on demand, on failure to comply with which demand the statutory power of sale was to be exerciseable without further notice. D.'s liability was limited to £1,000. The mortgagor alone covenanted with the mortgagees to insure in their names the debt and interest against loss with the plaintiff corporation. In a proposal for insurance made to the corporation, D.'s suretyship was mentioned, and this proposal was incorporated in, and was to be deemed the basis of the "contract of insurance" intended by, a contract (headed "Mortgage Insurance Policy") by which the corporation agreed that if the mortgagees should become entitled to exercise their power of sale, and should give notice thereof to the corporation, the latter would, after six months from receipt of a claim from the mortgagees, pay to them the principal moneys for the time being owing under the mortgage and the interest within a specified limit. Thereupon the mortgage debt and interest were to be transferred to the corporation, with all securities for the same. This contract contained no express mention of D.'s suretyship or of his being a party to the mortgage. The mortgagor having made default, D. having died, and a sale of the property under the power having produced less by £984 12s. 6d. than was owing, the corporation, who had paid that sum, brought this action to recover it from D.'s estate under his guarantee. D.'s executrix claimed contribution from the corporation as being co-sureties with D.

Held, (1) *that the contract was one of guarantee and not of insurance, but* (2) (*reversing the decision of* Swinfen Eady, J., ante p. 93, [1903] 2 *Ch.* 670), *that*

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

the corporation were not co-sureties with D., but were sureties for him and the mortgagor, on the principle of Craythorne *v.* Swinburne, 14 *Ves.* 160, *and that D.'s estate was not entitled to contribution, but must bear the whole deficiency.*

This was an appeal by the plaintiff corporation from a decision of Swinfen Eady, J. (reported *ante*, p. 93, [1903] 2 Ch. 670).

Maude Harvey, by deed dated the 2nd of November, 1899, mortgaged a public-house called the "Lord Palmerston" by sub-demise to a bank to secure £4,000 and such further sums as might be advanced to her or paid on her behalf for rent, rates, repairs, or otherwise, together with interest on such sum and sums, at a varying rate with a minimum of 4½ per cent. per annum.

George Denton joined in the deed, which contained a joint and several covenant by him and Miss Harvey to pay, on demand left at the mortgaged premises, the principal moneys that might be then owing on the mortgage, with interest at the rate aforesaid. His liability under the covenant was, however, limited to £1,000, and it was provided that although, as between himself and Miss Harvey, he was only a surety, yet as between himself and the bank he was to be considered a principal debtor to the extent of £1,000.

There was also a covenant by the mortgagor, in which Denton did not join, that she would insure and keep insured, while the security remained in force, the mortgage debt and interest against loss, in the name of the bank with the plaintiff corporation.

The deed further provided that the statutory power of sale should become exerciseable at any time after the said demand for payment had been left at the mortgaged premises without any such notice as is required by the Conveyancing and Law of Property Act, 1881, or any further notice whatever.

On the 28th of October, 1899, a proposal "to insure first mortgage of £4,000" had been made by Miss Harvey's solicitors to the plaintiff corporation, and it was therein stated that Mr. G. Denton would join in the mortgage deed for the purpose of guaranteeing £1,000. In pursuance of the said proposal a contract was entered into by the corporation with the bank (therein called the insured) on the 7th of March, 1900. It was headed "Mortgage Insurance Policy." It made no mention of Denton or his suretyship, and recited the mortgage deed as made between Miss Harvey of the one part and the bank of the other part; but it incorporated the said proposal and provided that the same should be deemed to be the basis of the "contract of insurance" thereby intended.

The terms of this contract (including certain printed conditions which were to be deemed part thereof) were that if the insured should become entitled to exercise the power of sale and should give notice thereof in writing to the corporation, the latter would, after the expiration of six calendar months from the receipt of a claim in writing from the insured requiring payment, pay to the insured the principal moneys for the time being due under the mortgage, together with interest for a specified period and until payment, and on such payment the mortgage debt and interest and all securities for the same were to be assigned or transferred to the corporation or their nominee or nominees.

The mortgagor having made default in payment of interest, the bank left on the mortgaged premises a demand for payment of the mortgage debt, and proceeded to exercise their power of sale. Certain sums were from time to time expended by the corporation for the preservation of the mortgaged property and in connection with the sale, with the result that the realization left the corporation out of pocket to the extent of £984 12s. 6d., and this sum, after taking a transfer of the mortgage, they claimed by originating summons to recover from the estate of Denton, who had died in 1899, under his guarantee.

It was argued for the defendant, who was Denton's executrix, that he and the corporation were co-sureties, and as such were bound to contribute rateably to the deficiency, and Swinfen Eady, J., upheld this contention, holding that the contract of the 7th of March, 1900, was one not of insurance but of guarantee, and that Denton and the corporation were under a common burden or liability and must contribute in proportion to the sums—in the one case £1,000, and in the other the whole debt—which they had respectively guaranteed.

Against this decision the corporation appealed.

Haldane, K.C., and *Owen Thompson*, for the appellants, argued that the corporation were insurers and not sureties, or if sureties they were sureties for Denton and the mortgagor, and not co-sureties with Denton for the mortgagor.

They cited *Dane* v. *Mortgage Insurance Corporation*, 42 W. R. 227, [1894] 1 Q. B. 54, 60, 61; *Craythorne* v. *Swinburne*, 14 Ves. 160; *Finlay* v. *Mexican Investment Corporation*, [1897] 1 Q. B. 517; *Seaton* v. *Heath*, 47 W. R. 487, [1899] 1 Q. B. 782, 790; *Steel* v. *Dixon*, 29 W. R. 735, 17 Ch. D. 825; *Ellesmere Brewery Co.* v. *Cooper*, 44 W. R. 254, [1896] 1 Q. B. 75; *Ellis* v. *Emmanuel*, 24 W. R. 832, L. R. 1 Ex. D. 157.

[The Court referred to *Castellain* v. *Preston*, 31 W. R. 557, 11 Q. B. D. 380, 387, and Rowlatt on Principal and Surety, p. 165.]

Eve, K.C., and *J. Henderson*, for respondent.

Thompson replied.

Cur. adv. vult.

March 30. — The following judgments were delivered:

VAUGHAN WILLIAMS, L.J.—This is a claim made by the Licenses Insurance Corporation and Guarantee Fund (Limited), as assignees of a mortgage deed, against the estate of Denton (deceased), a party to the mortgage deed on a covenant therein contained, and the only defence raised is that the corporation and Denton are co-sureties for Miss Harvey, the mortgagor, and that Denton is therefore entitled to deduct from the claim of the plaintiff corporation the contribution due as between two co-sureties. The corporation contends that it is not a co-surety with Denton, but is surety both for the principal debtor, the mortgagor, and for Denton, the surety, under the terms of the mortgage deed; and that this being so, there is no contribution, according to the authority of the decision of Lord Eldon in *Craythorne* v. *Swinburne*.

The question whether the plaintiff and defendant stand or do not stand in the relation of co-sureties within the meaning of this decision is the only question in the case. Swinfen Eady, J., has decided that the relation is that of co-sureties, and that Denton has a right of contribution. He bases this conclusion, as I understand, on the ground that according to the terms of the policy of insurance, which embodies the guarantee of the plaintiff corporation, both the corporation and Denton are liable for the same debt upon the same default of the mortgagor.

I think that the plaintiff and defendant are liable for the same debt upon the same default of the mortgagor for the reasons given by Swinfen Eady, J., in his judgment, but there is this difference, that whereas the liability of Denton to pay arises directly on demand left at the mortgaged premises, the

liability of the corporation is only to pay after the expiration of six calendar months from the mortgagee —the bank—becoming entitled to exercise the power of sale conferred by the mortgage deed, and giving notice thereof to the corporation; so that even assuming the occasion of the liability arising to be the same, because the power of sale is conferred upon the leaving a demand for payment at the mortgaged premises without any further demand or notice (thus departing from the provisions of the Conveyancing Act, 1881), yet the time when payment will accrue due differs by six months, and I do not think that this difference can be left out of consideration when determining whether the corporation and Denton are co-sureties.

Perhaps it would be convenient now to consider briefly what are the material facts in this case, and what is the nature of the claim.

Miss Maude Harvey obtained an advance of £4,000 from the London and City Bank secured by a mortgage of the "Lord Palmerston" public-house created by a deed of the 2nd of November, 1899, George Denton joining in the mortgage as surety for a limited amount. The mortgage was to secure £4,000 and further advances. The deed contained a covenant by the mortgagor and Denton to pay the £4,000 and interest, and also such further sums as should for the time being be due from the mortgagor to the bank. The deed also contained a covenant by the mortgagor with the bank that the mortgagor would insure, and at all times during the continuance of the security keep insured, the principal moneys and interest against loss in the name of the bank with the Licenses Insurance Corporation and Guarantee Fund (Limited).

A mortgage insurance policy was executed by the corporation on the 7th of March, 1900, and it is alleged by the plaintiff corporation that this policy was effected in pursuance of a proposal for insurance dated the 28th day of October, 1899, which was put in evidence. There is some little difficulty about this, as the proposal and the policy do not quite accord—the proposal relating to a debt repayable by annual instalments, which is not the case with the mortgage debt. But I think that the proposal is sufficient evidence that the insurance was effected by the corporation on the basis that the mortgage debt which the corporation was insuring would be secured by a mortgage deed in which Denton would join for the purpose of guaranteeing the repayment of £1,000 of the principal money.

The policy, however, makes no mention of Denton being a party to the mortgage deed. On the contrary, it describes the mortgage deed as made between Maude Harvey of the one part and the "insured" (*i.e.* the bank) of the other part.

It refers, however, to a proposal in writing of the 28th of October, 1899, for guaranteeing the said mortgage debt and interest, and recites that it is agreed that the said proposal shall be the basis of the contract of insurance intended. The premium of £18 15s. is recited as the first premium for guaranteeing the said mortgage debt and interest, and the policy goes on to witness that the corporation agree with the insured that if the insured shall become entitled under the power of sale conferred by the said mortgage deed, or otherwise, to sell the mortgaged property, and shall give notice in writing thereof to the corporation while this policy is in force, the corporation will, after the expiration of six calendar months from the receipt by the corporation of a claim in writing by the insured requiring payment, pay to the insured the principal money for the time being due under the said mortgage with any interest thereon.

I think that the proper inference of fact to draw from the proposal of the 28th of October, 1899, and the mortgage deed of the 2nd of November, 1899, and the policy of the 7th of March, 1900, is that, to the knowledge alike of the mortgagor and the mortgagee, Denton and the corporation, it was known at the date both of the mortgage deed and of the policy that it was intended that Denton should join in the mortgage as surety, and that the mortgage debt and interest should be guaranteed or insured by the corporation (the words "guarantee" and "insure" are used as synonymous in the policy).

I mention this inference because I think that the fact that there was one transaction only, to the details of which all were privy, may not be immaterial when one is considering whether the corporation ought to be regarded as co-surety with Denton for the mortgagor, or as surety for both the mortgagor and Denton under a distinct collateral security.

The summons claims that the plaintiffs, by virtue of a covenant of Denton contained in a deed of mortgage of the 2nd of November, 1899, which covenant has been assigned to them, are creditors of the estate of Denton for the sum of £984 12s. 6d. The facts as to the £984 12s. 6d. are these: The bank having left a demand at the mortgaged premises, and after giving notice to the corporation, under condition 5 of the policy, of their intention to exercise the power of sale, proceeded, not strictly in accordance with the conditions of the policy, to sell the property.

This sale realized £4,000 and discharged the whole of the principal money owing on the mortgage. The source of the money thus discharging the principal, although it may have passed through the hands of the insurance corporation, was the proceeds of sale.

The plaintiff corporation in the meanwhile had expended the £984 12s. 6d. sought to be recovered on this summons, on matters (such as repairs, &c.) clearly necessary and proper for the maintenance of the mortgage security. The utterly unbusinesslike manner in which the business of the corporation was done makes it difficult to ascertain the true facts.

It might be suggested that this was a voluntary expenditure by the corporation who had a clear interest, as Denton also had, that the mortgage security should not be wasted. But I think on the evidence that this expenditure may fairly be taken to be expenditure by the corporation at the request of the bank, and thus expenditure by the bank as mortgagees.

If the expenditure cannot be so regarded there is an end of the claim, but if it can be so regarded the only question is, as I have already stated—are Denton and the corporation co-sureties so as to entitle Denton to contribution?

In the first place I will deal with a contention raised by the corporation and based on the decision of the Court of Appeal in *Dane* v. *The Mortgage Insurance Corporation*. This contention is that, apart from anything else which might negative co-suretyship between the corporation and Denton, the very form of the obligation which they had undertaken towards the bank was sufficient to show that the corporation had not entered into a contract of suretyship but into a contract of insurance.

No doubt the form is that of a policy of insurance. But I think there is nothing in the form of the contract between the bank and the corporation, being that of a policy of insurance, to prevent the contract between one of guarantee, and I would refer to the judgment of Romer, L.J., in *Seaton* v. *Burnand*, which on this point is unaffected by the reversal in the House of Lords of the judgment of the Court of

Appeal. Romer, L.J., in discussing the difference in substance between these two classes of contract, says: "The difference between these two classes of contract does not depend upon any essential difference between the word 'insurance' and the word 'guarantee.' There is no magic in the use of those words. The words to a great extent have the same meaning and effect, and many contracts like the one in the case now before us may with equal propriety be called contracts of insurance or contracts of guarantee."

The distinction in substance, in cases in which the loss insured against is simply the event of the non-payment of a debt, seems to be, as I read the judgment of Romer, L.J., between contracts in which the person desiring to be insured has means of knowledge as to the risk, and the insurer has not the same means, and those cases in which the insurer has the same means. Now it seems to me that in the case of this mortgage debt the insurance corporation, knowing the terms of the mortgage deed and the exact nature of the property forming the security, had just as much means of ascertaining the nature of the risk as the bank had, and I do not think that the mere fact that the contract was made between the creditor and the insurance corporation, and not between the mortgagor-debtor, Miss Harvey, and the corporation, would of itself determine the character of the contract to be that of insurance and not of suretyship. This being so, the form and circumstances of the contract being consistent with the relation of co-suretyship between the plaintiff corporation and Denton, let us see if the facts, date, or contents of the mortgage deed are such as to negative this contract, which, according to its terms, is a contract of suretyship guaranteeing payment by the mortgagor—being a contract of suretyship constituting co-suretyship in relation to the contract of suretyship taken by Denton on himself by the mortgage deed.

If the policy is looked at it will be seen that, in form at all events, both the insurance corporation and Denton guarantee the payment of the mortgage debt by the mortgagor, Miss Harvey. The event upon which the obligation to pay arises is the same in each case; and although the insurance corporation have six months within which to pay, yet the obligation neither of the insurance corporation nor of Denton is dependent on what the mortgage security realizes. Taking these matters into consideration there seems much to support the conclusion in fact of Swinfen Eady, J., that the insurance corporation were sureties for, and guaranteed the debt of, Miss Harvey, and were not sureties only in the event that neither Miss Harvey nor Denton paid.

If this conclusion, which seems to me to be a conclusion in fact, is right, it puts the case outside the case of *Craythorne* v. *Swinburne*. I think it is a question of fact. It seems plain from the judgment of Lord Eldon in that case, that in considering the question whether the contract of insurance—the second contract in point of date—is to be considered as a collateral or supplemental security, the court may take into consideration not only the words of the respective contracts but also extrinsic evidence, giving consideration to this evidence as well as to the words of the respective contracts. Still, sitting by myself, I should have hesitated to differ from the conclusion of the learned judge, especially as I do not think that the mere fact that the insurance corporation knew (at the time at which the policy was effected) from the mortgage deed or the proposal, that Denton was a surety, is sufficient to negative the relation of co-suretyship; and it is certainly a case in which I should have wished to have applied the maxim that equality is equity if the facts allowed it.

But as my brothers take a contrary view of the facts I do not think that in such a doubtful case, turning largely on inferences of fact, I ought to refuse to concur in the judgment of the court.

STIRLING, L.J.—The question in this case is what is the true nature of the contract entered into between the London City and Midland Bank (mortgagees of a public-house for £4,000 and interest, George Denton being surety for the mortgagor to the extent of £1,000) and the plaintiffs in the action.

The defendant in the action, who is the legal personal representative of George Denton, contends that the contract was one of suretyship, and that by virtue of it the plaintiffs became co-sureties with George Denton; and this is the view which has been taken by Swinfen Eady, J.

The plaintiffs, on the other hand, insist that the contract is not one of suretyship at all, but is one of insurance or indemnity, such as was held by Lord Esher, M.R., to exist in *Dane* v. *Mortgage Insurance Corporation*; but they also urge that even if the contract was one of suretyship, the plaintiffs did not become co-sureties with Denton, but in fact guaranteed the bank against Denton's default, as was held to be the case in *Craythorne* v. *Swinburne*.

The answer to the question depends to a great extent on the construction of a document dated the 7th of March, 1900, and headed "Mortgage Insurance Policy"; but, before dealing with it I think it desirable to refer shortly to the main provisions of the mortgage deed, which bears date the 2nd of November, 1899.

By it Maud Harvey demised to the bank a leasehold public-house known as the "Lord Palmerston" at Highgate for the residue of the term for which she held the same, less one day, by way of mortgage to secure the repayment of £4,000 and interest. The mortgagor and Denton jointly and severally covenanted with the bank that they or one of them would pay to the bank on demand by the bank left at the public-house the sum of £4,000 with interest, subject, however, to a proviso that Denton should not be liable under the covenant to pay a larger sum in the whole in respect of the principal and interest taken together than £1,000 together with interest on such sum from the time of the demand being made on Denton until payment. The mortgagor also covenanted with the bank that she would insure, and at all times during the continuance of the security keep insured the principal moneys and interest thereby secured, against loss in the name of the bank with the plaintiffs, and would not at any time do any act or commit any default whereby the policy of mortgage insurance might be rendered void or voidable, and in case the policy or any new policy to be effected as aforesaid should by any means become void, would forthwith at her own cost effect a new policy for securing the repayment of the said principal sum and interest "as hereinbefore mentioned." By these last words I understand in accordance with the covenant for repayment contained in the mortgage.

It was provided by the mortgage that the powers of sale conferred upon mortgagees by the Conveyancing and Law of Property Act, 1881, should be exercisable by the said bank at any time after such demand should have been left as aforesaid without the necessity for giving any such notice requiring payment of the mortgage money as is provided for by the said Act or any notice whatever. The deed concludes with a stipulation that, although, as between the mortgagor and Denton the latter is a surety only, yet as between him and the bank he is to be considered a principal debtor.

Upon the covenant by the mortgagor to insure and keep insured "the principal moneys and interest

against loss," I observe that it appears to me to be so framed as to entitle the mortgagees and the plaintiffs to enter into a contract of either of the kinds which the plaintiffs assert to be that of the contract actually made between them and the bank.

On the 28th of October, 1899, before the mortgage had been executed, the solicitors of the mortgagor submitted to the plaintiffs a "proposal to insure first mortgage of £4,000." In this document various particulars are given as to the terms of the mortgage which are inaccurate; but the following statement occurs: "Mr. G. Denton will join in the mortgage for the purpose of guaranteeing the repayment of £1,000 of the principal money." It is not disputed that the document of the 7th of March, 1900, was the result of this proposal. The document, as I have already mentioned, is headed "Mortgage Insurance Policy," and in the recitals the proposal of the 28th of October, 1899, is recited, followed by the words "it is agreed that the said proposal shall be the basis of the contract of insurance hereby intended."

On the other hand, the proposal is recited as being one "for guaranteeing" the mortgage debt and interest, and the premium is stated to be "for guaranteeing" the mortgage debt and interest. The mortgage deed is stated to be dated the 2nd of November, 1899, and to be made between Maude Harvey of the one part, and the insured of the other part, and it does not appear on the face of the document itself that Denton was a surety for the debt. Still, notwithstanding all inaccuracies in the proposal and in the recitals, there is no question that the mortgage of the 2nd of November, 1899, as executed by the mortgagor and Denton, was that to which the document of the 7th of March, 1900, was intended to refer, and with reference to which it must be construed. I think, therefore, that the document must be read as relating to a mortgage in respect of which Denton was to a limited extent surety for payment of principal and interest.

The operative part of the document is as follows:—"Now this policy witnesseth that the corporation agree with the insured (subject to the conditions on the back hereof, which are to be taken as part of this policy) that if the insured shall become entitled under the power of sale conferred by the said mortgage deed or otherwise to sell the mortgaged property, and shall give notice in writing thereof to the corporation while this policy is in force, the corporation will, after the expiration of six calendar months from the receipt by the corporation of a claim in writing by the insured requiring payment, pay to the insured the principal money for the time being due under the said mortgage with any interest thereon at the minimum rate which would have been or be payable if the interest were punctually paid under the said mortgage, for any period not exceeding twelve calendar months preceding the date of the receipt of the claim, and with subsequent interest up to the day of payment at the same rate."

Condition 8. "If at the time a claim is made under this policy there be any other subsisting insurance or insurances whether effected by the insured or any other person, covering the same interest in the mortgaged property, the corporation shall not be liable to pay or contribute more than their rateable proportion."

Condition 9. "Upon payment of the amount which may become payable under this policy, the insured shall assign or transfer to the corporation or their nominee or nominees the mortgage debt and interest and all securities held by the insured for the same."

Condition 10. "The insured and any claimant under this policy shall, at the expense of the corporation, do and concur in doing all such acts and things as may be necessary or reasonably required by the corporation for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which the corporation shall be or would become entitled or subrogated upon payment under this policy, whether such acts and things shall be or become necessary or required before or after payment by the corporation."

In order that the plaintiffs may become liable under the policy it is necessary—

(1) That the insured, the bank, should become entitled under the power of sale in the mortgage or otherwise to sell; and it will be remembered that the power of sale in the mortgage becomes exerciseable upon a demand for payment in accordance with the covenant of the mortgagor and the surety being left at the public-house, and that the mortgagor and the surety *both* become liable upon such demand being so left; (2) that the insured should give notice in writing to the plaintiffs of their having become entitled to exercise the power of sale; (3) that the insured should make a claim in writing on the plaintiffs requiring payment.

These conditions being satisfied, the plaintiffs bind themselves after the expiration of six calendar months from the receipt of the claim in writing to pay to the insured the principal money for the time being due on the security with interest.

In arriving at this sum there would be taken into account all sums paid by the mortgagor, or by the surety, or realized out of the mortgaged property. Upon payment by the plaintiffs of the amount payable they are entitled under condition 9 to have assigned or transferred to them the mortgage debt and interest and all securities held by the insured for the same; and this would, according to the natural meaning of conditions 9 and 10, include, in my opinion, the benefit of the covenant by the surety to the full extent to which the mortgagees were entitled thereto.

The result is that a period of six months is to elapse between claim made on the plaintiffs and payment. During that period the bank were left to realize their securities as they saw fit, unless the plaintiffs chose to intervene under the provisions of condition 7. At the expiration of the period the plaintiffs were bound to pay the principal and interest remaining due on the security, quite irrespective of any question whether loss had occurred or was likely to occur. Upon payment, however, the plaintiffs, as it seems to me, became entitled to all the rights and remedies of the mortgagees, and to enforce them just as the mortgagees might have done, as well against the surety as against the mortgagor.

Swinfen Eady, J., held that the instrument of the 7th of March, 1900, was not merely an insurance against loss, and in that respect I agree with him; but it does not follow that the instrument created a mere contract of co-suretyship with Denton. The learned judge does not appear to have had presented to him the second contention raised on behalf of the plaintiffs, and strongly urged in this court; at all events he does not deal with it explicitly in his judgment. The question is, in my opinion, one of difficulty, occasioned by the inaccuracies and ambiguities which are found in the instrument of the 7th of March, 1900, an instrument framed by the plaintiffs themselves. I have, however, come to the conclusion that, regard being had to all the circumstances, the true meaning of the parties to the transaction was not that the plaintiffs were to become co-sureties with Denton, but that, as between themselves and the bank, Denton should be in the position of a principal; or, in other words, that the transac-

tion was of the same nature as that which was the subject of decision in *Craythorne* v. *Swinburne*. Taking this view, I think that the appeal ought to be allowed.

COZENS-HARDY, L.J.—This is a claim by the Licenses Insurance Corporation, hereinafter called the corporation, against the estate of Denton, who joined as surety in a mortgage by Miss Harvey to a bank. The mortgaged property has been sold for less than the amount due to the bank. The deficiency, which is less than £1,000, has been paid by the corporation to the bank, and a transfer has been executed by the bank to the corporation of the mortgage debt and all securities for the same.

There is no answer to this claim unless it can be established that the corporation and Denton were co-sureties, in which case a right of contribution only would arise. Swinfen Eady, J., has adopted this view, and has made a declaration accordingly.

The corporation appeal against this order, and they contend (1) that their contract with the bank was properly a contract of insurance and not of suretyship; and (2) in the alternative, that if they were not insurers they were sureties for both Miss Harvey and Denton, and not co-sureties with Denton for Miss Harvey.

The first contention was overruled by the learned judge. The second contention, although raised, seems not to have been strongly insisted upon before him, and it is not directly dealt with in his judgment; but it has been forcibly pressed upon us, particularly by Mr. Owen Thompson in his able argument. It is based upon *Craythorne* v. *Swinburne*.

In that case Lord Eldon held that parol evidence was admissible to show whether in truth the defendant was a co-surety with the plaintiff for the principal debtor and as such bound to contribute, or was a surety for both the principal debtor and the plaintiff, and as such under no liability to contribute. The principles there laid down are clear, but I have found great difficulty in applying them to the very peculiar circumstances of the present case.

There are three documents which, and which alone, have to be considered: (*a*) The mortgage dated the 2nd of November, 1899, between Maude Harvey of the first part, Denton of the second part, and the bank of the third part. It is to secure an advance of £4,000. Denton plainly joins as surety. There is a joint and several covenant for payment on demand, with a proviso limiting Denton's liability under the covenant to £1,000. Then follows a covenant by the mortgagor that she will insure and keep insured the principal moneys and interest thereby secured against loss in the name of the bank with the corporation. And there is a power of sale given to the bank exercisable at any time after demand and without any notice. There is also the usual provision that although, as between Miss Harvey and Denton, Denton was only surety, yet as between Denton and the bank Denton should be considered as a principal debtor to the extent aforesaid—*i.e.*, to the extent of £1,000. It is apparent on the face of the mortgage deed that it was part of the bargain with the bank that a security of some kind should be procured from the corporation. (*b*) The "proposal to insure first mortgage of £4,000" is dated the 28th of October, 1899. It is obviously inaccurate in some respects. It refers to the mortgage as dated the 2nd of November, 1899, and states the mortgage debt as repayable by instalments, although this is not the fact. It mentions, however, that Denton will join in the mortgage for the purpose of guaranteeing the repayment of £1,000 of the principal money. (*c*) The document imposing a liability on the corporation towards the bank is dated the 7th of March, 1900, four months after the mortgage. It is headed "Mortgage Insurance Policy." It inaccurately recites the mortgage as made between Miss Harvey of the one part and the bank of the other part, and omits all reference to Denton. [His lordship read extracts from the policy and conditions—the more material of which are given in the judgment of Stirling, L.J.—and continued:] It will be observed that the obligation of the corporation to pay does not arise for six months after Denton's obligation to pay arises, and further that the corporation stipulate with the bank for transfer of all securities held by the bank, and to be "subrogated" to all rights and remedies of the bank against other parties as soon as the corporation pays under the policy, an event which has happened.

Now, on the construction of this document, I agree with Swinfen Eady, J., that it was not an insurance against loss, but was a guarantee of the mortgage debt; and I adopt the reasoning contained in his very careful judgment on this point.

It only remains to consider the second—or what I may call the *Craythorne* v. *Swinburne* point. What was it that the corporation guaranteed? If I look only at the policy it is reasonably clear that the corporation guaranteed the debt due from Miss Harvey, the principal debtor, and nothing more. If, however, I look at the proposal, which is "deemed to be incorporated in the policy," and also at the mortgage deed, I think it appears that the corporation guaranteed a partially guaranteed debt; or, in other words, guaranteed that Miss Harvey to the full extent, and Denton to the extent of £1,000, would pay the bank, Miss Harvey and Denton being, as between themselves and the corporation, both principal debtors. It is of no moment that Denton is not shown to have been party or privy to the proposal or the policy, for the only obligation imposed on Miss Harvey by the covenant in the mortgage deed, to which Denton was a party, was to insure against loss. This obligation would have been exactly satisfied by a policy of insurance strictly so called. Denton had no right to expect to be relieved by having the corporation as a co-surety. He must accept the position, whatever it may be, as between the bank and the corporation. Upon the whole, I think the appellants' contention on this point must prevail, notwithstanding the difficulties created by the forms of the instruments.

Appeal allowed.

Solicitors, *Jennings, Son, & Allen; Loxley, Elam, & Gardner.*

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) } March 17, 18, 26.

CONTINENTAL CAOUTCHOUC AND GUTTA PERCHA CO. v. KLEINWORT, SONS, & CO. (*a*.)

Banker—Customer—Mistake—Money paid under mistake of fact.

The defendants, who were foreign bankers, were in the habit of making advances to K., who then purchased goods which the defendants held as security; when K. found a purchaser he assigned the right to receive the purchase-money to the defendants, who accordingly released the goods. K. also carried on the same system with B. & Co. The plaintiffs bought from K. two parcels, the one released by the defendants and the other

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

by B. & Co. K. instructed the plaintiffs to pay the defendants and B. & Co. respectively for the goods so purchased. By mistake the plaintiffs paid both sums to the defendants, who credited K.'s account, notifying K. of their having done so. The defendants acting bonâ fide *continued to make advances to K., who knew of the mistake, but did not disclose it, and afterwards became bankrupt. The plaintiffs sought to recover from the defendants the sum which should have been paid to B. & Co. as money paid under mistake of fact.*

Held, that the defendants were liable to refund the money which had been paid to them under a mistake of fact, even though they had paid it away to a third party in ignorance of the mistake.

Judgment of Bigham, J. (51 *W. R.* 541), *affirmed.*

This was an appeal by the defendants from the judgment of Bigham, J., in the Commercial Court (51 W. R. 541).

The action was brought to recover back a sum of £1,480 15s. 11d., money paid by the plaintiffs to the defendants under a mistake of fact.

The facts are fully set out in the judgment of the learned judge in the court below.

Asquith, K.C. (*J. A. Hamilton, K.C.*, and *A. H. Chaytor* with him), for the appellants.

Scrutton, K.C. (*F. D. MacKinnon* with him), for the respondents.

Cur. adv. vult.

COLLINS, M.R., read the following judgment: This is an appeal from the decision of Bigham, J., who has held that the appellants (the defendants in the action) are bound to repay to the plaintiffs a sum of £1,480 15s. 11d. paid by the plaintiffs to the defendants under a mistake of fact. The defence is that the sum in question was paid to and received by the defendants as agents for one Kramrisch, now bankrupt, with whom they had, previous to the plaintiffs' demand, settled it in account. The facts are fully and lucidly stated in the judgment of Bigham, J., and a bare outline is all that is necessary to make this judgment intelligible. Kramrisch, above referred to, was an importer of indiarubber, carrying on business at Liverpool. He was financed by two "merchant bankers," as they are described in the case—viz., the defendants Kleinwort, Sons, & Co. and Brandt & Co., who only come incidentally into this discussion. The course of business as between Kramrisch and these firms was that when he imported a parcel of indiarubber one or other of these firms made itself liable to the vendor for the price upon the security of the shipping documents, which were deposited with the firm, and as Kramrisch effected sales of the rubber so imported the financing firm released the bills of lading covering such sale and transmitted them to the purchaser, taking from Kramrisch an authority to receive the price from the purchaser direct. The plaintiffs, before the transaction in question, had bought from Kramrisch parcels of indiarubber, some of which he had imported through the aid of the defendants and some through that of Brandt & Co., and had in each case arranged to pay direct to the defendants and Brandt & Co. respectively, according to the instructions received with each consignment. The sum in question in this case represented the price of indiarubber which was in fact payable direct to Brandt & Co., but by a mistake of a clerk of the plaintiffs it was sent to the defendants instead of to the account of Kramrisch. The defendants placed it to the credit of Kramrisch in their account with him, and apprised him of the fact, and he acknowledged and approved of what they had done. It was contended by the defendants that they were thus discharged from all liability to the plaintiffs. Bigham, J., has rejected their contention, and I am of opinion that he was right. Without going into the question whether there was an absolute assignment of the debt by Kramrisch to Kleinwort, Sons, & Co., with notice to the plaintiffs—a matter that was discussed under somewhat similar circumstances in *Brandt, Sons, & Co.* v. *Dunlop Rubber Co*, [1904] 1 K. B. 387, the undisputed facts are sufficient, in my judgment, to decide this case in favour of the plaintiffs. It is clear law that *primâ facie* the person to whom money has been paid under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake, for he has had the benefit of the windfall and must restore it to the true owner. On the other hand, it is equally clear that an intermediary who has received money for the purpose of handing it on to a third party, and has handed it on, is no longer accountable to the sender. In such case he is a mere conduit-pipe and has not had the benefit of the windfall. A case rather more difficult arises when the mode by which he passes it on is by settlement in account with a third party for whom he has received it involving the application of the money to the discharge of a debt due from the third party to himself. He has thus no doubt benefited by getting his debt paid, but he has done so in discharging his primary duty of passing the money on to his principal. He has constructively sent it on and received it back, and has done nothing incompatible with his position as a conduit-pipe or intermediary. He was entitled to be paid, and has been paid by his debtor, who was no doubt put in funds to do so by the receipt of the money, and who therefore, and not the intermediary, has had the benefit of the windfall. Hence the care with which the courts have considered whether the sum has in fact been effectually passed out of the hands of the agent into those of the principal, no entry by the agent in his books sufficing until the assent of the principal has completed the transaction: see *Buller* v. *Harrison*, 2 Cowp. 565. But these questions as to whether or not the sum received has been effectually passed on to the principal are only material in those cases where the person receiving is really and primarily a mere intermediary—that is to say, a person who as against his principal has no right to receive the fund except for the purpose of passing it on. Once place him in the position of a person who has a right to receive and apply the fund for his own benefit, and he is at once taken out of the category of mere intermediaries, for whom alone the defence is available that they have acted as such and passed on to another the liability to refund the windfall. I think the cases of *Buller* v. *Harrison*, 2 Cowp. 565; *Cox* v. *Prentice*, 3 M. & S. 344; *Holland* v. *Russell*, 11 W. R. 757, 4 B. & S. 14, and *Newall* v. *Tomlinson*, L. R. 6 C. P. 405, 19 W. R. Dig. 48 (particularly the judgment of Brett, J., in that case), fully establish the above propositions.

Now, in this case it is quite clear that, as between Kleinwort, Sons, & Co. and Kramrisch, the former were the persons primarily entitled to receive the purchase-money of the goods in respect of which they had released the bills of lading. Had the sum due from the buyer been deposited with a third party and become the subject of an interpleader issue between Kramrisch and the defendants, it must, I think, have been awarded to the defendants. For these reasons I think that the defendants in respect of the sum claimed are in no better position than any other persons who have received for their own benefit money paid to them under a mistake of fact. The grounds on which I base my opinion relieve me from discussing some of the points referred to in the judg-

ment of Bigham, J., and in the admirable argument before us. In my opinion the appeal fails.

ROMER, L.J., read the following judgment: I am of the same opinion. I will only add that, in my opinion in this case—unlike the one recently decided by us and referred to by the Master of the Rolls, *Brandt, Sons, & Co.* v. *Dunlop Rubber Co.*—the evidence is sufficient to establish an equitable assignment as between Kramrisch and the defendants. The proceeds of the rubber against which the defendants had made advances, and which was consigned to the plaintiffs for sale, were equitably assigned by Kramrisch in favour of the defendants. And, if it were essential to the present case (though, in my opinion, it is not), I should come to the conclusion that the plaintiffs had notice of the assignment, and could only disregard that notice at their peril. But, in justice to the plaintiffs, I think they did not disregard the notice. On the contrary, it was, in my opinion, because the plaintiffs recognised the obligation cast upon them that they forwarded the proceeds of the rubber to the defendants, and it was by reason of the mistake in fact made on their behalf, in thinking that the moneys, the subject of this action, were proceeds of such rubber, that these moneys were forwarded to the defendants. When the mistake in fact was discovered, the plaintiffs became entitled to recover the moneys from the defendants, unless the defendants could show that they had received the moneys as agents, and before notice of the mistake had parted with them to their principal, or so dealt with them by mandate of their principal as to render it unjust to call upon them to repay the moneys to the plaintiffs. But in the present case the defendants could not show that they had so received and dealt with the moneys. In fact, they received the moneys by virtue of the rights existing between them and Kramrisch, including their rights as equitable assignees, and when they had so received the moneys they dealt with them according to those rights, and not according to any unfettered right of Kramrisch to direct how the moneys should be dealt with. The notice they gave to Kramrisch of the way in which the moneys had been appropriated by them was simply notice that they had applied them according to their own rights as previously pointed out, and not by way of obtaining a ratification from Kramsrisch of a previously unauthorized application. I agree, therefore, that the appeal fails.

MATHEW, L.J.—I am of the same opinion. [His lordship having dealt at length with the facts of the case, and with the correspondence and the various transactions that took place between the plaintiffs, the defendants, Kramrisch & Co., and Brandt & Co., continued as follows:] The position of Brandt & Co. in point of law appears to me to be precisely the same as the position of Kleinwort & Co. The plaintiffs in the present case were properly advised that they had no defence to the action brought against them by Brandt & Co., and, accordingly, they paid the amount claimed. Then they naturally enough turned to the defendants in the present case and said, "You have received the money, it was paid to you under a mistake, repay it to us." The defendants refused to repay on the ground that they could not find that they had received from the plaintiffs a remittance which could be specifically designated as having been made in error. In other words, they profess to be unable to identify the remittance made to them as covering the sum of £1,480, and say that they cannot satisfy themselves that they ever received the money demanded from them. It appears to me perfectly clear that the transaction as to this sum of money as between the plaintiffs and the defendants was a final transaction. The defendants received the money as representing the goods with which they had parted; that money was theirs, and they were under no obligation to the plaintiffs to hand it over to Kramrisch & Co. Under these circumstances I am of the opinion that the money was received by the defendants on a mistake of fact and must be repaid. I think, therefore, that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for appellants, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for respondents, *Stephenson, Harwood, & Co.*

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Feb. 4, 5.

STONE & Co. v. MIDLAND RAILWAY Co. (a.)

Railway—Rates—Carriage of non-perishable goods by passenger train—Absence of statutory duty to so carry—Inclusive charge for collection, carriage, and delivery—Right of company to impose its own terms—Equality clause—Midland Railway Co. Act, 1844 (7 *&* 8 *Vict. c. cxviii.*), *s.* 203—*Railway Clauses Act,* 1845 (8 *&* 9 *Vict. c.* 20), *s.* 90—*Midland Railway Co. Act (Rates and Charges) Order Confirmation Act,* 1891 (54 *&* 55 *Vict. c. ccxix.*), *Part V., clause* 3.

By section 203 *of the Midland Railway Co. Act,* 1844, *it was enacted that "all tolls for the use of the railway shall be at all times charged equally to all persons, and after the same rate. . . ."*

By the Midland Railway Co. (Rates and Charges) Order Confirmation Act, 1891, *it was provided that "the company shall not be under obligation to convey by passenger train, or any similar service, any merchandise other than perishables." By the same Act a provisional order fixing maximum rates for the conveyance of goods was fixed.*

Held, that both section 203 *of the Act of* 1844 *and section* 90 (*the "equality clause") of the Railway Clauses Act,* 1845, *apply only to tolls which the defendant railway company were authorized by their Act to take, and that as the company were under no statutory obligation to carry non-perishable goods by passenger train, they were entitled to demand from persons who wished to send such goods by passenger train a special rate, including collection, carriage, and delivery, although the collection had been in fact made by the sender himself.*

This was an appeal by the plaintiffs from the judgment of the Divisional Court (Lord Alverstone, L.C.J., and Wills and Channell, JJ.) ([1903] 1 K. B. 741, 51 W. R. Dig. 134), reversing the judgment of the judge of the Bristol County Court.

The action was brought to recover the sum of one shilling alleged to have been received by the defendants to the use of the plaintiffs.

The plaintiffs were common carriers at Bristol, and before April, 1900, they, as agents for the defendants, collected goods and parcels from warehouses in Bristol for transit by the defendants' railway to Southampton Docks, and handed them over to the defendants at their goods or passenger station, as the case might be, and were paid one penny commission on each package so collected.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

In April, 1900, this arrangement came to an end, since which time the plaintiffs collected on their own account from the public, goods and parcels and handed them over to the defendants for transit by their railway. As regards goods so collected for transit by goods trains and carried by the defendants under a rate which purported to include a rate for collection, the defendants always paid to the plaintiffs a rebate which, on the face of the "dissected" rate, represented the charge for collection.

By the Midland Railway Co. (Rates and Charges) Order Confirmation Act, 1891, which contains a schedule of the maximum rates and charges which the defendants are authorized to charge for the conveyance of merchandise (including clothing) by goods train, and of the maximum rates and charges in respect of perishable merchandise carried by passenger train, it is provided as follows: Part V. "The following provisions and regulations shall be applicable to the conveyance of perishable merchandise by passenger train. . . . (3) The company shall not be under obligation to convey by passenger train, or any similar service, any merchandise other than perishables."

The defendants carried parcels by passenger train from Bristol under two scales of charges, which were set out in their "List of Rates Arrangements for the Conveyance of Parcels by Passenger Trains from Bristol," one scale applying when they undertook the ordinary liability of common carriers, and the other applying where the goods were carried at "owner's risk." The first scale had this footnote: "Collection and delivery included within the usual limits." The second scale had appended to it a list of articles against each of which was placed either "c," "d," "cd," or "ss," which letters were explained as follows: "c, including collection," "d, including delivery," "cd, including collection and delivery," "ss, station to station, including neither collection nor delivery." In this list the letters "cd" were set against the item "Tailors' unfinished and finished clothing."

On the 7th of August, 1901, the plaintiffs collected and handed to the defendants, at their passenger station at Bristol, three boxes of tailors' goods to be carried by passenger train at "owner's risk," and they paid to the defendants, under protest, the sum of £1, being the amount of the scale rate for the carriage of the boxes to Southampton. The plaintiffs had notice of the terms on which the defendants carried tailors' goods by passenger train.

The plaintiffs then brought this action in the Bristol County Court to recover the sum of one shilling in respect of the collection of the goods by them, and they contended that they were entitled to recover that sum as a reasonable rebate on the ground that the charge of £1 included a charge for collection, whereas they themselves, and not the defendants, had rendered the service of collection.

The defendants contended that, as tailors' goods were non-perishable goods, they were not bound to carry them by passenger train, and that the right to a rebate did not extend to passenger train traffic where there was no maximum limit of charge, and where the defendants, not being bound to carry, could charge what they chose.

The learned county court judge, being of opinion that the proper inference to be drawn from the rate-book was that the charge for carriage of tailors' goods by passenger train at owner's risk included a charge for collection and delivery, held that, though the defendants were not bound to carry by passenger trains any articles other than perishable goods, yet if they chose to carry other articles by such trains they must carry them subject to the obligations imposed upon them by the law when they carry "small parcels" by goods trains.

He accordingly gave judgment for the plaintiffs for one shilling.

On appeal to the Divisional Court that court (Lord Alverstone, L.C.J., and Wills and Channell, JJ.), ([1903] 1 K. B. 741), held that the plaintiffs were not entitled to any rebate, and that the action was not maintainable.

From this judgment the plaintiffs now appealed.

J. A. Foote, K.C. (*Balfour Browne, K.C.*, and *Weatherley* with him), for the plaintiffs.—The plaintiffs are entitled to recover the rebate of one shilling as money had and received to their use, on the ground that they have performed the service of collection for which they have been charged by the defendants: *Baxendale* v. *Great Western Railway Co.*, 14 C. B. N. S. 1, 12 W. R. 602, 16 C. B. N. S. 137; *Garton* v. *Bristol and Exeter Railway Co.*, 9 W. R. 734, 1 B. & S. 112. The distinction the defendants seek to draw between carriage by goods train and carriage by passenger train is purely arbitrary. Section 90 (the "equality clause") of the Railway Clauses Consolidation Act, 1845, enacts that it shall be lawful for the company, subject as therein mentioned, to alter or vary "the tolls authorized by the special Act to be taken . . . as they shall think fit; provided that all such tolls be at all times charged equally to all persons and after the same rate . . . ." It is not in accordance with that clause for a railway company to have only one rate including collection and delivery. Section 203 of the defendants' special Act of 1844, has the same provision for equality as in that section. It provides that "All tolls for the use of the railway shall at all times be charged equally to all persons and after the same rate in respect of all goods . . ." The charge made by the defendants for carrying non-perishable goods by passenger train is a toll within the meaning of the Act of 1845, and the "equality clause" applies to such a toll. That clause applies just as much to a toll fixed by a railway company under a discretionary power as to a toll for which a maximum has been provided by Act of Parliament. In *Great Western Railway Co.* v. *Sutton*, L. R. 4 H. L. 226, 17 W. R. Dig. 13, which approves of *Baxendale* v. *Great Western Railway Co.*, Lord Chelmsford at p. 254 says that "the notion that the clauses for making equal charges are inconsistent with the power given to the defendants . . . to demand any sum they think fit for parcels not exceeding 500lbs., appears to me to be unfounded."

Cripps, K.C. (*W. J. Noble* and *W. G. Clay* with him), for the defendants.—The defendants' powers of making charges are now governed by the Midland Railway Co. (Rates and Charges) Order Confirmation Act, 1891, and under that Act they are under no obligation to carry non-perishable goods by passenger train. If they do so carry non-perishable goods they may demand any rate they please for such service, for in so carrying them they are in the position of a common carrier who is under no obligation to treat all customers equally, and may, at common law, give any particular individual any privilege he likes. The defendants may lawfully refuse to carry non-perishable goods by passenger train, but if they consent to so carry such goods they are at liberty to charge any rate they like: *Dickon* v. *Great Northern Railway Co.*, 35 W. R. 202, 18 Q. B. D. 177.

Foote, K.C., replied.

COLLINS, M.R.—This is an action brought by carriers against the Midland Railway Co., claiming to recover back money which they say has been

improperly obtained from them by some species of duress—that is to say, that the company demanded and received from them a sum beyond that which they were entitled to charge. They claim to recover that money on the ground that either under the equality clause in section 90 of the Railway Clauses Consolidation Act, 1845, or under the special clause of the company's own private Act they are entitled to get back this proportion of money.

The railway company say that they are not bound to carry such goods as the plaintiffs tendered, which were non-perishable merchandise, by passenger train at all, and that, therefore, being entirely free whether they will carry them or not, being under no obligation to carry them, and there being no toll by statute with respect to them, they do not come under the railway legislation as to equality at all. That is their point. Counsel for the plaintiffs, on the other hand, contend that they do. [His lordship here read section 90 of the Railway Clauses Consolidation Act, 1845.] This section deals with the power conferred by law upon the company to demand certain tolls and to vary those tolls, and it says it is expedient that the company should be able to vary those tolls, but that such power of varying them should not be used for the purpose of prejudicing or favouring particular parties, and then follows the special clause for equality which I have just read. Now, it has hardly been contended for the plaintiffs that that clause is not directed to the tolls which by special legislation the company is empowered to demand; and recognizing that difficulty, the plaintiffs rest their case upon the equality clause in the private Act of the defendant company, and the ground for so doing is that the words of that section do not in terms appear to limit the word "toll" to the tolls specially authorized by the special Act. The clause relied on is section 203 of the Midland Railway Act, 1844, which begins thus: "And be it enacted that all tolls for the use of the railway shall be at all times charged equally to all persons." The rest of the section is practically in the same words as section 90 of the general Act. It is contended that section 203 of the special Act means all tolls which the company in fact charge, and not merely all tolls which by law they are entitled to demand, and that, therefore, the section is larger in its terms than section 90 of the Act of 1845, and brings under its operation any charges which the company in fact make, whether they are the subject of legislation by special Act of Parliament or not. However, when one looks at the position in which section 203 occurs in the special Act, one finds that it is simply a section in what I may call a particular code as to tolls; for in section 198 the Act deals with "tolls" and says: "And with respect to the tolls to be levied for the use of the railway, be it enacted that the company may lawfully demand any tolls not exceeding the following." Therefore this legislation is one empowering the company to demand certain tolls and limiting the amount of these tolls. It is to those tolls which are referred to directly or indirectly in the sections subsequent to section 198, up to section 203, and in several other sections afterwards, that in my judgment the words in section 203 apply.

In my opinion the legislation in the private Act differs in no way from the legislation in the public Act. They are both statutory enactments with respect to statutory rights to demand special tolls.

Then what are the statutory rights now governing the Midland Railway's undertaking? By section 24 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), it is enacted that "Notwithstanding any provision in any general or special Act, every railway company shall submit to the Board of Trade a revised classification of merchandise traffic, and a revised schedule of maximum rates and charges applicable thereto, proposed to be charged by such railway company. . . ." I need not read in detail the provisions of this section, but they provide in terms that the company shall submit a schedule, that that schedule shall be discussed before the Board of Trade, that when sanctioned by the Board of Trade it shall be first of all issued under the terms of a Provisional Order; and then by sub-section 4 it is provided that: "If, after hearing all parties whom the Board of Trade consider to be entitled to be heard before them respecting the classification and schedule, they approve thereof, they shall embody the agreed classification and schedule in a Provisional Order." That is the genesis of the Provisional Order. Then comes the statutory sanction. Sub-section 10 enacts that "The Act of Parliament confirming any Provisional Order made under this section shall be a public general Act, and the rates and charges mentioned in a Provisional Order as confirmed by such Act shall, from and after the Act coming into operation, be the rates and charges which the railway company shall be entitled to charge and make." Those, and no others, are the rates by which the defendants are now bound. Now the schedule of rates is set out in the Provisional Order which contains the following clauses: "The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train; and subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not hereinafter provided for."

"Perishable merchandise by passenger train: (1) The company shall afford reasonable facilities for the expeditious conveyance of the articles enumerated in the three divisions set out hereunder (which articles are hereinafter called 'perishables'), either by passenger train or by other similar service. (2) Such facilities shall be subject to the reasonable regulations of the company for the convenient and punctual working of their passenger train service, and shall not include any obligation to convey perishables by any particular train. (3) The company shall not be under any obligation to convey by passenger train, or other similar service, any merchandise other than perishables."

Now here is a company whose rates and charges are ascertained and regulated by a Provisional Order, ultimately sanctioned by the Confirmation Act of 1891. That Act regulates its charges, and the company is under no obligation whatever to carry non-perishable merchandise by a passenger train; there is no tariff fixed for doing so, and no statutory obligation to make a tariff. The merchandise in this case was non-perishable, and was carried by passenger train. Being under no obligation to carry such merchandise by passenger train, the company, nevertheless, have given certain facilities to the public and they have announced: "We are prepared to take this traffic from the house of the sender and deliver it at its destination at a certain rate." But they say: "With regard to this class of merchandise, as to which we are entirely at large, so far as the Legislature is concerned, we are willing, of our own motion, on our own rights at common law, apart from statute law, being the owners of machinery whereby carriage of merchandise can be carried on, to give the public this facility if they like to take it. If they do not like to take it they can leave it alone, and the only facility we will give for carrying non-perishable merchandise by passenger train is, we will charge an inclusive rate for the whole service

which you may avail yourself of altogether or in part, just as you like, but you must pay this inclusive charge, which is the only charge we make for this, whether you get the benefit of all the incidental services or not. If you like to collect your own goods and deliver them at our station and ask us to send them, we tell you we will make the same charge as if we ourselves had collected and delivered. That is the only rate we quote for it. We are under no obligation to quote any, and if you like to take that facility you may take it or else leave it alone."

The plaintiffs say that will not do. They say: "We collect our own goods, we tender them at your station, and therefore we ought not to be charged the same as other persons who do not collect their own goods and for whom you collect and take their goods to your station." If the plaintiffs had a right to demand a station to station rate that would undoubtedly be a very strong argument; but when they have no right to demand such a rate they cannot complain that the company refuse to grant them that rate and say that the only terms upon which they will carry non-perishable merchandise by passenger train is upon a rate which includes collection and delivery.

I think it is perfectly true to say, as the learned Lord Chief Justice said in the court below, that the plaintiffs are demanding a station to station rate, a falicity which they are not at law entitled to ask for, and that they can only send non-perishable merchandise by passenger train on the terms embracing collection and delivery. It is contended on behalf of the plaintiffs that even if there is no obligation on the part of the company to take such merchandise from their station by passenger train, nevertheless if they do so carry such goods and make a charge for collection and delivery in respect of such merchandise which they have not collected, they have in fact charged a sum which constitutes an inequality, and that under those circumstances the inequality clause applies. In support of that contention the case of *Baxendale* v. *Great Western Railway Co.* is cited. In that case, however, the company were bound to take the goods and to carry them in the way they did, and they were entitled by law to demand a tariff for doing so. It is true that the precise amount of that charge was left to their discretion, but they had no discretion to refuse to carry the goods and they had by law the right to demand a toll for them, and, therefore, the court held that, though they were free as to the amount of the toll, they were not free as to anything else; and therefore they came under the equality clause and must deal equally with all people. But the cardinal difference in this case is that this particular traffic is governed by no statute; there is no obligation to carry, and there is no tariff imposed for carrying this merchandise. That being so, the company are outside the railway legislation. In fact I think this case may be summed up in the short and conclusive passage in the judgment of my brother Wills in the court below: "Two principles . . . apply here, and the combined effect of them is to make the case perfectly clear. One is, that there is no statutory obligation to carry these goods by passenger train; the other, that it is not *ultra vires* for the company to carry them if they so choose. The combined effect is that, so far as concerns the carriage of this kind of article by passenger train, the company are on exactly the same footing as a private individual."

In my opinion this appeal fails. No question of undue preference arises in this case, and it is not necessary to express any opinion whether such a claim could be supported.

ROMER, L.J.—So far as concerns carriage of non-perishable goods by passenger train, the company, since the Act of 1891, is clearly under no obligation to carry such goods, and if they do carry them, it appears to me they may prescribe as to between what termini they will carry, and as to the amount of rate. I think, therefore, the company are entitled to say that they will only carry non-perishable goods by passenger train and to charge a through rate for that carriage from house to house, including collection and delivery. Even if it be admitted that there must be equality of charge, the only equality need be that the through rate is not charged differently as between different persons availing themselves of the company's offer of carriage from house to house at a through rate. It cannot be contended that there is inequality merely because one house may be more distant than another.

MATHEW, L.J.—I am of the same opinion. It seems to me that this arrangement of the company with respect to the carriage of non-perishable goods by passenger train was an option given to the public, imposing the terms upon which the goods would be carried. The company are entitled to do that as common carriers. I therefore agree with my brothers in thinking that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for the plaintiffs, *Burgess, Cosens, & Co.*, for *C. E. Isbell*, Bristol.

Solicitors for the defendants, *Beale & Co.*

High Court of Justice.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) — Feb. 5.

BAGG v. COLQUHOUN. (a.)

Justices—Jurisdiction—Power of adjournment—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 16.

Where, on the hearing of a criminal information, the justices are equally divided in opinion they have power to adjourn the case for rehearing, and are not bound to dismiss the information.

Case stated by the justices of the borough of Swansea.

The special case set out the following facts:

An information under the Licensing Acts, 1872 and 1894, had been preferred by the respondent for selling and exposing for sale intoxicating liquors during prohibited hours.

The information was heard on the 18th of August, 1903, before two justices, who, after hearing the evidence retired to consider their decision. Upon their return they announced in open court that they were divided in opinion, whereupon the appellant's solicitor asked that the information should be dismissed.

The justices decided that a more satisfactory decision could only be arrived at upon a rehearing with other of their fellow justices, and said that they had agreed to adjourn the information to a future day when they and the other justices on the rota for that day would be convened to rehear it. They further

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

stated they were unanimous in agreeing to the adjournment. The information again came on for hearing on the 15th of September, 1903, before five justices, including the two justices who had heard it on the previous occasion.

Upon its being called on, counsel for the appellant objected to the jurisdiction of the justices present to rehear it, on the ground that it had been heard and determined by the two justices on the 18th of August, and that as they could not agree, and as the information was a criminal information upon which the appellant could have been fined on conviction and imprisoned in default of distress, they could not or should not have adjourned the information, but should have dismissed it; and he cited in support of his contention *Reg.* v. *Ashplant*, 52 J. P. 474, and *Kinnis* v. *Graves*, 67 L. J. Q. B. 583.

The respondent's solicitor contended that it was competent for the two justices who were divided in opinion to adjourn the information to a future date for the purpose of rehearing it by themselves and other justices, and that no decision or determination was come to by the justices when they agreed to adjourn the information; he cited *Ex parte Evans*, [1894] A. C. 16.

The justices determined they had power to rehear the information, and in the result convicted and fined the appellant.

The question for the court was whether upon the facts the justices had come to a correct determination in point of law.

S. T. Evans, K.C. (*Ivor Bowen* with him), for the appellant.—The second hearing was without jurisdiction. The only power of the justices to adjourn is given by section 16 of the Summary Jurisdiction Act, 1848, and that gives power to adjourn "before or during" the hearing only. Here the magistrates had already given their decision.

Avory, K.C., and *L. M. Richards*, were not called upon to argue.

Lord ALVERSTONE, L.C.J.—In this case no question arises as to a *mandamus* to the justices to rehear the information, nor as to the points which have caused difficulty in cases where a decision of the justices, though originally divided in opinion, has been embodied in the order, as in *Kinnis* v. *Graves*, where my brother Wills expressed the opinion the magistrates ought to have adjourned instead of coming to an immediate decision. The magistrates here did not give a final decision, but agreed to adjourn the hearing. In my opinion the principle of *Jones* v. *Williams*, 46 L. J. M. C. 270, applies to this case. I think, indeed, the present case is a far stronger one. It would be lamentable if we were compelled to hold, under such circumstances as those we are dealing with, that the justices had no power to adjourn. It is not necessary to decide what is the true dividing line, but in any event the mere expression of opinion by justices that they were divided does not deprive them of their right to adjourn.

WILLS, J.—I agree. I adhere to what I said in *Kinnis* v. *Graves* and am quite clear the power of adjournment was not taken away by anything that happened in the present case.

KENNEDY, J.—I agree.

Appeal dismissed.

Solicitors for appellant, *Riddell & Co.*, for *Viner Leeder & Morris*, Swansea.

Solicitors for respondent, *Helder, Roberts, & Co.*, for *Laurence Richards*, Swansea.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) — Dec. 11.

CLAYTON v. PEARSE. (*a*.)

Fishery law—Validity of bye-law—Salmon Fisheries Act, 1873 (36 & 37 *Vict. c.* 71), *s.* 39, *sub-section* 3.

Where conservators of a river have power to determine (inter a ia) "*the length, size, and description of nets . . . for taking of salmon,*" *they are entitled to prohibit the use of a particular kind of net altogether.*

Case stated.

An information was prepared by the respondent Clayton against the appellants for that they on the 13th of May, 1903, in the parish of Goodrich, in the county of Hereford (within the Wye Fishery District), and in that part of the River Wye which lies above a line drawn across the river along the lower side of Begsweir Bridge, did unlawfully use a net other than a beating net—to wit, a draft or seine net, contrary to the bye-law.

By the bye-laws which were made on the 27th of November, 1901, and confirmed on the 27th of February, 1902, fishing in the Wye Fishery District was regulated.

The terms of the bye-law in question were: "The length, size, and description of nets, and the manner of using them . . . which may be lawfully used in the Wye Fishery District shall be as follows: (*a*) In that part of the said district which includes so much of the River Wye as lies below a line drawn across the said River Wye along the lower side of Begsweir Bridge . . . the description of such nets shall be draft or seine nets, beating nets, and lave nets as hereinafter determined. (*b*) In all other parts of the said district . . . the description of such nets shall be beating nets as above described to be used in manner above mentioned."

The licence fee as fixed by the scale attached to the bye-laws is £5 for every draft or seine net, and for every beating net £20.

It was proved at the hearing that the appellant Clayton, on the 12th of May, 1903, was using a draft or seine net above Begsweir Bridge, and that the lessee of the Huntsman Salmon Fishery, whose servant Clayton was, held a licence to use a draft or seine net, for which he had paid £5.

The justices convicted the appellant.

The question for the opinion of the court was whether the bye-law was or was not *ultrà vires*.

By the Salmon Fishery Act, 1873, s. 39, "a board of conservators may make bye-laws for the better execution of the Salmon Fishery Acts, 1871 to 1873, for all or any of the following purposes, that is to say; . . . (3) to determine the length, size, and description of nets, and the manner of using the same . . . for taking salmon, provided that no bye-law . . . shall limit the length of a hang net or limit the length of a draft net, so as to be less than 200 yards; (8) to prohibit the use of nets within a certain distance of the mouth of any river and of the point of confluence of rivers in any part of the district (not being a several fishery)."

Robson, K.C. (*Lloyd* with him), for the appellant.—This bye-law is bad. Section 39, sub-section 3, of the Salmon Fishery Act, 1873, under which it purports to be made, only gives the conservators power to regulate the kind of net, and does not allow them to forbid a particular net altogether. If it did sub-section 8 would be superfluous.

(*a*.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

W. Denman Benson, for the respondent.—This bye-law was confirmed after a full inquiry by the Board of Trade, and is *intra vires*. The conservators have power to regulate the description of net, and this includes prohibition of a particular kind of net.

Robson, K.C., replied.

Lord ALVERSTONE, L.C.J.—We are asked to say that a certain bye-law made under the Salmon Fisheries Act of 1873 is *ultrà vires* and unreasonable. As was said in *Kruse* v. *Johnson*, a strong case is needed to induce the court to hold such a bye-law void for unreasonableness. When clear powers are given by the enabling Act of Parliament, we ought not to hold that a bye-law made under those powers is *ultrà vires* unless it prescribes something which is clearly not within the statute, and that is certainly even more the case when the bye-law is passed, as was the case here, after a public inquiry at which all persons interested in the question might have been heard. It is plain that the conservators had power to make regulations determining the "length, size, and description of the nets to be used in the river," and also that they might apply these bye-laws to any part of their district (section 40). What they have done is to say that for a certain limited distance certain nets may be used, but that above that and higher up the river only a beating net can be used. Their right to say so depends on whether they have the right to say that as regards the whole river persons may not use a particular kind of net for fishing. It is contended such a power is not given them by the words in sub-section 8 of section 39, "description of nets and the manner of using the same." In other words, it is said they connot prohibit the use of a particular kind of net, but only the length, size, or make of such net. It would, I think, lead to absurdity, and would unduly restrict the power of the conservators, to say that the word "description" in that sub-section only means description of a particular kind of net, such as, for instance, a beating or draft net, and that it does not enable the conservators to prohibit the use of that kind of net altogether. In my opinion the word "description" means kind as comparing one kind with another, and I think that the proviso to sub-section (3) rather supports that view because it regulates the limitations of two particular kinds of nets. Such a proviso to a section enabling regulations to be made as to the description of nets, certainly suggests that a draft net or a hang net may be a description of net within the section. That, perhaps, does not carry the matter much further, but I am clearly of opinion that it would be cutting down the powers of conservators unduly to say that the Act did not allow them to prohibit the use of a particular kind of net altogether.

But it is urged that this cannot be the meaning of sub-section 3, because sub-section 8 enables the conservators to prohibit the use of nets altogether except in a several fishery. But section 39, sub-section 3, and section 40 give the conservators clear powers to deal with the control of nets in all parts of the river, and their powers, therefore, are intended to be extensive. I think the language of section 39, sub-section 3, ought to be construed as conferring on them power to make the bye-law in question.

Then it is said, to hold the bye-law to be *intra vires* is practically to prohibit fishing in this fishery altogether, because the payment for a licence to use a beating net is four times as great as that for a draft net. The licence duties depend on the power given by the third schedule to the Act of 1873, and there is ample provision in section 41 of that Act for enabling persons whose interests are at stake to bring forward their objections to the provisions of the bye-laws before they are confirmed. It seems to me quite hopeless to argue that this bye-law is *ultrà vires* because it prescribes the use of a net for which a duty of £20 is payable, and forbids the use of another for which only £5 is payable. In my opinion this conviction must be affirmed.

LAWRANCE, J.—I agree.

KENNEDY, J.—It is plain that if this bye-law is not *ultra vires* it must be a bye-law properly made under the powers given by section 39 of the Salmon Fisheries Act, 1873. It is intended that the word "description" in sub-section 3 only refers to the characteristics of the various sorts of nets, and that it does not enable the conservators to prohibit the use of any particular kind of net altogether. It seems to me there is no reason why the word description should not be held to cover the generic description of nets as well as particular characteristics of those nets. The conservators may say, as I think, that a net of a certain description, such as a draft net or a beating net shall not be used, or they may say that its description shall be so and so, indicating its particular characteristics. I think that there is no reason for limiting the word description to the description of the characteristics of the net. For all practical purposes it must be conceded that it would be possible, by prescribing the characteristics of a particular kind of net, to make it of different degrees of efficacy, and therefore by a bye-law made under sub-section 3 of section 39 it would be possible by setting out the characteristics of a net which should be forbidden, to exclude the use of a particular kind of net altogether. In other words, according to the argument for the appellants, the conservators have powers to forbid the use of a net described by the enumeration of its points, but have not the power to exclude its use if they merely called it by its name, as a draft net or a beating net. The argument therefore leads to the fallacy that the bye-law would be good if the net had been described without naming it, but it is bad because it names without describing it.

As to the alleged inconsistency between sub-section 3 and sub-section 8, it is difficult to see why sub-section 8 should not be added, for there is no conflict between it and sub-section 3. I do not think that the mere adding of the powers given by sub-section 8 makes a bye-law made under sub-section 3 *ultrà vires*. Further, sub-section 8 allows the prohibition of all kinds of nets within a certain distance of the mouth of the river, and I do not see how that in any way limits the powers of the conservators under sub-section 3. The appeal must therefore be dismissed.

Solicitors for appellants, *Robson, Meredith, & Co.*, for *Wallis*, Hereford.

Solicitor for respondent, *R. J. Owen*, Builth.

Court of Appeal.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) May 3.

JAMES v. OCEAN COAL CO. (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Average weekly earnings—Review of weekly payment—Fall in wages—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clauses* 1 (b), 2, 12.

A haulier in a colliery was injured by an accident which for a time totally incapacitated him for work, and, by arrangement, his employers paid him one-half his weekly wages as compensation under the Workmen's Compensation Act, 1897. *Subsequently he was able to do light work, and his employers took him back into their employment as a lamp man, and paid him the same amount of wages as hauliers were then receiving, hauliers' wages having fallen since the accident. The employers thereupon discontinued the weekly payment. The workman filed a request for arbitration under the Act of* 1897 *to assess the weekly payment. The county court judge refused to award any weekly payment upon the ground that the maximum which had been originally fixed on the average weekly earnings before the accident was subject to variation according to the variation in the wages, and that, as the wages which the workman was receiving were the same as he would have received if there had been no accident and he had continued in the same employment, he was not entitled to any weekly sum as compensation*

Held, that the county court judge was wrong in holding that the original maximum was subject to variation, and that he was bound as a matter of law to award the workman no weekly sum as compensation, but that he should consider, in the exercise of his discretion, whether he would award any, and if so what, proportion of the difference between the wages earned by the workman previous to the accident and the wages which he was earning in the new employment since the accident.

Appeal from an award of Judge Gwilym Williams, sitting at the Bridgend County Court of Glamorganshire, in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was a workman who was in the employment of the respondent company as haulier. On the 9th of October, 1901, he met with an accident arising out of and in the course of his employment, and thereby sustained injuries which totally incapacitated him from performing any work until the 15th of June, 1903. His average weekly earnings during the twelve months previous to the accident were 34s. The company by arrangement paid him by way of compensation a weekly sum of 17s. On the 15th of June, 1903, he undertook light employment as a lampman under the same employers. The wages paid him as a lampman on his undertaking this light employment were at the rate of 29s. 5d. per week—that is, 4s. 7d. less than he was receiving before the accident. The respondent company thereupon ceased to pay him the weekly sum of 17s. On the 18th of August, 1903, he filed a request for arbitration under the Workmen's Compensation Act, 1897, claming payment of the weekly difference between the wages earned by him previous to the accident and those which he had been earning since the 15th of June, and a declaration of the respondents' liability. The medical evidence showed that the applicant still suffered from the effects of the accident, and that he would probably never be able to do heavy work.

It appeared that the wages of the workmen in the employment of the company were subject to fluctuations occurring from time to time in percentages on the wages, which were subject to an increase or decrease upon the standard rate of wages, the percentages being regulated by a conciliation board; and that in the interval between the 9th of October, 1901, the date of the accident, and the 15th of June, 1903, the date on which the applicant undertook light employment, there had been a drop or reduction in the percentages, brought about in the regular and usual way. It appeared also that the wages which the applicant was receiving, viz, 29s. 5d., were the same as would be received by any other workman engaged in the same class of work as the applicant was engaged in at the time of the accident—namely, as a haulier.

The county court judge, in delivering judgment, said: "The principal question, therefore, for decision in this case is whether, when the amount of compensation has been decided, either by award or agreement, on the basis of the earnings of the injured person prior to the accident, by which for a time he was totally incapacitated from working, that compensation is subject to revision when he is able to undertake light employment, and whether it is subject to the variations governing the wages paid to persons doing similar work to that which he performed prior to the accident. I am of opinion that the proper principle to be adopted in such circumstances is that the basis—*i.e.*, the wages on which the amount of compensation was originally fixed—should be varied to the extent of the variation of the percentages in the wages earned by persons performing similar work at the time, but that the wages earned by the injured person when he undertook light employment should be supplemented by a sum which would bring up his earnings to the same amount as are paid to persons in similar employment to that in which he was engaged prior to the accident. . . . The effect of my decision is to place the injured person in the same position with regard to earnings as he would have been in if he had not been injured, for if he had continued to work without interruption his wages would have been subject to the variations in the percentages, and would therefore in this case be less than those which he earned prior to the accident. On the other hand, if the applicant's contention is to be allowed—viz., that the wages earned by him in undertaking light employment are to be supplemented by a sum which would bring them up to those which he earned prior to the accident—he would be receiving higher wages than those who were at that time engaged in a similar capacity. That, in my opinion, would be absurd. In arriving at these conclusions I have not lost sight of the fact that he is as a consequence of the injuries he received still unable to undertake the duties which he performed prior to the accident, or indeed any heavy work." He found that the applicant was receiving the same rate of wages as those hauliers now received who performed the same duties as he did prior to the accident, their wages having by the drop in the percentages been reduced to the same amount as he was now being paid. He therefore declined to order any weekly payment, but he made a declaration of liability.

The applicant appealed.

Abel Thomas, K.C., Rhys Williams, and *John Sankey,* for the applicant.

Ruegg, K.C., and *Albert Parsons,* for the employers.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Jamieson v. *Fife Coal Co.*, 5 Fraser 958, was referred to.

COLLINS, M.R.—This is an appeal from an award of the county court judge, which was made upon the application of the workman, not in the strict sense for a review, but to have the amount of compensation determined. What happened was this. The workman, who was a haulier in the respondents' employment, met with an accident in the course of his employment, which resulted in his complete incapacity for work. His average weekly earnings before the accident were 34s., and the employers paid him half that amount—namely, 17s.—a week for a considerable time. Afterwards the workman sufficiently recovered to do light work, and he was taken back into the respondents' employment at light work, and was paid wages at the rate of 29s. 5d. a week. It happened that that was the full rate of wages for hauliers at that time. In these circumstances the employers refused to pay, in addition to the sum of 29s. 5d. a week, any further sum as compensation under the Act. The workman, not being satisfied with that decision of the employers, applied to the county court judge to settle what sum should be paid. The county court judge found that 29s. 5d. was sufficient, at the same time making a declaration of liability.

If the judge had simply said that he saw no reason for interfering with the arrangement by which the workman was receiving 29s. 5d. a week, and had not travelled into a discussion as to the reasons and principles of his decision there would have been no ground for interfering. We have no right to say whether a county court judge is right or wrong in merely assessing a certain sum as compensation which he has a discretion to assess. The real difficulty arises from the reasons given by the judge for his decision, which raise questions that both parties are desirous of having determined. The judge has laid down a hard and fast rule as to the calculation of the amount, a rule which I am not prepared to adopt. The county court judge has stated two questions for his own consideration in determining the case. The first is this: "The principal question, therefore, for decision in this case is whether, when the amount of compensation has been decided either by award or agreement on the basis of the earnings of the injured person prior to the accident, by which for a time he was incapacitated from working, that compensation is subject to revision when he is able to undertake light employment." So far the answer to that question is clear. The amount of compensation is clearly subject to review when the injured person is able to undertake light employment. By clause 2 of Schedule I. to the Workmen's Compensation Act, 1897, "in fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity." By clause 12, "any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act." Therefore the first question admits of only one answer—namely, that the amount of compensation is subject to revision. Now comes the second question, which, when analyzed, seems to me to involve a misconception of law, and so far as it was a factor in the determination of the amount of the compensation to be awarded, and so far as it had any bearing upon the final decision arrived at by the judge, it was wrongly taken into consideration. The question is: "And whether it"—that is, the compensation which *ex hypothesi* was the maximum in case of total incapacity—"is subject to the variations governing the wages paid to persons doing similar work to that which he performed prior to the accident?" That is the second question which the judge put to himself, and I think, on analyzing the words, that they mean whether the sum awarded on the basis of total incapacity was subject to the variations governing the wages paid to persons doing similar work to that which the injured man performed prior to the accident, and the question was put upon what must be treated as in substance an application to review the weekly payment. The judge, in his judgment, went on to say: "I am of opinion that the proper principle to be adopted in such circumstances is that the basis—*i.e.*, the wages on which the amount of compensation was originally fixed—should be varied to the extent of the variation of the percentages in the wages earned by persons performing similar work at the time, but that the wages earned by the injured person when he undertook light employment should be supplemented by a sum which would bring up his earnings to the same amount as are paid to persons in similar employment to that in which he was engaged prior to the accident." It seems clear, therefore, that the judge held that the maximum which has been originally fixed on the average amount of the wages may on occasion of review be varied to the extent of the variation of the percentages in the wages. So far as the judge adopted that view I think that he was wrong, for, in my judgment, the maximum fixed in the first instance is entirely independent of fluctuations in wages afterwards. That maximum is not to be altered. This is in accordance with the decision in *Jamieson* v. *Fife Coal Co.*, and with the scheme of the Act. Having once arrived at that maximum, it is not to be altered by anything happening afterwards. If it were subject to alteration, the effect would be to introduce a fluctuating maximum. I do not say that the county court judge would necessarily be wrong, in the exercise of his discretion in a particular case, in supplementing the workman's wages by awarding the whole or part of the original maximum so as to bring the injured man's earnings up to the same amount as were at that time paid to persons in similar employment to that in which the injured workman was employed at the time of the accident. But the county court judge cannot lay down a rigid rule which obliges him to arrive at the same result in different cases. In each case the judge must exercise his discretion. So far as he laid down a general rule of arithmetic, he was wrong; and in so far as that rule involves the proposition that the original maximum is subject to variation, it was wrong. In so far as that error entered into the calculation, the principle applied was wrong. The Act seems to me to be clear. When there is total incapacity arising from accident, the judge in assessing compensation has to find out what the average weekly earnings of the injured man before the accident have been, and having ascertained that amount he cannot award him more than one-half of it. When that is once ascertained that matter is concluded. Then, by clause 2 of Schedule I., "in fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." So that upon an application to review a weekly payment a new factor is introduced, and the county court judge has to find

out what, in all the circumstances, the injured workman should be paid. Any element of uncertainty in the original maximum is entirely remote from the discussion. The judge has to look at the maximum in view of the fact that the incapacity has ceased to be total and has become partial, and he is to have regard to the facts specified in clause 2. It was entirely in the discretion of the judge, subject to clause 2. That is all that is laid down. He is to have regard to the average weekly earnings before the accident and the average amount which the workman is able to earn after the accident. Neither of those facts embrace the consideration as to whether the maximum is subject to fluctuation. I do not know how far, if at all, this element affected the mind of the county court judge. The case must therefore go back to him. It may be that when the judge comes to reconsider the matter he may make no difference in his award. I am unable to say how this may be. As, however, the point was pressed upon him, his decision may have been influenced by it, and therefore there may have been a mistake. In these circumstances there is no alternative but to send the case back to him.

ROMER, L.J.—My brethren are of opinion that the county court judge has misdirected himself, and that consequently he may not have exercised his discretion properly in the matter. That being so, I do not differ from them upon that point, because there are certain passages in the county court judge's judgment which do not accurately state the law. The case must therefore go back. I regret this result because, in my opinion, the judgment of the county court judge worked substantial justice. The judge, in assessing compensation, can take into consideration the fact that the injured man is earning the same wages which he would have earned as a haulier if there had been no accident, and I cannot say that the judge would be wrong in refusing to award a further sum so long as the injured man was paid those wages. I cannot help thinking that the judge will probably arrive at the same conclusion after he has exercised his discretion in the matter, and that the only result of sending the case back to him will be to make further costs.

MATHEW, L.J.—I am of the same opinion. The question is whether or not the county court judge, when asked to review the weekly payment, was bound to decline to order any weekly payment if, upon looking at the wages earned by the workman, he found that they were the same as he would have earned if there had been no accident and he had continued in the same employment as he was in before the accident. The county court judge held that he was so bound, and in my opinion he was wrong in so holding. It is then said that we ought to deal with the case on the footing that the judge in refusing to order any weekly payment did so in the exercise of his discretion. The judge, however, does not seem to have exercised his discretion. He only considered one point—namely, that the injured man was earning the same wages as men were earning at the same work as he was engaged upon before the accident. If the judge had told us that he had considered all the circumstances, that he had looked forward to the future as well as backward to the past, and had considered that the man was not the same man as before with regard to his earning capacity, he would have exercised his discretion, and the case would have been different. But he did not do so. The case must therefore go back to him. I refrain from giving him any direction as to what he should do when he reconsiders the case.

Appeal allowed.

Solicitors for the applicant, *Smith, Rundell, & Dods*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

Solicitor for the employers, *H. P. Becher*, for *Simons & Powell*, Pontypridd.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — Feb. 26.

ELLIOTT v. CRUTCHLEY AND ANOTHER. (a.)

Contract—Impossibility—Contract to supply refreshments for steamer for Coronation Naval Review—Cheque given in part payment—Review abandoned—Condition in contract that if review was cancelled before caterer incurred expense there should be no liability on charterers.

The plaintiff and the defendants entered into a contract whereby the former was, in consideration of £300, to be paid in advance, to supply refreshments on board a pleasure steamer chartered by the latter for the purpose of taking passengers to see the Coronation Naval Review. In the letter accepting the contract the defendants wrote, "It is, of course, understood that in the event of the cancellation of the review before any expense is incurred by the caterer there shall be no liability on our side." Enclosed in this letter was a cheque for £300 in part payment of the contract. The review was on the next day cancelled before any refreshments were supplied or the cheque presented for payment, and the defendants stopped payment of the cheque.

Held, that upon the true construction of the contract, the parties had agreed that if the review was cancelled there was not merely to be a release of both from any further performance thereunder, but as nearly as possible a restitutio ad integrum, *and therefore the plaintiff was not entitled to recover the value of the cheque.*

Semble, *the fact that the part payment was made by cheque, which had not been cashed before the review had been officially announced as cancelled, did not alter the rights of the parties.*

Chandler *v.* Webster, ante, *p.* 290, [1904] 1 K. B. 493, *distinguished.*

Appeal by the plaintiff from a decision of Ridley, J.

The plaintiff brought this action to recover £300 from the defendants as drawers of a cheque for that amount.

In March, 1902, an arrangement was made by which a company agreed to let their pleasure steamer *Yarmouth Belle* to the Navy League, of which the defendants were members of the executive committee, for the purpose of taking passengers to see the Naval Review proposed to be held on the 28th of June, 1902, and under that agreement the plaintiff was to have the catering for the steamer. It was in reference to the supply of refreshments that the present action was brought, the agreement for which was contained in two letters.

The first letter written by the plaintiff's manager to the defendants, was dated the 4th of March, 1902, and so far as material was in these terms: "I now beg to set out the arrangement Mr. Elliott is willing to agree to as verbally reported to you this afternoon by telephone. That is to say, that he will supply the three meals as per menu at 12s. 6d. per head . . . you guaranteeing not less than 600 passengers and paying for all over that number . . . £300 to be

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

paid to Mr. Elliott on account of the refreshments on the Monday previous to the review day."

On the following day the defendant Crutchley, on behalf of the Navy League, wrote to the plaintiff accepting the terms contained in the letter of the previous day, but added in a postscript a term to the contract as follows: "It is, of course, understood that in the event of the cancellation of the review before any expense is incurred by the caterer there shall be no liability on our side."

It was subsequently agreed that the price to be paid for refreshments should be £1 1s. per head, but in other respects the contract was unaltered. The defendants sent the plaintiff a cheque for £300 on the 23rd of June, being the Monday previous to the day fixed for the Naval Review. The next day the review was cancelled, and the defendants gave notice to the plaintiff, and the steamer never started on the proposed excursion.

After negotiations the cheque was stopped, the defendants contending that the consideration under the contract for which it was paid had wholly failed. At the trial they pleaded also by way of counterclaim that if anything was due to the plaintiff in respect of expenses incurred in connection with the contract such expenses must have been less than £300, and they were entitled to be repaid the balance on the cheque, after the plaintiff had deducted such an amount for expenses as he might be entitled to.

Ridley, J., in giving judgment, said he understood that all along the defendants offered to make good all expenses incurred by the plaintiff, but the latter at first insisted on payment of the full amount to which he would have been entitled on performance of the contract, and later on upon payment only of the cheque. The conclusion he had come to was that the plaintiff was not entitled to recover the amount of the cheque, and he gave judgment accordingly for the defendants.

The plaintiff appealed.

Witt, K.C., and *Poley*, for the plaintiff.—The money sued for being due and payable under the terms of the agreement prior to the abandonment of the review, the defendants are not entitled to withhold payment of the cheque. *Chandler* v. *Webster*, *ante*, p. 290, [1904] 1 K. B. 493, decides that the contract is not rescinded *ab initio*, but that the further performance of it having been removed out of possibility anything yet to be done under the contract could not be demanded. Therefore, if this cheque had not been payable until after the date of the abandonment, it could not have been sued for. Here the money was due when paid, and if it had been paid in cash could not have been recovered. The fact that payment was made by cheque, which was not cashed prior to the date when the contract became impossible of performance, does not alter the relationship or liabilities and rights of the parties.

Montague Shearman, K.C., and *Eustace Hills*, for the defendants, were not heard.

COLLINS, M.R.—This is one of a series of cases which have arisen out of the cancellation of the Coronation Procession and the Naval Review which occurred in consequence of the unfortunate illness of the king. In deciding them this court has endeavoured to follow the same principle of law in order as much as possible to lay down a general rule, and has declined to decide any one on its particular merits. Now what are the facts here: The defendants, Commander Crutchley, and Mr. H. T. Knox are two gentlemen who were interested in the Navy League, and they desired to secure a steamer for the purpose of enabling a number of persons to view the Naval Review. They had necessarily to make some provision for catering, and with that object came to an agreement with the plaintiff. That agreement was put into writing, and is contained in two letters, so that we have not to draw an inference here as to what was the real intention of the parties when they entered into the agreement. [His lordship having read the letters, the substance of which is set out above, continuing said:] When the day arrived on which the £300 was to be paid, the defendants sent the plaintiff a cheque for that amount. The plaintiff did not immediately present the cheque for payment; the review was cancelled the next day, and he still kept the cheque in his possession, and it was not until some time afterwards that the defendants stopped payment. I agree with Mr. Witt's contention so far, that the plaintiff, by accepting a cheque was in no worse and no better position thereby, than if he had been paid cash, and that the stopping of the cheque did not affect the rights of either party to the money. The courts have on several occasions laid down the rule as to the rights of the parties to a contract where an event on which the performance of the contract depended has without the default of either become impossible. The rule is that if before the impossibility is ascertained either party has paid money under the contract, he cannot recover it back, but he is relieved from making any further payment under the contract. The contract—as was pointed out in *Chandler* v. *Webster*—is not by the mere fact that something outside the contemplation of the parties when they contracted has happened which makes the contract impossible, thereby rescinded *ab initio*, but the further performance under it cannot be demanded by either party. Mr. Witt said that the present case came within that rule, and that the payment having been made before the fact of the abandonment—the event that rendered further performance impossible—became known to either party, the money so paid could not be recovered back. And he said the giving of the cheque was equivalent to the payment of the money. If the facts had been as Mr. Witt put them, that argument, on the authority of *Chandler* v. *Webster*, must have resulted in our judgment being for the plaintiff. But the rule laid down in that case is not applicable here, for the simple reason that the parties themselves in the present case dealt with the matter which the court would have had to deal with had they been silent. The parties themselves contemplated the contingency of the naval review not taking place, and they themselves made special provision for that contingency. Mr. Witt, for the plaintiff, argued that the postscript to the second letter—the letter by the defendants accepting the contract—only affirmed what the law would have said if the parties had been silent. The postscript was in these words: "It is, of course, understood that in the event of the cancellation of the review before any expense is incurred by the caterer there shall be no liability on our side." The learned counsel relied on the use of the future tense in the words "there shall be no liability on our side," and he said the part payment by the cheque was not made thereby conditional, and that the liability there referred to was a liability arising from and after that date. In my opinion, the fair meaning of that postscript is that if the review did not take place, the parties were to be in a position in which the law could not in the absence of such an agreement have placed them, had they been silent in the matter. The true meaning, in my opinion, to attach to those words is that in the event which happened there was to be a rescission of the contract with as nearly as possible a *restitutio ad integrum*. I understand that the defendants have all along

expressed their willingness to pay the plaintiff's actual out-of-pocket expenses, and that by consent, if the judgment entered for defendants stands, some small sum is to come off. With that we have nothing to do, as we are asked merely to decide the question raised by the payment of the cheque for £300.

In my opinion the plaintiff, for the reasons I have given, is not entitled to judgment, and therefore this appeal fails.

ROMER and MATHEW, L.JJ., agreed.

Appeal dismissed with costs.

Solicitors for the plaintiff, *Samuel Price & Sons.*

Solicitors for the defendants, *Dowson, Ainslie, & Martineau.*

From K. B. Div.
(Lord Alverstone, L.C.J., Collins, M.R., and Romer, L.J.) Jan. 29.

BRANDTS, SONS, & CO. *v.* DUNLOP RUBBER CO. (*a.*)

Practice—Assignment of debt—Absolute assignment in writing—Notice—Written request to debtor to pay third party—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.

The plaintiffs sued the defendants to recover £3,263, which the plaintiffs claimed had been assigned to them by K. & Co. K. & Co., who owed money to the plaintiffs, sold goods to the defendants for £369 and £3,263 respectively. On the 6th of January, 1903, K. & Co. wrote to the plaintiffs enclosing a document which the plaintiffs were to forward to the defendants. This document was written on one sheet of paper which consisted of two detachable parts, and was as follows: "To D. & Co. (the defendants). Dear Sirs,—Kindly sign the attached letter and forward the same to Messrs. B., Sons, & Co. (the plaintiffs).—Yours truly, K. & Co." "To Messrs. B., Sons, & Co. (the plaintiffs). Dear Sirs,—Herewith we beg to confirm that we shall remit, subject to the approval of goods, the amount of invoice—£369 for eight, and £3,263 for seventy-five, packages raw rubber received to-day from K. & Co. When due, direct to your good selves for account of K. & Co." This part was intended to be signed by the defendants. The plaintiffs, on the 7th of January, forwarded this document to the defendants to their local works at Birmingham, and the letter attached was signed by the local manager of the defendants at Birmingham, who returned it to the plaintiffs. The local manager of the defendants had no authority from the defendants to sign the document on their behalf, and he omitted to notify the defendants that he had signed it. The defendants being unaware of the letter so signed, paid the sum of £3,263 to K. & Co. direct, who subsequently became bankrupt. The plaintiffs thereupon brought the present action.

Held that the document above referred to was not an assignment of the debt due by the defendants to K. & Co., and that the action should be dismissed.

Decision of Walton, J. (8 *Com. Cas.* 174), *reversed.*

Appeal by the defendants against a judgment entered against them in an action brought to recover £3,263 alleged to be due from the defendants to the plaintiffs under an assignment, or alternatively under an agreement.

In November, 1901, the plaintiffs, who were bankers in London, entered into an arrangement for the purpose of financing certain commercial transactions of a Liverpool firm, Kramrisch & Co., by which Kramrisch & Co. would buy goods for shipment from abroad, and would sell the same to customers in England, the plaintiffs to accept bills drawn by the sellers abroad for the prices of these goods; and Kramrisch & Co., among other steps for securing the plaintiffs, would direct their customers to pay the invoice price to the plaintiffs. Among the various transactions on this footing which took place, Kramrisch & Co. bought two lots of rubber, and resold the same to the defendants for £369 and £3,263 respectively (the latter sum being the amount now in question), and on the 3rd of January, 1903, the following letter was written to the plaintiffs by Kramrisch & Co.: "Dear Sirs,—We beg to advise having received from Messrs. Blessig, Braun, & Co. for your account delivery orders of two lots of rubber of about nine tons and one and a-half tons respectively, and we hereby engage receiving such goods, to hold same in trust on your behalf, and as such goods are forwarded to buyers (as *per* statement overleaf) to send you the new documents (unless forwarded by rail); in any case to grant you the sole and absolute lien on said goods and their proceeds until you have received full payment, *plus* charges of the advance granted by you to us on said goods for £3,430, and we further engage to hold this transaction separate from any other."

The statement overleaf was as follows: "Transaction No. 251. Sold to the Dunlop Rubber Co. (Limited), Para Mills, Birmingham," the two lots of rubber above mentioned.

The plaintiffs accepted bills for payment to the sellers, being for a sum less than the invoice prices.

On the 6th of January, 1903, Kramrisch & Co., in accordance with the above arrangement, wrote to the plaintiffs enclosing a printed document which by the letter they requested the plaintiffs to forward to the defendants for their signature. This document consisted of two parts, which were detachable; one part was signed by Kramrisch & Co., it was addressed to the defendants at their Birmingham office (Para Mills), and was as follows: "Dear Sirs,—We should thank you to kindly sign the attached letter and forward the same to Messrs. Brandts, Sons, & Co." The other part (the attached letter above referred to) was addressed to the plaintiffs, and was intended for signature by the defendants; it was in these terms: "Dear Sirs,—Herewith we beg to confirm that we shall remit, subject to approval of goods, the amount of invoices £369 for eight, and £3,263 for seventy-five, packages raw rubber received to-day from Messrs. Kramrisch & Co., Liverpool. When due, direct to your good selves for account of Messrs. Kramrisch & Co."

On the 7th of January the plaintiffs forwarded this document to the defendants at their mills at Birmingham, where the rubber had been delivered, in a letter which said: "We request you to kindly return to us the counterpart duly signed by your good selves"; and on the 9th of January the attached part was returned to the plaintiffs, having been signed in the name of the defendant company by their manager there, a Mr. Gooding. The registered office, however, of the defendant company was in London, and Gooding omitted to inform the head office of the receipt of the letter.

The goods were approved, and the sum of £369 was duly paid to the plaintiffs (the invoice containing a direction to pay the plaintiffs), but the £3,263 was paid by the defendants from the head office direct to Messrs. Kramrisch's general bankers (the invoice not containing any direction to pay the plaintiffs); and Kramrisch & Co. having become bankrupt, the defendants refused to entertain the plaintiffs' demand for payment, who thereupon brought this action.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The case was tried by Walton, J., without a jury; the learned judge held that the documents above referred to amounted to an absolute assignment of the debt in question by Kramrisch & Co. to the plaintiffs, and notice of such assignment to the defendants; and he accordingly gave judgment for the plaintiffs.

The defendants appealed.

Bray, K.C., and *Schiller*, for the defendants.—There was not here an absolute assignment of the debt within section 25 (6) of the Judicature Act of 1873; by the agreement there was at most an hypothecation of a larger sum as security for a smaller: *Durham Bros.* v. *Robertson*, [1898] 1 Q. B. 765, 46 W. R. Dig. 9; *Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. 613, 47 W. R. Dig. 8; *Fisher* v. *Calvert*, 27 W. R. 301. The document was a revocable authority or request to the defendants to pay the plaintiffs: *Ex parte Hall*, 27 W. R. 385, 10 Ch. D. 615, shows that letters in this form do not of themselves constitute an assignment. Secondly, there was no sufficient notice of the assignment—no "express notice in writing." Moreover, if the transaction, which clearly does not amount to an absolute assignment, is to be treated as an equitable assignment within the Judicature Act, 1873, the plaintiffs must fail as they cannot sue in their own names. Under the Companies Act, 1862, notice must be sent to the registered office of the company, where the financial business of the company is conducted, whereas here it was sent to the company's mills at Birmingham, and the manager there had no authority to make the agreement as alleged.

Hamilton, K.C., v. *Loehnis*, for the plaintiffs.—The document, as a business document, clearly amounts to an absolute assignment of the debt for which the defendants attorned to the plaintiffs: *Hamilton* v. *Spottiswoode*, (1849) 4 Ex. 200. It is no legal objection that this absolute assignment is in the form of an order to the debtor to pay the creditor: *Harding* v. *Harding*, 34 W. R. 775, (1886) 17 Q. B. D. 442. [They also referred to *Brice* v. *Bannister*, 26 W. R. 670, 3 Q. B. D. 569; *Fleet* v. *Perrins*, 17 W. R. 862, (1868) L. R. 3 Q. B. 536; *Percival* v. *Dunn*, 29 Ch. D. 128, 33 W. R. Dig. 38.] The notice of the assignment having been sent to Gooding, who was the manager at the Birmingham office, was a good notice to the company under sections 39 and 62 of the Companies Act, 1862.

Bray, K.C., replied.

Lord ALVERSTONE, L.C.J.—The conclusion I have come to here is that the contention of the defendants that this document was not an absolute assignment of the debt within section 25, sub-section 6, of the Judicature Act, 1873, is right, and that their appeal therefore must succeed.

It was contended by the plaintiffs that the document must be construed as amounting to an absolute assignment, either legal or equitable, of the debt within that sub-section, and that they could sue in their own names. The plaintiffs therefore have to show an absolute assignment by writing, under the hand of the assignor (not purporting to be by way of charge only), of the debt or other legal *chose in action*, of which express notice was given to the debtor. It is obvious that unless we arrive at the conclusion that this document in question amounts to an absolute assignment no question of notice arises, therefore that is the question to be decided first. The plaintiffs sought to make out an absolute assignment in writing sufficient to satisfy the statute, by the document containing the two detachable letters sent by them to the defendants. The letters were, we are told, attached together, one being signed by Kramrisch & Co.; and if the other part of the document does amount to an absolute assignment the document would, in my opinion, be duly signed by the assignor. The other part of the document on its face did not purport to be an assignment at all, but merely a request to the defendants to sign the attached letter agreeing to remit the amount of the invoices to the plaintiffs, and if the defendants had signed the letter they would have been in the position like that of the defendants in *Harding* v. *Harding*, 34 W. R. 775, 17 Q. B. D. 442, which was relied on by the plaintiffs, and where it was held that the document was a valid assignment of the balance in the hands of the defendants, and that the plaintiff was entitled to recover the amount. The difficulty here, however, is to see why this document should be treated as an assignment of the debt. Nor do I see any really satisfactory answer to the question, why, if the surrounding circumstances can be looked at, it is to be assumed that there has been, as the foundation of the document, any assignment in writing signed by Kramrisch & Co. of the debt at all. In my opinion the request signed by Kramrisch & Co. to the defendants to sign the attached letter was merely a request and did not amount to an assignment of the debt. The document is consistent with the plaintiffs having merely a floating lien. I do not base my judgment on the fact that three days before there was a letter from Kramrisch & Co. to the plaintiffs making themselves trustees of the money for the plaintiffs and giving the latter a lien. Nevertheless if it cannot be said that the document on the face of it is an absolute assignment, and if it is allowable to go outside the document to see what the true nature of the transaction was, it seems to me clear that the plaintiffs have not got an absolute assignment of the debt. It is to be noted, moreover, that the defendants did not assent to the request.

For the reasons I have given I have come to the conclusion that the document relied on by the plaintiffs does not fulfil the conditions of the section, and the plaintiffs therefore are unable to maintain this action.

During the argument several cases were cited on each side, and with regard to them they no doubt were useful in so far as they indicate the principle on which any particular case should be decided, but to a great extent the decision in each case must depend on the particular circumstances under which the question arises. In *Harding* v. *Harding* Wills, J., did undoubtedly express an opinion that the document in question there was an absolute assignment within the section. In that case the decision turned very much on the words in the letter "I hereby instruct the trustees in power to pay," but the real ground of that decision seems to me to be this—that the defendants (the trustees) had assented to the direction to pay the money to the plaintiffs, and were, therefore, bound so to pay it, on equitable principles, apart altogether from section 25, sub-section 6, of the Judicature Act, 1873. *Ex parte Hall*, 27 W. R. 385, 10 Ch. D. 615, was another authority cited, where a letter written by the landowner authorizing the tenant of his farm to pay rent to certain bankers from whom the former had borrowed £200, was held to be a revocable assignment, which was in fact revoked by the bankruptcy of the landowner. The decision in that case really seems to have turned on the fact that the transaction related to an interest in land, and so came within the Statute of Frauds. It is doubtful, therefore, if that case can be treated as anything more than an illustration of the principles that govern cases of this kind; and we ought not to treat it as an authority that the words "I

hereby authorize and request you to pay" could or could not in other circumstances amount to an assignment within the Judicature Act. Those two cases are not therefore authorities covering the present case. Mr. Loehnis has also satisfied me that the doubt which Chitty, J., expressed in *Durham Brothers* v. *Robertson*, [1898] 1 Q. B., at pp. 773, 774, as to Lord Coleridge's decision in *Brice* v. *Bannister*, 26 W. R. 670, 3 Q. B. D. 569, which was cited also in *Ex parte Hall*, was not so much that the language employed in *Brice* v. *Bannister* could not amount to an assignment, as that the assignment, if any, being the assignment of a part of the debt only, could not come within the statute. If the view I have taken in the present case is correct it is unnecessary to decide the question of notice to the defendants, but while resting my decision of the other ground, I confess that I should have felt some difficulty in overruling the decision of my brother Walton, who held that the notice was in this case a good notice.

COLLINS, M.R.—It is with some hesitancy and with very great diffidence that I have come to the conclusion that the decision of Walton, J., in this case must be reversed. My lord has covered all the ground, and it is only in reference to the main point—namely, as to whether this was an absolute assignment, that I desire to add anything to what has been already said.

The conclusion I have come to is that the words in this document do not fulfil the requirements of section 25, sub-section 6, of the Judicature Act, 1873. On the face of the document itself there is no absolute assignment. On the face of it there is merely a request from Kramrisch & Co., addressed to the defendants, asking them to make an agreement with the plaintiffs whereby they were to pay to the plaintiffs a sum of money which would otherwise have been payable by the defendants to Kramrisch & Co. but for the suggested arrangement. I fail to see how that suggestion itself amounts to an assignment. No doubt the document may presuppose an arrangement between the plaintiffs and Kramrisch & Co. as to the moneys payable by the defendants, to be carried out by means of the letter which the defendants were requested to sign, but I fail to get from the document itself an absolute assignment of the debt to the plaintiffs. Much during the argument was addressed to us on the word "confirm," and I agree that it is a word that is often employed not in its strict sense. But read with the context here it seems to me that it was used in its strict sense, and that all that Kramrisch & Co. "confirmed" was the first part of the document, which was a request merely that the defendants should "sign the attached letter and forward the same to Messrs. Brandts, Sons, & Co." The letter was in the form of a proposed undertaking by the defendants to pay the plaintiffs direct for account of Kramrisch & Co., and it contained an invitation to the defendants to confirm some arrangement by which they would have become liable by contract to pay this money to the plaintiffs. Where was there any absolute assignment in writing of the debt on the face of the document? For my part I can see none. Then they were invited to collect it from the surrounding circumstances. But when those surrounding circumstances are looked into, and when all the correspondence that has been put in is considered, it seems to me only to show that there had been an arrangement previously made between the plaintiffs and Kramrisch & Co., by which a lien is given by Kramrisch & Co. to the plaintiffs on certain documents and on the debt due from the defendants. The document of the 6th of January is *primâ facie* more consistent with such an arrangement in the nature of a lien than with an absolute assignment. If there had been an absolute assignment in writing there would have been no necessity to suggest making any such contract as is suggested in that document. Indeed, it seems to me clear that the words "for account of Messrs. Kramrisch & Co." point to there being some retention of interest by Kramrisch & Co. in the debt incompatible with an absolute assignment of it. For these reasons I agree with the judgment delivered by my lord.

ROMER, L.J.—I agree. The question is whether the document relied on by the plaintiffs constituted in itself an assignment of the debt and notice of that assignment to the defendants. In using the word "assignment," I include for the present purpose an equitable assignment, not within section 25 of the Judicature Act, 1873. There is no doubt considerable difficulty in construing the document in this case, and none the less so because we are bound to confine our attention to the terms of the document itself, and not bring into consideration the relations between the plaintiffs and Kramrisch & Co., which were not disclosed by the document, and were not known to the defendants. The document on its face appears, at any rate in terms, merely to import a request by Kramrisch & Co. to the defendants that they should bind themselves to pay to the plaintiffs the debt which they owed to Kramrisch & Co. It states no reason why Kramrisch & Co. or the plaintiffs should make such a request or indicate the nature of the relations between Kramrisch & Co. and the plaintiffs, except so far as to show that the plaintiffs were to receive the moneys remitted to them "for account of Kramrisch & Co." There is no mention or suggestion of any charge on or assignment of the debt. I do not think that the defendants were bound to speculate as to what the relations were between Kramrisch & Co. and the plaintiffs, or why they wished the defendants to sign the document put before them. The defendants were not bound to sign that document; and I ask myself the question whether it was in such terms that they were bound to assume, if they did not sign it, that Kramrisch & Co. had in that condition of affairs given them a clear mandate to pay the amount to the plaintiffs, which they could not afterwards revoke. It does not appear to me that it was, and although the case is not free from difficulty to my mind, I do not think the defendants were bound to regard the document itself as being an assignment of the debt or as giving notice of the existence of such an assignment.

Appeal allowed.

Solicitors for the plaintiff, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for the defendants, *John B. & F. Purchase.*

Appeal.
(Collins, M.R., and Mathew and Cozens-Hardy, L.JJ.) — Dec. 11.

BLOVETT v. SAWYER. (a.)

Master and servant—Employer's liability—Accident—Compensation—Employment—Bricklayer paid so much an hour—Accident during dinner hour—Workman permitted to remain on premises—Workmen's Compensation Act, 1897, *s.* 1, *sub-section* 1.

A workman employed on a building which exceeded thirty feet in height was paid by the hour for the number of hours per week that he was actually engaged on his

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

work, not including the midday dinner hour. The workman, without being under any obligation to do so, remained on the premises during the dinner hour, and was eating his dinner under a wall which he had been building when the wall was blown down and he was injured.

Held, that the accident arose out of and in the course of his employment within section 1 of the Workmen's Compensation Act, 1897, the dinner hour not causing a break in the workman's employment with his master.

Appeal by the applicant from the refusal of the judge of the North Shields County Court to award him compensation under the Workmen's Compensation Act, 1897, in respect of injuries caused to him by an accident.

The applicant was a bricklayer in the employ of the defendant, and was engaged on the day the accident happened on a building over thirty feet high. He left his work at noon for dinner, having an hour off for this purpose. It was admitted that it was open to him either to stay upon the premises for his dinner or to go away and have it elsewhere. However, on this particular day it was very wet and windy, so he and some of the other men decided to stay, and sat down under the lee of the wall of the building on which the applicant was engaged. He was just about to commence his dinner when part of the wall fell, and he was seriously injured.

The only evidence upon the judge's note as to the wages of the applicant was that he received about £2 per week, but on the arguments of the appeal it was stated that admissions were made at the hearing that he was paid weekly at a fixed rate per hour for the hours that he had worked, and that the dinner hour was excluded in calculating the number of hours for which he received pay.

The county court judge expressed the opinion that, as the applicant had sat down under the wall for the purpose of eating his dinner, the accident did not arise either out of and in the course of his employment, and he dismissed the application.

The applicant appealed.

Ruegg, K.C., and *Chester Jones* (*Harold Morris* with them), in support of the appeal.—The workman is entitled to compensation in this case for the necessary hour off work for dinner does not constitute a break in the day's employment. To hold that it did would be to take too narrow a view of the Act as laid down repeatedly in this court. The continuation of employment after work has actually ceased is illustrated by *Brydon* v. *Stewart*, (1855) 2 Macq. 30, and *Cowler* v. *Moresby Coal Co.*, (1885) 1 Times L. R. 575. These cases show that if a man is either on his way to or from work when he meets with an accident he is entitled to compensation, and it cannot logically be argued, therefore, that an accident happening to the workman during the dinner hour, which time, although included in the man's day, was not paid for, is not within the scheme of the Act.

Meynell, for the employer.—As the man was paid by the hour, and not by the week, he could have been dismissed at any moment. The onus, therefore, is on the applicant to show that the accident arose out of and in the course of his employment. When the accident happened he not only was not being paid, but he was doing something entirely for his own benefit, and the master is not liable, for the employment had for the dinner interval ended: *Smith* v. *Lancashire and Yorkshire Railway*, 47 W. R. 146, [1899] 1 Q. B. 141; *Armitage* v. *Lancashire and Yorkshire Railway Co.*, [1902] 2 K. B. 178, 50 W. R. Dig. 112; and *Lowe* v. *Pearson*, 47 W. R. 193, [1899] 1 Q. B. 261.

Ruegg, K.C., replied.

COLLINS, M.R.—I am of opinion that this appeal must be allowed. We are told that the applicant was a bricklayer who was paid so much an hour, although that does not appear from the judge's notes. The evidence only stated was that he was receiving about £2 a week. He was at liberty either to go away during the dinner hour or to stay on the premises. He stayed, and sat down under a wall on which he had been at work, for the purpose of eating his dinner, when the wall fell, and he was injured. The county court judge gave judgment in a few words. He said, "I was of opinion that as the applicant had sat down for the purpose of eating his dinner when the accident happened, the accident did not arise out of and in the course of his employment, and therefore dismissed the application." On the evidence as it stands on the judge's notes I should not have felt any difficulty in coming to a conclusion, because it would appear *primâ facie* to indicate that the man was in his master's employment during the whole of each day from the time that he went to his work to the time when he came away, and equally during the dinner hour, if he stayed, as during any other part of the time. In my opinion the time of employment embraces all the time occupied in coming, going, and stopping for any purpose ancillary to the applicant's work. But we are told that there were admissions made between the parties which do not appear on the judge's notes; that men in the position of the applicant were not paid by the day or week, but the hour, and that the dinner hour was excluded from the computation of his wages, and was not a time during which he was earning pay. That creates a difficulty, or at all events requires consideration. It seems to me, however, that if the dinner hour can be brought in as part of the time which is given by the workman for some purpose ancillary to his work, such as feeding himself, which, of course, is essential to enable him to do his work, it would be taking too technical a view to say that the pause in the actual course of his work for this purpose was a break in his employment from the time that he stopped work to the time when he began again. Therefore, notwithstanding the fact that the applicant was paid by the hour, and the dinner hour was excluded, we must take a broader view and treat the dinner hour as part of the time of employment. A workman would do his work all the better by taking his meal at that time, and if it is part of the contract between him and his master that he may do so upon the works instead of going away, that may very well be a matter of mutual convenience. From the mere fact that he was not paid for this particular time, and that he was not engaged in the main purpose of his work, it cannot as a matter of law be said that he had ceased to be in the employment of his master. On the other hand, the accident to the applicant can, as it seems to me, be properly said to have arisen out of and in the course of his employment, and that being so, the appeal must be allowed.

MATHEW and COZENS-HARDY, L.JJ., gave judgment to the same effect.

Appeal allowed.

Solicitors for the applicant, *Shaen, Roscoe, Massey, & Co.*

Solicitors for the respondents, *Busk, Mellor, & Norris*, for *C. J. R. Brown & Holliday*, North Shields.

High Court of Justice.

Chan. Div. } Kekewich, J. } Feb. 23.

In re HOUGHTON.
HAWLEY *v.* BLAKE. (*a.*)

Executor—Power to compromise claim of co-executor—"Compromise"—Trustee Act, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 21—*Judicial Trustees Act,* 1896 (59 *&* 60 *Vict. c.* 35), *s.* 3.

The power of an executor to compromise claims against his testator's estate extends—in a proper case—to claims made by a co-executor, and where such a claim has been allowed by an executor acting honestly and reasonably the transaction is valid and binding on the residuary legatees.

Adjourned summons.

Charles Houghton, by his will made in 1889, gave the income of his residuary estate to his wife Esther for life, and directed that after her death such estate should be realized, and the proceeds divided among his nephews and nieces, and he appointed his wife, the defendant John S. Blake (a nephew of the wife), and the defendant F. Houghton executors of his will.

The testator died in 1894, and his will was proved by the widow and the defendant Blake, power being reserved to the defendant Houghton.

The widow died on the 7th of June, 1902, having appointed the defendant Blake her sole executor.

This was a summons by the residuary legatees under Charles Houghton's will, seeking to charge the defendant Blake with (in effect) the amount of a claim allowed by him under the circumstances mentioned below.

Soon after Charles Houghton's death, and before probate, the defendant Blake and the widow, Esther Houghton, had an interview with reference to the estate, and Mrs. Houghton produced certain securities from an iron safe, but stated that in fact some of such securities represented her own money up to a sum of £1,180, and that it had come to her partly from her father and partly from her mother, and she produced a memorandum of four items equalling the sum of £1,180.

The defendant Blake thereupon consulted the solicitors who were acting in the administration of the estate upon the matter, and made inquiries also of the family, and certain receipts were shown to him evidencing Mrs. Houghton's statement, although as to part of the money there was no evidence that she was entitled for her separate use, so as to gain a title as against her husband and his estate. In these circumstances the defendant Blake raised no objection to the widow's claim, and allowed her to retain securities sufficient to cover the amount.

In May, 1903, the defendant Blake delivered to the residuary legatees a cash account of the administration of the estate showing an entry on the credit side in this form:

"April 1.—Shares, &c., allocated to Mrs. Houghton in discharge of moneys belonging to her separate estate and lent to the deceased, £1,180."

The residuary legatees declined to recognize the validity of this allowance, and asked by the present summons for an inquiry what amount (if any) was owing to Mrs. Houghton by the deceased, and for an order upon the defendant Blake, as executor of Mrs. Houghton (in effect), to pay or transfer the moneys and securities retained by Mrs. Houghton to the joint names of himself and the defendant F. Houghton as part of the residue of Charles Houghton, and for the administration (if necessary) of Mrs. Houghton's estate for that purpose.

As to £820, part of the £1,180, the court was satisfied that Mrs. Houghton was entitled for her separate use, but as to the balance there was no evidence of title as against the husband, and the solicitor who was consulted by the defendant Blake was dead.

C. James, for the plaintiffs, the residuary legatees.—There is no decision to the effect that an executor can compromise a claim by his co-executor. I rely on *De Cordova* v. *De Cordova*, L. R. 4 A. C. 692, 27 W. R. Dig. 83; in this case as in that the alleged compromise was unfair and prejudicial to the estate. It is impossible for an executor to exercise an independent judgment in such circumstances.

Warrington, K.C., and *T. Ribton*, for the defendant Blake.—The defendant relies on section 21 of the Trustee Act, 1838, and the fact that he had in the circumstances acted "honestly and reasonably" within section 3 of the Judicial Trustees Act, 1896.

KEKEWICH, J., stated the facts as above set forth and continued as follows: The question is whether John S. Blake, as one of the executors of Charles Houghton, could compromise this claim by the other executor, Esther Houghton, by allowing it in full. I use the word "compromise" advisedly. In one sense it was not a compromise since there was no give and take, Mrs. Houghton simply taking all that she claimed. On the other hand, she had possession of the securities, which could only be obtained from her by discussion and perhaps litigation. It was entirely for those representing the estate to say whether there should be litigation with delay and expense, or whether the claim should be acceded to. That is a compromise. Very little was given up, but there was reason in the transaction, when the avoidance of litigation was in view. I think, therefore, that, if honest, it was a compromise. About the honesty there is no doubt. No imputation has been made on the honesty either of J. S. Blake or of Mrs. Houghton. Therefore I come to the question whether it was competent to J. S. Blake to admit the claim of his co-executrix, she being the widow of the testator. The latter fact seems to me to make no difference; she was not a stranger as regarded his estate, but she was a stranger as to the claim and the compromise of it, notwithstanding that she was also co-executrix. So that the bare question is whether one of two executors can make a compromise with the other. Very large powers of compromising are given to an executor by the common law, and he has also statutory authority, though that in reality adds nothing to the common law powers which have been recognized again and again. Executors are seised of their office *per mie et per tout*; each of them represents the estate for all purposes. I think I should be infringing that rule if I were to say that one executor could not compromise the claim of another. The position, however, is a delicate one, and an executor in that position would do well to apply to the court for direction as to whether he is at liberty to make the compromise. But, under the Judicial Trustees Act, 1896, I should have to consider whether he "acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach." Upon the latter point I cannot form an opinion. I cannot say whether he ought to have applied to the court, but I have no doubt that he acted honestly and reasonably. Therefore, whether I take this case simply on his powers as executor or whether I take only the

(*a.*) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

last statute to which I have referred, it seems to me that I must uphold this executor as having done what is right.

Solicitors, *Clarke, Rawlins, & Co.*, for *Percival & Sons*, Peterborough; *Field, Roscoe, & Co.*, for *Senior & Furbank*, Richmond.

Chan. Div. }
Buckley, J. } April 21, 22.

In re THE LEEDS AND HANLEY THEATRES OF VARIETIES (LIMITED).

Ex parte THE CONSOLIDATED EXPLORATION AND FINANCE CO. (LIMITED). (*a.*)

Company—Winding-up—Damages owed company for misfeasance—Debenture debt owed by company—Cross-claims—Set off—Proper administration of assets.

T. Co. was promoted by F. Co., and was in liquidation. T. Co. owed F. Co. £5,100 upon a debenture. It was owed by F. Co., which was also in liquidation, £4,323 under the following circumstances: F. Co. had been held liable to pay T. Co. £12,000 as damages for misfeasance, and, having at the time no other creditors, it was ordered to pay, and did pay, all its assets, which amounted to £7,677, to T. Co., without prejudice to its rights to prove in the liquidation of that company. Subsequently other persons established claims against F. Co. The liquidator of T. Co. out of this £7,677 distributed about £3,900 among its creditors other than F. Co. as a dividend of 16s. 8d. in the £, but refused to pay any dividend to F. Co. until that company had paid it the £4,323 still owing of the £12,000.

Held, that until the dividend due to the F. Co. exceeded the £4,323 owing by it, no dividend was payable to it, and that the proper way of administering the assets of the T. Co. was notionally to add the £4,323 to its assets, and, calculating the dividends upon that total sum, only pay the F. Co. the excess (if any) of the dividend thus appearing due to it over the £4,323.

Summons.

This was a summons in the winding up of the above company by the liquidator of the Consolidated Exploration and Finance Co. (Limited), and involved a consideration of the proper method of administering the assets of a company in liquidation in respect of the claims of a creditor of the company who was at the same time liable to the company for a sum of money awarded as damages or compensation in proceedings against him for misfeasance in connection with the company.

The Leeds and Hanley Theatres of Varieties (Limited) was incorporated in February, 1897, and was promoted by the Consolidated Exploration and Finance Co. (Limited). At the trial the former company was spoken of as the "Theatres Co.," and the latter as the "Finance Co."; and these terms will be adopted in this report.

In November, 1898, the Finance Co. went into voluntary liquidation.

In November, 1899, an order was made for the compulsory winding up of the Theatres Co. At this time the Theatres Co. owed the Finance Co. a sum of money due upon the security of a debenture of the 19th of February, 1897. This sum, with interest and certain costs, amounted to £5,100 11s. 2d., and this amount was subsequently, under an order made in April, 1903, proved for by the Finance Co. in the winding up of the Theatres Co. This debt was the only one subsisting between the two companies.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Subsequent legal proceedings (reported in *In re Leeds and Hanley Theatre of Varieties (Limited)*, 51 W. R. 5, [1902] 2 Ch. 809) were taken which resulted in an order of Wright, J., in July, 1901, and of the Court of Appeal in July, 1902, under which the Finance Co. were held liable for misfeasance, and were ordered to pay to the Theatres Co. £12,000.

In August, 1902, all the proving creditors of the Finance Co. had been paid, with the exception of the Theatres Co., and the Finance Co. had remaining assets to the amount of £7,677.

On the 26th of August, 1902, an order was made in the winding up of the Finance Co., and under that order, the liquidator of that company paid to the Theatres Co., or to its liquidator, this sum of £7,677, the liquidator of the latter company undertaking to set aside thereout £1,000 to provide for any claim for costs of the winding up of the Finance Co. But this order was expressly made without prejudice to any rights which the Finance Co. might have to prove in the liquidation of the Theatres Co.

In February, 1903, actions were commenced by certain shareholders in the Theatres Co. against the Finance Co. for misrepresentation in the prospectus of the Theatres Co., and under orders made in these actions in July and August of that year the Finance Co. became liable to pay sums amounting to £5,490 and interest to these persons.

The liquidator of the Theatres Co. had distributed out of the assets of the company among its creditors, other than the Finance Co., the sum of £3,905 5s. 10d., being a dividend after the rate of 16s. 8d. in the £ upon their claims. There was, at the date of the last account in November, 1903, the sum of £3,028 18s. 3d. standing to the credit of the Theatres Co. in the books of the Board of Trade.

Under these circumstances, the liquidator of the Theatres Co. claimed to set off the difference between the sum of £12,000 ordered to be paid him by the Finance Co., and the sum of £7,677 actually paid against all dividends otherwise payable to the Finance Co. in respect of the debt of £5,100 owed to this company by the Theatres Co., and he refused to pay any dividend to the liquidator of the Finance Co.

The latter thereupon took out this summons asking for a declaration that the liquidator of the Theatres Co. was not entitled to retain or make any set off against the dividend due to the applicant in respect of his claim under the debenture issued by the Theatres Co. of the 19th of February, 1897, and for an order that the liquidator of the Theatres Co. should pay the dividend to him, and should repay to him (the applicant) the sum by which the amount received by the liquidator of the Theatres Co., under the order of the Court of Appeal of July, 1902, exceeded the dividend on the £12,000 *pro rata* with the other creditors of the Finance Co. on the balance of the account between that company and the Theatres Co.

Buckmaster, K.C., and *Martelli*, for the Finance Co.—The Theatres Co. have no right to set off the remainder of the £12,000 ordered to be paid to them as damages or compensation in misfeasance proceedings, against the dividends due from them to the Finance Co. upon their debenture debt: *In re Anglo-French Co-operative Society, Ex parte Pelly*, 31 W. R. 177, 21 Ch. D. 492, *In re Exchange Banking Co.*, 31 W. R. 174, 21 Ch. D. 519; *In re Goy & Co. (Limited)*, 48 W. R. 425, [1900] 2 Ch. 149. The saving clause in the order of the 26th of August, 1902, was intended to prevent the payment of the £12,000 prejudicing the creditors of the Finance Co. It was never intended by that order that the creditors of the

Theatres Co. should be paid in full before the creditors of the Finance Co. could receive anything at all. The rights of the creditors of the two companies must be considered upon the footing that the £7,677 had not been paid.

Younger, K.C., and *C. H. Cozens-Hardy*, for the Theatres Co.—The Finance Co. cannot claim to participate in the assets of the Theatres Co. until they have contributed to those assets the whole of the debt they owe to the Theatres Co.: see Cotton, L.J., in 32 W. R. 601, *In re Milan Tramways Co., Ex parte Theys*, 25 Ch. D., p. 593.

Cur. adv. vult.

April 22. — BUCKLEY, J. — As between the £5,100 11s. 2d. owed by the Theatres Co., and the £12,000 ordered to be paid by the Finance Co. there could be no set off. There was no mutual credit. That there is no set off is plain from *In re Anglo-French Co-operative Society, Ex parte Pelly*. In that state of facts in August, 1902, the winding up of the Finance Co. had proceeded to a point at which all proving creditors of the Finance Co. had been paid, with the exception of the Theatres Co., which had just established its right to the £12,000, and the Finance Co. had assets to the amount of £7,677 remaining to be disposed of. Under the order of August, 1902, the liquidator of the Finance Co. paid the Theatres Co., or its liquidator, the £7,677, the liquidator of the Theatres Co. undertaking to set aside £1,000 for costs of the Finance Co. But this order was to be without prejudice to any rights, of the Finance Co. to prove in the liquidation of the Theatres Co. In other words, there being, so far as was known, no creditor at all of the Finance Co. other than this creditor, the Theatres Co., all the remaining assets of the Finance Co. were handed over to the Theatres Co. upon the terms that the costs of the winding up of the Finance Co. so far as not provided for should be provided for, but it was to remain open to the Finance Co. to say that the Theatres Co. was still its debtors. Now, the Finance Co. did say that, and were creditors of the Theatres Co. for £5,100 11s. 2d. After 1902 there turned up other creditors of the Finance Co., whose total debts amounted to £5,490. They were people who established rights for misrepresentation or misfeasance, or something of that kind. I have, therefore, a Finance Co. which has no assets at all, but which has now some new creditors—I mean new in this sense, that they came in after all its assets have been disposed of in the way that I have described. Of course they cannot disturb prior dividends, or prior payments, but they are people who would be entitled if the Finance Co. had any money—which it has not—to have a claim to dividends; just as the Theatres Co. had before the Theatres Co. could get anything more. That is the position in which the Finance Co. is placed. In the liquidation of the Theatres Co. the position is this, that they have got the funds. There is a cash sum of a little over £600. There is the £7,677 which they have received under an order of August, 1902. And they have this further asset, they are entitled, as against the Finance Co., to get, if they can, the balance of their debt of £12,000, that is, £12,000 less £7,677, which seems to be £4,323. The assets side of the Theatre Co.'s balance-sheet for the moment is £600 odd, and £7,677 received from the Finance Co., and the right to prove against the Finance Co. for £4,323. On the other side of the balance-sheet their liabilities are a liability to the Finance Co. of £5,100 11s. 2d. and £4,685 3s. 1d. to other people who have proved in the Theatres Co. liquidation. The question is, how the fund ought to be administered. What I have said is not quite accurate in this sense, that the Theatres Co. have paid out of the £7,677 to these other creditors for £4,685 3s. 1d. the sum of £3,905 5s. 10d. as being dividends of 16s. 8d. in the £, but that payment does not affect the principle upon which the balance should be dealt with.

Now what is the proper way to administer the fund? In my opinion what I have to do is this. I am administering the assets of the Theatres Co. There is a person — namely, the Finance Co.—who is both a debtor to the fund to be administered and a claimant against it. I think that that person cannot come and say that he is entitled to a dividend out of the fund until he has first made complete the fund out of which he says he is entitled to a dividend. I think the observation of Cotton, L.J., in *In re Milan Tramways Co., Ex parte Theys*, 21 Ch. D., p. 593, applies: "The appellant also relied on this, that the company could say to Hütter, 'You shall not receive anything from the assets till you have paid what you owe us.' Probably the company could effectually say so." Applying these words to this case, it means that the Theatres Co. can say to the Finance Co., "You shall not receive anything from our assets until you pay what you owe to our fund." In point of fact, of course, the Finance Co. cannot pay what it owes to the Theatres Co. because it has no money, and the only question is whether it can get anything out of its proof against the Theatres Co. The proper administration, in my judgment, therefore is this. Notionally, treat the Finance Co. as having paid the £4,323 to the Theatres Co. Take the sum thus arrived at and apply it in payment of a dividend upon all the debts of the Theatres Co.—that is to say, the £5,100 due to the Finance Co. and the £4,685 due to other people. That will thus attribute to the Finance Co. a certain sum. If that sum should be greater than the £4,323 which the Finance Co. owes, the Finance Co. will get the difference. If it be less or equal, the Finance Co. will receive nothing. If the dividend arrived at in that way on the £4,685 cannot be satisfied in full—because, of course, the notional sum is not really paid—then the creditors for the £4,685 would take the whole of the assets of the Theatres Co., as they would be less than the notional dividend calculated upon the footing that the Finance Co. have paid that which it in fact has not paid. I believe, however, that in fact the figures will work out the other way when the notional payment has been treated as made, and that there will be enough to answer the £4,323, and that the result will be that the £4,685 will be satisfied.

Solicitors for the liquidator of the Finance Co., *Walls & Stallard*.

Solicitor for the liquidator of the Theatres Co., *G. B. W. Digby*.

Chan. Div. } Joyce, J. } Feb. 6.

ASHWORTH v. ENGLISH CARD CLOTHING CO. (LIMITED) (No. 1). (a.)

Practice—Costs—Taxation—Inspection of property the subject of the action—Inspection without an order—Taxing-master's discretion—R. S. C., 1883, *ord.* 50, *r.* 3.

The fact that an inspection of property, the subject-matter of an action, has been carried out by an arrangement between the solicitors of the parties and not in

(a.) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

pursuance of an order under ord. 50, r. 3, is not of itself sufficient reason why the costs of such inspection should be disallowed.

Adjourned summons.

An action for infringement of the plaintiff's patent was dismissed on the ground that the patent was invalid for want of subject-matter and that infringement was not proved.

In taxing defendants' costs the taxing-master disallowed fees to counsel and an expert for inspecting certain machinery involved in the patent, the inspection having been arranged by agreement between the respective solicitors in order to avoid the expense of an order under ord. 50, r. 3. In answer to defendants' objections the taxing-master said that, considering the nature of the action, an inspection was in itself reasonable and proper, but that in the absence of agreement between the parties themselves, he could not properly allow the costs of the inspection of property, the subject of an action, against the unsuccessful party unless an order had been made and the costs either expressly given under the order or made costs in the action. He referred to *Mitchell* v. *Darley Colliery Co.*, 31 W. R. 549, 10 Q. B. D. 457, and said that it had never been the practice of the taxing-master to allow such costs without an express direction.

This summons was by the defendants to review the taxation.

Younger, K.C., and *A. J. Walter*, for the summons.

Terrell, K.C., and *J. C. Graham*, for the plaintiff.

JOYCE, J.—The inspection is found and also admitted to be necessary and proper, and I think it would be the worst possible precedent if the costs of it were disallowed merely because the inspection was made without an order of the court having been obtained. I therefore allow these costs.

Solicitors for the defendants, *Rowcliffes, Rawle, & Co.*, for *Ramsden, Sykes, & Ramsden*, Huddersfield.

Solicitors for plaintiff, *W. J. & E. H. Tremellen*, for *Blair & Seddon*, Manchester.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.)

Feb. 29; March 1, 28.

GRAND JUNCTION WATERWORKS CO. (*Appellants*) v. RODOCANACHI (*Respondent*). (*a.*)

Water—Waterworks—Supply of water—Defective communication pipe—Non-repair by occupier of premises—Waste of water—Right to cut off supply—Right to receive supply—Waterworks Clauses Act, 1847 (10 & 11 *Vict.* c. 17), *ss.* 28, 29, 30, 43, 52—*Metropolis Water Act*, 1871 (34 & 35 *Vict. c.* 113), *ss.* 28, 29, 32.

A communication pipe from the plaintiff company's main pipe to certain stables in the metropolis in the occupation of a servant of the defendant became defective, and thereby there was a leakage and waste of water. The communication pipe was the property of the defendant. The company served notice to repair, and intimated that unless the pipe was repaired they would cut off the supply of water. The defendant failed to repair the pipe, and the plaintiffs cut off the supply. The defendant thereupon preferred an information against the plaintiffs for penalties under section 43 of the Waterworks Clauses Act, 1847, for refusing to furnish a supply of water.

Held, that the plaintiffs were entitled to cut off the water and cease to supply the defendant, as the duty to repair a defect in a communication pipe being cast by section 28 of the Metropolis Water Act, 1871, upon the owner or occupier of the premises, he had, after notice to repair, permitted the pipe to remain in a condition in which it would cause waste of water, and had wrongfully failed to prevent the waste within the meaning of section 32 of the same Act.

This was a case stated by T. D'Eyncourt, Esq., metropolitan police magistrate.

An information was preferred by the respondent against the appellants—the water company—under section 43 of the Waterworks Clauses Act, 1847, for refusing, on the 6th of June, 1903, to furnish to the respondent a supply of water for 113, Eastbourne-mews.

Upon the hearing the magistrate convicted the appellants and imposed a penalty of £6, being 40s. a day for three days, and awarded the respondent £12 12s. costs.

The respondent was the lessee of 113, Eastbourne-mews under a lease, by the terms of which the lessor was liable for all internal repairs. No. 113, Eastbourne-mews was a stable with a dwelling-house above, and the dwelling-house was inhabited by two grooms in the respondent's service. Eastbourne-mews is a public street repairable by the local authority, and is within the district of the appellants. The supply to the premises in question was a supply for domestic purposes, and was a constant supply under the provisions of the Metropolis Water Acts, 1852 and 1871.

The notices under section 27 of the Act of 1871 were duly served, and the prescribed fittings were duly provided.

The water rate for the period from the 6th to 10th of June, 1903, was to be taken to have been paid. Before Saturday, the 6th of June, 1903, there were indications in the roadway opposite 113, Eastbourne-mews of the existence of a small leak. Upon that day it became evident from the subsidence of the cobble-stones in the roadway (which was thereby rendered dangerous to vehicles) that the leak was serious; and on an investigation being made by a ganger in the employment of the appellants it was discovered that there was a leak in the communication pipe (which was the property of the respondent) supplying 113, Eastbourne-mews close to the junction of the said pipe with the appellants' main under the roadway. The leak was at the rate of about 1,500 gallons in twenty-four hours. The ganger who opened the ground thereupon served upon the respondent's coachman, who was on the premises, a notice requiring the repair of the said communication pipe to be forthwith undertaken by the respondent, and intimating that otherwise the water would be cut off. The notice was addressed to the occupier of 113, Eastbourne-mews, and was in these terms: "Sir,—Upon opening the ground opposite No. 113, Eastbourne-mews a leakage of water was found to exist from the defective state of your communication pipe, and unless you forthwith repair the same it will be the duty of the company to disconnect such pipe from their main. Immediately after the repair, rendered easy by the ground being now open, the company will reconnect the pipe with their works, and will undertake to fill in and make good the ground upon payment of the expenses incurred thereby, amounting to 15s." The coachman took the notice immediately to the respondent's house, but found that the respondent had left for the city, and would not return for some hours. The coachman then returned and explained this fact to the ganger,

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

and in answer to a suggestion by the latter that he would request the plumber usually employed by the respondent to do the necessary work of repair, stated that he had no authority to order any repairs to be executed to the said pipe. Beyond communicating with his landlady the respondent at no time took any step to have the communication pipe repaired or the waste stopped. The water was thereupon cut off by the company, and it remained cut off till Wednesday, the 10th of June, when the repairs were executed by order of respondent's landlady, and the water was thereupon restored. The soil removed was too wet to be replaced, but the ground was refilled with dry earth by the company by 11.30 on the morning of Saturday, the 6th of June, and it remained filled in until Wednesday, the 10th of June, when, at the request of the respondent's landlady, the roadway was again broken up by the appellants and the repairs were executed by her order. The time occupied in executing the repairs was stated to be about two hours.

It would be necessary to disconnect the supply during the repairs. On the afternoon of Saturday, the 6th of June, the respondent wrote the following letter to the appellants complaining of the cutting off of the water: "Dear Sir,—113, Eastbourne-mews.—I am informed that your men have cut the water off at these stables without notice. As this is illegal, if the water is not on at 10 a.m. on Monday morning my solicitor will take proceedings. I am also writing to the borough authorities. These stables, I may add, belong to 113, Westbourne-terrace, and the owner of that house keeps them in repair.—Yours, &c."

That letter was received by the appellants on the 8th of June, and their secretary replied as follows on the same day: "Dear Sir,—113, Eastbourne-mews.—In reply to your letter of the 6th inst., I have to inform you that the company's men opened to a leakage in the above mews opposite No. 113, and found that the 1¼in. lead pipe supplying these premises was broken. The defective pipe was shown to your coachman, and a notice was also handed to him stating that the company would have no alternative but to disconnect the pipe from their main unless the repair was taken in hand forthwith. This was not done, and accordingly the pipe was disconnected from the company's main. The company cannot permit the pipe to be reconnected to their main until the necessary repairs have been carried out by your plumber.—I am, &c."

It was contended by the appellants (1) that the appellants ought not to be convicted because the respondent was not entitled to a supply of water at the time of the alleged refusal of the appellants to give a supply; (2) that upon the true construction of the Acts of Parliament governing the matter the appellants were entitled to cut off the supply, and were under no obligation to supply water after the communication pipe had been severed until the same had been restored; (3) that the appellants were entitled to disconnect the defective communication pipe from their main and prevent the waste of water, the respondent having wrongfully failed to keep the said pipe in proper repair, and to do what ought to have been done to prevent waste; (4) that the appellants did not on the 6th of June, 1903, or on any other day, refuse to furnish a supply of water within the meaning of section 43 of the Waterworks Clauses Act, 1847; (5) that even if they did refuse they were within the exemptions mentioned or referred to in sections 42 and 43 of the Waterworks Clauses Act, 1847, in that the supply was not given only during necessary repairs; (6) that even assuming the appellants could be properly convicted the maximum penalty which could be imposed was not £6, but only £4, being at the rate of 40s. for the two days which elapsed between the receipt of the respondent's letter of the 6th of June, 1903, demanding a supply and the time when the supply was restored.

On behalf of the respondent it was contended (1) that there was neglect or refusal on the part of the appellants to furnish a supply of water to 113, Eastbourne-mews within the meaning of section 43 of the Waterworks Clauses Act, 1847; (2) that the severing of the pipe was a wrongful act on the part of the appellants, and that the respondent did not by reason of such severance cease to be entitled to a supply of water for his premises; (3) that section 42 of the Waterworks Clauses Act, 1847, had no application, and that in any event "necessary repairs" only continued for about two hours on the morning of Wednesday, the 10th of June; (4) that there was no power in the respondent to dig up the public highway, and no liability on the respondent to repair this pipe; (5) that upon the true construction of the Acts of Parliament the appellants could only justify cutting off the supply of water if the conduct of the respondent in failing to repair was either wilful or negligent; (6) that there was no evidence of any wilful wrong or of any negligence on the part of the respondent; (7) that the penalty of £6 was rightly imposed.

The magistrate was of opinion that the respondent's contention was correct, and convicted and fined the appellants.

The questions for the opinion of the court were (1) whether, upon the facts stated, the magistrate had properly convicted the appellants; and (2) whether the magistrate was justified in imposing a penalty of £6.

Macmorran, K.C. (*Acland* with him), for the appellants.—The company acted within their legal rights in cutting off the supply, and until the respondent had repaired the defect in the communication pipe he was not entitled to demand a supply. The company are therefore not liable to penalties under section 43 of the Waterworks Clauses Act, 1847. In *Sheffield Waterworks Co.* v. *Wilkinson*, 28 W. R. 241, 4 C. P. D. 410, it was held that the company were not liable to penalties imposed by that section until the tenant had restored the communication with their main pipes. Section 3 of the Metropolis Water Act, 1871, enacts that the term "fittings" includes, *inter alia*, communication pipes, and section 28 provides that the owner or occupier of the premises shall keep all fittings in proper repair. The respondent failed to do so. The learned magistrate was therefore wrong in convicting and fining the appellants.

W. Finlay, for the respondent.—The respondent could not lawfully repair the pipe, as the occupier or owner of premises has no statutory authority to break up a street, and in order to repair the pipe in this case it would have been necessary for him to do so. The appellants alone had power to break up the street for the purpose of repairing the communication pipe: *Chapman* v. *Fylde Waterworks Co.*, 43 W. R. 1, [1894] 2 Q. B. 599. There has, therefore, been no wrongful act on the part of the respondent within the meaning of section 32 of the Act of 1871, and the appellants consequently were not justified in cutting off the water and refusing to furnish a supply. The conviction was right.

Cur. adv. vult.

March 28.—Lord ALVERSTONE, L.C.J., read the following judgment of the court: This was an appeal from a special case stated by Mr. d'Eyncourt, police magistrate, in a complaint preferred by the respondent against the appellants for refusing to furnish a

supply of water, contrary to section 43 of the Waterworks Clauses Act, 1847. The case was extremely well argued by Mr. Macmorran on behalf of the appellants, and by Mr. Finlay on behalf of the respondent, and raises a point of general importance. It is not necessary to refer to the facts in detail, as to which there was no dispute and which are clearly set out in the special case; it is sufficient to say that on Saturday, the 6th of June, 1903, a leak having occurred under the roadway opposite 113, Eastbourne-mews, the road was opened and the leak was found to be in the communication pipe, the property of the consumer. Notice was thereupon given to the respondent's coachman, who was occupying the premises which were supplied with water, to repair the pipe, and the notice stated that it would be the duty of the company to disconnect if the pipe was not repaired. The respondent took no steps to repair it, and the water was then cut off by the company. The pipe was subsequently repaired by the appellants at the request of the respondent's landlady. The magistrates convicted the appellants, the water company, and fined them a penalty of £6 for neglecting, or refusing, to supply water in accordance with section 43.

The question we have to consider is whether there was any evidence upon which this conviction can be supported. It must, we think, be taken upon these facts, and, in fact, it was so stated in the course of the argument, that the only refusal to supply the water was by the company's cutting it off upon the 6th of June, and continuing to keep the water cut off until it was again supplied on the 10th. The questions we have to decide are whether in the metropolis, if a leak is found in a pipe belonging to a consumer, the company is entitled to cut off the water until the pipe is restored; and, secondly, does a refusal to supply under the circumstances of the present case constitute an offence under section 43? It is found as a fact in the case, and for reasons which we will state later on, it must be the fact, that the pipe was the property of the consumer—*i.e.*, the owner of the premises let to the respondent. Under section 43 of the Waterworks Clauses Act, 1847, if the undertakers, except when prevented, as provided in an earlier section, neglect or refuse to furnish to any owner or occupier entitled under the Waterworks Clauses Act, or the special Act, to receive a supply of water during any part of the time during which the rates for such supply shall have been settled, or tendered, they shall be liable to a penalty. The exception referred to in the earlier words of that section is to be found in the provisions of section 42, and does not, in our opinion, apply. Under section 28 powers are given to the undertakers to open the streets and lay down service pipes and other works for the supply of water; under section 29 they may not enter private property without consent, except in a case which does not apply here, and by section 31, before breaking up the street, they must give certain notices. By section 48 the owner or occupier of any dwelling-house who wishes to have water brought into his premises may open the ground between the pipes of the undertakers and his premises and lay communication pipes, and section 52 empowers such owner or occupier to open or break up the street for such purpose. There are also provisions in sections 44-47 as to the laying of communication pipes by the undertakers which are only material as supporting the view that communication pipes are, under ordinary circumstances, the property of the consumer. The Metropolis Water Act, 1871, contains a group of sections—sections 26-32—which were referred to in argument and require consideration. Under these sections the company may prescribe fittings, which by the interpretation clause, section 3 of the same Act, include communication pipes, and section 28 provides that in the case of a constant supply the owner or occupier of the premises shall provide all supply fittings, and from time to time keep the same in proper repair. Section 29 enables the company, if the fittings are out of order, to give notice requiring the owner or occupier within twenty-four hours to cause the same to be repaired so as the prevent any waste of water, and, if any person fails to comply with the terms of such notice, the company may repair the fittings of such person and may recover the expenses incurred. Section 32 provides that if any person wilfully or negligently causes or suffers any fittings to be out of repair, or to be so used that the water supplied to him is likely to be wasted, he shall be liable to a penalty, and the second paragraph of the same section provides that if any person supplied with water wrongfully fails to do anything which ought to be done for the prevention of waste, the company may cut off any pipes by or through which the water is supplied to such customer, and may cease to supply him with water as long as the cause of injury remains or is not remedied.

It will have been observed that neither the Waterworks Clauses Act nor the Metropolis Water Act, 1871, nor any other Act to which our attention has been called, contains any express provision giving the consumer the right to open the street for the purpose of repairing the pipe, and this we gather from the statement in the special case and from the judgment of the learned police magistrate to be one of the grounds on which he decided against the appellants. It is true that Bramwell, L.J., sitting in the Court of Queen's Bench, expressed the opinion, in the case of the *Sheffield Waterworks* v. *Wilkinson*, 4 Q. B. D., at p. 421, that the right to break up the soil followed from the right which the consumer had to lay down fresh pipes for the purpose of obtaining a supply, and it may be that the obligation imposed upon the owner and occupier by section 28 of the Metropolis Water Act, 1871, to keep the prescribed fittings, which include communication pipes, in proper repair may give the consumer a right to open the road for the purpose of repair. On the other hand, the Court of Appeal, in the case of *Chapman* v. *Fylde Waterworks*, [1894] 2 Q. B. 607, expressly decided that the Waterworks Clauses Act gave the consumer no power to open streets for the purpose of repair. In the view, however, we take, this does not seem to us to be conclusive of the case. The question still remains—Is the consumer who, having the opportunity of doing so without opening the street, does not choose to repair his own communication pipe a person entitled to demand a supply of water under section 43? We do not think for the purpose of this question that any distinction can be drawn between owner and occupier. It was contended on behalf of the respondent that the duty of repairing the pipe rested with his landlord. The water company have no means of knowing what the contractual relations between the occupier and his landlord are, and, in our opinion, the liability of the company in respect of an offence under section 43 cannot depend upon the relations between the owner and occupier of the premises. No question in this case arises as to the opening of the street. The street was opened by the company; notice was given, and the company offered to reconnect the pipe upon payment of the expenses; they at the same time gave notice that if the pipe was not repaired the water would be cut off. In our opinion the duty to repair the defect in the communication pipe is by section 28 of the Act of 1871 cast upon the owner or occupier. We think that the owner or occupier who, after notice to him that the

communication pipe belonging to him is out of repair, permits the pipe to remain in a condition in which it would cause waste of water has wrongfully failed to do something to prevent the waste within the meaning of the second paragraph of section 32 of the Act of 1871, and that under these circumstances the company were entitled to cut off the water and to cease to supply him as long as the injury to the pipe remained unremedied. It might be that the owner or occupier of a house did not wish to continue the supply, or preferred to put in a better, larger, or different communication pipe. The fact that the company could, if they were so minded, have repaired the pipe after twenty-four hours' notice under section 29 does not disentitle them from exercising their rights under section 32, and we therefore think that the owner or occupier who, under such circumstances as the present, will not repair the pipe which causes the waste is not a person entitled to receive a supply of water under section 43. We think the true view to be taken of the facts is that indicated by the court in *Young* v. *Southwark and Vauxhall Water Co.*, 69 L. T. 144; and, although no doubt in one sense it may be said that the question is one of fact, we think that the magistrate ought as a matter of law, upon the evidence in this case, to draw the conclusion which we have indicated upon the facts as stated. The appeal will therefore be allowed, with costs.

Solicitors for the appellants, *Bircham & Co.*

Solicitors for respondent, *Markby, Stewart, & Co.*

K. B. Div.
(Wills and Kennedy, JJ.) Jan. 19.

OLIVER *v.* CAMBERWELL BOROUGH COUNCIL. (*a.*)

Metropolis—Public health—Nuisance—Intimation notice threatening proceedings—Repair of sewer in consequence of such notice—Right of owner to recover cost of work from sanitary authority—Voluntary work—Work done under compulsion—Public Health (London) Act, 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 3, 4.

The plaintiff, the owner of certain premises, was served by the defendants with an intimation notice under section 3 *of the Public Health (London) Act*, 1891, *of the existence of a nuisance on his premises, and requiring him to abate the same within seven days, failing which the sanitary authority would commence proceedings against him by the service of a statutory notice. The nuisance was specified as a defective "drain." The plaintiff complied with the notice, and during the course of the work it was discovered that the so-called "drain" was in fact a "sewer," which was legally repairable by the defendants. The plaintiff thereupon brought an action to recover from the defendants the money he had expended in complying with their notice.*

Held, that the plaintiff could not recover such expenses, because work done in compliance with an intimation notice under section 3 *of the above Act, as distinguished from an abatement notice under section* 4, *must be regarded as work done voluntarily, and not under compulsion.*

Thompson and Norris Manufacturing Co. *v.* Hawes, 59 *J. P.* 580, *followed.*

This was an appeal by the plaintiff from the decision of his Honour Judge Emden, sitting at the Lambeth County Court, in favour of the defendant corporation.

The plaintiff in his action sought to recover from the defendants the sum of £17 in respect of the expenses he had incurred in doing certain work necessary to abate a nuisance in an alleged drain under his house in compliance with an intimation notice of the defendants under section 3 of the Public Health (London) Act, 1891. In carrying out the work the plaintiff discovered that the alleged defective drain was a defective sewer repairable by the defendants. The plaintiff, however, carried out the work without waiting for a statutory notice under section 4, and then sued the defendants for the recovery of the expenses on the ground that he was, by the notice, compelled by the local authority to execute works which the local authority were legally compellable to do.

The defendants disputed the claim on the ground that the plaintiff had done the work voluntarily and not under compulsion.

The learned county court judge gave judgment for the defendants, holding that work done in compliance with an intimation notice under section 3 of the Act, as distinguished from an abatement notice under section 4, must be regarded as work done voluntarily and not under compulsion.

From this judgment the plaintiff now appealed.

The notice served upon the plaintiff by the officer appointed by the vestry was as follows: "The Vestry of Camberwell. Public Health (London) Act, 1891. Public Health Department, Vestry Hall, Camberwell, S.E. 18th March, 1903. Intimation. To the Owner, 117, High-street, Peckham. Take notice that I, the undersigned, having visited the above premises, find that the nuisances numbered 9, 12, 21, 38, and 40 in the schedule at the back hereof, which are liable to be dealt with summarily, exist thereon. I, therefore, now by this written intimation, make the existence of the said nuisances known to you, as being the person who is required to abate them, and I have to request that the same be abated within the period of seven days. At the end of this time I shall again visit the premises, and if the necessary works have not then been completed, the vestry, as the sanitary authority for the parish, will commence proceedings against you by the service of a statutory notice. (Signed) E. Home, the officer appointed by the vestry of the said parish to take proceedings under the above-named Act."

The Public Health (London) Act, 1891, provides as follows:

Section 3. "Information of a nuisance liable to be dealt with summarily under this Act in the district of a sanitary authority may be given to that authority by any person, and it shall be the duty of every officer of that authority and of every relieving officer, in accordance with the regulations of the authority having control over him, to give that information; and it shall be the duty of the said authority to make the said regulations, and also the duty of the sanitary authority to give such directions to their officers as will secure the existence of the nuisance being immediately brought to the notice of any person who may be required to abate it, and the officer shall do so by serving a written intimation."

Section 4. "(1) On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose, and, if the sanitary authority think it desirable (but not otherwise) specifying any works to be executed."

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Naldrett, for the plaintiff.—The plaintiff was entitled to recover the costs he had incurred in complying with the notice. He did under compulsion the work which the defendants were legally compellable to do. A notice under section 4 compels the person upon whom it is served to carry out the work necessary to abate the nuisance: *Andrew* v. *St. Olaves*, 46 W. R. 424, [1898] 1 Q. B. 775. A notice under section 3 is equally compulsory. In *North* v. *Walthamstow Urban District Council*, 62 J. P. 836, the plaintiff in compliance with a notice to abate a nuisance served upon him by the sanitary inspector did certain repairs to what he believed to be a drain, but which turned out to be a sewer repairable by the defendants, and Channell, J., there held that the plaintiff had done the work under pressure, and though the notice under which he acted was not a statutory notice with which he was bound to comply, there was sufficient compulsion to entitle him to recover from the defendants the expenses he had incurred. The plaintiffs in the present case are, therefore, entitled to succeed.

Courthope-Munroe, for the defendants.—The plaintiff in this case cannot recover the expenses incurred by him in doing the work. There is direct authority for this contention. In *Thompson and Norris Manufacturing Co.* v. *Hawes and Another*, 59 J. P. 580, the plaintiffs, who were the lessees and occupiers of premises owned by the defendants, received from the vestry a notice addressed to the "owner" requiring them to abate a nuisance on the premises, warning them that unless this was done within a certain time the statutory steps would be taken. The plaintiffs, without forwarding the notice to the defendants, or communicating with them in any way, forthwith executed the repairs necessary to abate the nuisance. The Court of Appeal (Lindley, Lopes, and Rigby L.JJ.) there held that the plaintiffs, being not legally compellable to execute the repairs, were not entitled to recover the costs of them in an action for money paid on behalf of the defendants. Lindley, L.J., in giving judgment, said: "It is obvious upon the face of the notice that it was not a formal notice, for in it is a reference to the statutory proceedings which will follow if its requirements are not complied with. This notice was, therefore, not the first step in the hostile proceedings under the Act, but it was a warning notice, an intimation that if certain things were not done within a certain time hostile proceedings would be commenced." Then a little lower down, having pointed out that they should have sent the notice to the owners but did not do so, and that they began to execute the repairs, his lordship continues: "And even if we assume that no more was done than was necessary, still the fact remains that the plaintiffs did this for their own convenience, expecting to be reimbursed." That decision is binding on this court.

The following cases were also referred to: *Proctor* v. *Islington Borough Council*, 62 J. P. 836; *Sillas* v. *Fulham Borough Council*, [1903] 1 K. B. 829; *Harris* v. *Hickman*, [1904] 1 K. B. 13; and *Ellis* v. *Bromley Rural District Council*, 63 J. P. 711.

Naldrett, in reply.—*Thompson's case* is distinguishable, as the decision appears to have been given there on another ground, namely, that the plaintiffs, who were only the occupiers of the premises, acted on a notice addressed to the owners of the premises.

WILLS, J.—I confess to giving the decision I am about to give with some reluctance, but I can hardly think that the question is open to us after the decision of the Court of Appeal in *Thompson and Norris Manufacturing Co.* v. *Hawes*. It is quite true that that decision does not go entirely upon the point now in question, but the point now in question was distinctly raised, and is distinctly dealt with in the judgment of Lindley, L.J., because there can be no doubt he had before him a notice which was substantially in the same form as the notice in the present case; and he held that a notice under section 3 of the Public Health (London) Act, 1891, is not equivalent for the purpose of compulsion to a notice under section 4. My brother Wright has twice decided the same thing on the same point; and, although sitting here as a Divisional Court we are not bound by his judgment, still it is an important factor in considering what our judgment ought to be. Inasmuch as these three cases deal with the very point in question in the present case, and there is really no substantial difference of any kind to be drawn between the notices in those cases and the notice which is in question in the present case, I think we are bound to follow those decisions and to say that there was no legal compulsion in this case upon the plaintiff to do the work, and that, therefore, he cannot recover against the defendants.

I give this judgment with great reluctance, and only because I am bound by authority. To my mind a perfectly different view of sections 3 and 4 might have been taken. I think it might very well have been held that a notice under section 3 was intended to be one with which a man might comply if he was so disposed without waiting for a notice under section 4.

Where a person complies with the intimation of the vestry, which they accompany with a threat that they will make it compulsory for him to do the work if he does not do it voluntarily, it seems to me contrary to natural justice that he should stand in a worse position than if he refused to do what they have told him to do, and waits for a further compulsory order. I think the fact has been overlooked that in section 3 there are words which seem to indicate that the notice is something more than a mere intimation, because what is said is that the sanitary authority shall give such direction to their officers as will secure the existence of a nuisance being immediately brought to the notice of any person who may be required to abate it. I think that those words seem to indicate that when he gets the notice he is required to abate it. It seems to me a very thin distinction indeed to say that if a notice is given, such as has been given in the present case, there is less compulsion because the person who receives it is told that if he does not do the work within a week the sanitary authority will take proceedings against him. Counsel for the respondent says "that is only the language of the inspector." I do not agree. An inspector does not use forms of this kind without the knowledge of his employers; and the sanitary authority which give him these forms, and allow him to make use of them, are, I think, legally as well as morally liable for their contents; and if they allow him to sign himself as the officer deputed by them to take proceedings under this Act, and to state that unless the notice be complied with within a week proceedings will be taken without any further decision of the sanitary authority, I think that they must be bound by such a statement, and that the notice must be taken as their notice that they will proceed to make it compulsory. As I say, the distinction is a very thin one and is not one which commends itself to my judgment. I am far more disposed to take the view which was taken by my brother Channell in the case of *North* v. *Walthamstow Urban District Council* than I am to take the view taken by my brother Wright, and by Lindley, L.J., in *Thompson's case*. However, I am bound by the latter authority, and I follow it loyally, but, at the same time, inasmuch as this question will probably be further argued elsewhere, I think there is no objec-

tion to my expressing my individual opinion; and I do so the more readily because I think many of the considerations which I have dealt with in the course of this case have not really been before the courts which have dealt with the question.

I think we must therefore dismiss this appeal.

KENNEDY, J.—I have come to the same conclusion, and I wish to add that I join in the expression of my Brother Wills as to his feeling of reluctance in the decision we are compelled to arrive at.

In this case the only point which we have to decide is whether or not the work the plaintiff undertook was or was not voluntarily undertaken by him. If he incurred the expense of this work voluntarily, he cannot, on finding that he need not have gone to the expense of doing the work, and that another person ought to have done it, go to that person and say, "I have paid what you ought to have paid and you must repay me." If, on the other hand, the payment has been made by him, not voluntarily, but under pressure, and under pressure from the very person who ought to have done the work and incurred the expense, then he is without doubt entitled to recover the cost from that other person. Therefore, shortly, the question is whether owing to the fact that the plaintiff did the work after receiving and in consequence of the intimation of the 18th of March, 1903, that is sufficient to deprive the conduct of the plaintiff of its voluntary character.

Now it is obvious from the different decisions that have been given and the different views of the two decisions of my brother Wright, on the one hand, and the decision of my brother Channell, on the other, that the question is not an easy one to answer, and I should feel great difficulty in coming to the conclusion I have been obliged to come to if it had not been for the decision of the Court of Appeal in *Thompson and Norris Manufacturing Co.* v. *Hawes*. If my judgment had been unfettered, I should have found it very difficult to say that it really mattered, as regards the voluntariness of what was done by the plaintiff, whether he did it on receiving an intimation in the form in this case or on receiving a notice under section 4 (*b*). There was no compulsion in the sense of duress or in the sense of having a penalty imposed if he did not comply with the intimation *per se;* but was not the work done by him, not because he wished to do it for somebody else or for himself, but, because a public authority intimated to him that it was his bounden duty to do it, and that if he did not do it legal proceedings would be taken against him? There is the duty of a citizen to obey, *primâ facie*, a public authority governing his district, in an urgent matter of public health, which is alleged to be affected by his want of care or his wrong doing in the management of his premises. In a form, recognized by that public authority, an intimation is conveyed to him that if he does not carry out the work required, legal proceedings will be taken against him. Is not the work he does under such an intimation involuntary? While no doubt it is true that the intimation in the present case was under section 3 and not under section 4, there is in each case a notice which emanates from the local authority and is signed, in accordance with the schedule to the Act, by "the officer appointed by the vestry of the parish to take proceedings." I am, however, bound to follow the decision of the Court of Appeal in *Thompson's case*. It may be that the only report of that case, which is evidently a summarised report, does not fully represent, in their right proportion, the views of the learned Lord Justices. It may be that there was much more stress laid upon the fact that the plaintiffs in that case had taken upon themselves to treat a notice addressed to somebody else as addressed to them, than appears in the report, but I am bound to say, reading that report fairly, and in its natural meaning, that I think that, at any rate, the majority of the court did base their decision upon the distinction between a document served under section 3 as an intimation, and a document consisting of a notice requiring an abatement of a nuisance under section 4, as if the latter would constitute a proceeding a compliance with which, by the person who received it, would be an involuntary act, whereas an intimation under section 3 would leave the person who received it so far free that he could not say he was acting under it, except voluntarily. Therefore, it seems to me, we must decide as my brother Wills has decided, whatever otherwise might have been our view.

Appeal dismissed with costs.

Leave given to appeal.

Solicitors for plaintiff, *Mead & Sons.*

Solicitors for defendants, *Marsden & Son.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — April 19.

GUARDIANS OF WEST HAM UNION v. GUARDIANS OF HOLBEACH UNION. (*a*.)

Poor law—Settlement—Three years' residence—Child under sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

Where a child has, while under the age of sixteen, resided with its parent in a parish for three years in such manner and under such circumstances in each of such years as render a person irremovable, the child may, on attaining the age of sixteen, claim the benefit of the three years' residence as giving it a settlement in the parish under section 34 *of the Divided Parishes Act*, 1876.

Judgment of the Divisional Court (ante, *p.* 30, [1903] 2 *K. B.* 627) *affirmed.*

Reg. *v.* Elvet, 7 *W. R.* 586, 2 *E. & E.* 266, *followed.*

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Wills and Channell, JJ.) on a special case stated under the provisions of 12 & 13 Vict. c. 45, s. 11 (*ante*, p. 30, [1903] 2 K. B. 627).

On the 3rd of December, 1901, the respondents, the Guardians of Holbeach Union, obtained an order from two justices of the peace for the county of the parts of Holland, Lincolnshire, whereby it was adjudged that the parish of West Ham, in the West Ham Union, in the county of Essex, was the place of the last legal settlement of George Ernest Neep, aged about two years, a pauper, and it was ordered that the appellants, the Guardians of the West Ham Union, should receive and provide for the said pauper according to law.

Notice of appeal to quarter sessions having been given, this special case was stated for the opinion of the court.

The facts set out in the case were as follows:

George Ernest Neep, hereinafter called the pauper, is the illegitimate child of Emma Neep, and was born

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

in the Holbeach Union Workhouse on the 25th of October, 1899.

Emma Neep, the mother of the pauper, is the illegitimate child of Mary Ann Neep, and was born in the parish of Tilney St. Lawrence, in the Wisbech Union, on the 11th of April, 1879.

Mary Ann Neep married Alfred Frederick Chapman, at Tilney St. Lawrence, on the 23rd of December, 1881.

From the 27th of June, 1890, to the 7th of September, 1893, Alfred Frederick Chapman resided in the parish of West Ham, in the West Ham Union, with his wife for a term of three years in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable therefrom and settled therein.

From the 7th of September, 1893, Alfred Frederick Chapman continued to reside in the parish of West Ham and was in receipt of relief from the West Ham Union until his death on the 8th of September, 1894. His wife, Mary Ann Chapman, resided with him until his death.

From the 8th of September, 1894, Mary Ann Chapman (the widow of Alfred Frederick Chapman and the mother of Emma Neep) continued to reside in the parish of West Ham, and was in receipt of relief from the West Ham Union from the 8th of September, 1894, until the 28th of November, 1895, when she ceased to reside in the West Ham Union. She died in the Poplar Union Infirmary on the 14th of October, 1896.

From the 27th of June, 1890, to the 28th of July, 1893, Emma Neep (the mother of the pauper) resided with Alfred Frederick Chapman and her mother, Mary Ann Chapman, in the parish of West Ham, in the West Ham Union. On the 28th of July, 1893, she went into service in the Poplar Union, and has since had no settled residence.

Before the justices the appellants affirmed that the settlement of Emma Neep could not be ascertained without inquiring into the derivative settlement of her parent, Mary Ann Chapman, and that she must be deemed to be settled in the parish of Tilney St. Lawrence where she was born.

The respondents affirmed that Emma Neep acquired a legal settlement in the parish of West Ham by reason of the residence therein of Alfred Frederick Chapman and his wife, or by reason of the residence of Emma Neep for upwards of three years prior to the 28th of July, 1893, in such manner and under such circumstances in each of such years as would, in accordance with the provisions of the several statutes in that behalf, render her irremovable therefrom.

The question for the opinion of the court was whether, upon the facts above stated, Emma Neep acquired a settlement under the Divided Parishes Act, 1876, sections 34 and 35, in the parish of West Ham, in the West Ham Union.

The Divisional Court affirmed the order of the justices, being of opinion that Emma Neep acquired a settlement for herself in the West Ham Union by residence therein for three years, under section 34 of the Divided Parishes Act.

The Guardians of the West Ham Union appealed to the Court of Appeal.

Montague Lush, K.C., and *W. J. Grubbe*, for the appellants.—The words "any person" in section 34 of the Divided Parishes Act mean any person who is *sui juris*. The section does not apply to unemancipated children or married women; unemancipated persons are dealt with by section 35: *per* Lopes, L.J., in *Guardians of Medway Union* v. *Guardians of Bedminster Union*, 36 W. R. 851, 21 Q. B. D. 278. This view was approved of by Lords Watson and Macnaghten when the case was heard before the House of Lords together with *Guardians of Reigate Union* v. *Guardians of Croydon Union* and another case, 38 W. R. 295, 14 App. Cas. 465. Emma Neep, therefore, having been an unemancipated child during her three years' residence in West Ham, did not acquire a settlement there under section 34. Being a child under the age of sixteen, her only settlement was that of her parent, by virtue of section 35. And, being an illegitimate child, she came within the second clause of that section. The future tense in that clause, "shall retain," means that an illegitimate child is, first, to take the settlement of its mother while it is under sixteen, as if the first clause of the section applied, and then to retain that settlement after the age of sixteen until the child acquires another settlement on its own account. It is not till the child attains the age of sixteen that it becomes a person within the meaning of section 34 capable of acquiring a settlement for itself. Emma Neep, however, never acquired a settlement for herself after she attained the age of sixteen. She therefore came within the third clause of section 35. That clause applies only to children who have attained the age of sixteen. It says, "If any child in this section mentioned"—that is to say, any child whether legitimate or illegitimate—"shall not have acquired a settlement for itself"—that must necessarily refer to a child who is capable of acquiring a settlement for itself; that is to say, a child who is over the age of sixteen—"and it cannot be shown what settlement such child derived from the parent without inquiring into the derivative settlement of such parent, such child shall be deemed to be settled in the parish in which he or she was born." Here it cannot be shown what settlement Emma Neep derived from her mother, Mary Ann Neep, without inquiring into Mary Ann Neep's derivative settlement. It follows that Emma Neep's settlement must be the parish in which she was born. The cases of *Guardians of West Derby Union* v. *Guardians of Atcham Union*, 38 W. R. 361, 24 Q. B. D. 117; *Guardians of Mitford and Launditch Union* v. *Guardians of Wayland Union*, 38 W. R. 632, 25 Q. B. D. 164; *Overseers of Manchester* v. *Guardians of Ormskirk Union*, 38 W. R. 778, 24 Q. B. D. 678; and *Guardians of West Ham Union* v. *Churchwardens of Bethnal Green*, 42 W. R. 573, [1894] A. C. 230, are all authorities in the appellants' favour. *Reg.* v. *Elvet*, 7 W. R. 586, 2 E. & E. 266, was before the Divided Parishes Act, and the pauper child in that case had become emancipated, although she was under the age of sixteen, her father and mother both being dead.

Rawlinson, K.C., and *C. B. Marriott*, for the respondents, were not called upon to argue.

COLLINS, M.R.—A somewhat intricate question as to the settlement of a pauper has been presented to us in this case; but it seems to me, after hearing the matter fully argued on the part of the appellants, that it really comes down to a single point. The pauper with whom we have to deal, George Ernest Neep, was born in the Holbeach Union Workhouse in 1899. He was the illegitimate child of Emma Neep, who was herself also an illegitimate child. She was born in the parish of Tilney St. Lawrence. The question is whether Emma Neep acquired a settlement for herself in the parish of West Ham by three years' residence there with her mother while was herself under the age of sixteen years. She lived there for more than three years with her mother and a man named Chapman whom her mother had married. During the three years in question Chapman resided in the parish of West Ham with his wife and her child in such a manner and

under such circumstances in each of the years as would render him irremovable therefrom and settled therein. Section 34 of the Divided Parishes Act, 1876, deals with this state of facts. It is as follows: "Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." In this case Chapman had acquired a settlement in the parish of West Ham under that section. Under the first clause of section 35 his wife took the same settlement. What about the child, Emma Neep? Being an illegitimate child, her case is dealt with by the second clause of section 35, which is as follows: "An illegitimate child shall retain the settlement of its mother until such child acquires another settlement." The section continues: "If any child in this section mentioned shall not have acquired a settlement for itself, or being a female, shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

If Emma Neep acquired no settlement for herself in West Ham, then, inasmuch as it cannot be shown what settlement she derived from her mother without inquiring into her mother's derivative settlement, it is contended that she must be deemed to be settled in the parish where she was born. But if a settlement other than a derivative settlement can be found for her in West Ham, then the pauper child with whom we have to deal is also settled in West Ham. Now, Emma Neep resided in West Ham for a period of three years in such manner and under such circumstances in each of such years as would by the statutes render her irremovable. But this residence took place before she attained the age of sixteen. The question is whether residence for three years in such a manner and under such circumstances by a person under the age of sixteen is capable of conferring on such person the right of acquiring a settlement mentioned in section 34. The appellants contend that that section does not deal with unemancipated persons or persons under sixteen, but only with persons over the age of sixteen. In my opinion the court is relieved from the necessity of considering the case of a child under sixteen with regard to that section. The question seems to me to have been decided by authority in the case of *Reg.* v. *Inhabitants of Elvet*. At the time of that decision the age of emancipation had not yet been fixed at sixteen. In that case the pauper lived with her father until his death, when she was about fourteen years of age. She then continued to live in the same parish until she became chargeable, when an order was made for her removal to a parish where her mother had recently, before and since the father's death, been maintained as a pauper lunatic. This order was quashed by the quarter sessions, and their decision was affirmed by the Court of Queen's Bench. Lord Campbell, C.J., said: "I am of opinion that the pauper, by her residence with her father, acquired the status of irremovability. This status, which the father had acquired before he received relief through his wife, was not taken from him by such subsequent receipt of relief. And at the time that the order for her removal was made the pauper continued irremovable, her mother being then dead." Wightman, J., said: "By her residence with her father the pauper became irremovable, and, as she continued to reside in the respondent township down to the time that the order for her removal was made, and her mother had died before that time, she was then still irremovable." Erle, J., said: "The fact that the father of the pauper received relief after he had acquired the status of irremovability does not appear to me to affect the question. When her father died the pauper had acquired an independent status of irremovability, which she retained down to the time that the order for removal was made." In my opinion *Reg.* v. *Elvet* is a clear authority that a person, who while unemancipated resides in a parish for the necessary period, can on emancipation claim that residence as founding a right to a status of irremovability. That case was considered by the House of Lords in *Guardians of Reigate Union* v. *Guardians of Croydon Union*, and the two other cases that were heard at the same time. Lord Halsbury, L.C., in dealing with the second of the three cases, said he thought it was concluded by the authority of Lord Campbell, C.J., and Wightman and Erle, JJ., in *Reg.* v. *Elvet*, which he would be very sorry to see disturbed. He continued thus: "The pauper had by more than the necessary period of residence acquired a status of irremovability, and so was settled in the parish of Rhydgwern. It is true that during a part of that period she was under sixteen years of age, and it is true that if it be assumed, as it was by the Court of Appeal, that unemancipated residence will not suffice, then she had not accomplished the necessary period of emancipated residence. The statute knows no such distinction. It makes the emancipated and unemancipated equally irremovable; and, if so, the periods of emancipated and unemancipated residence may be put together." Neither Lord Watson nor Lord Macnaghten said anything to the contrary of this. It was suggested on the part of the appellants that the judgment of Lord Watson ought to be treated as being the really authoritative statement of the law, and that the view of Lord Watson on this point was different from that of the Lord Chancellor. But the passage in Lord Watson's judgment on which the appellants rely, when it is read in its context, does not seem to me to show any difference from the view taken by the Lord Chancellor. In one part of his judgment Lord Watson said: "I have been unable to find in section 34 any provision, express or implied, to the effect that an emancipated child claiming a settlement under its provisions is not to have the benefit of residence whilst it was under the age of sixteen." But the appellants point to another part of his judgment which they say is inconsistent with this. Speaking of the third clause of section 35, he said: "The provisions of the clause have, in my opinion, no application to children under the age of sixteen." I do not think that that is inconsistent with the rest of his judgment. He was then referring to an unemancipated person during the period of non-emancipation.

I am of opinion that we have here an unambiguous affirmation by the House of Lords of the principle laid down in *Reg.* v. *Elvet*. Applying that principle to the present case, Emma Neep is now entitled to claim the benefit of her three years' residence in West Ham when she was under sixteen as giving her the settlement which section 34 says is to be deemed to be acquired by the residence therein mentioned. The only difference that I can see between *Reg.* v. *Elvet* and the present case is that there the pauper continued to reside in the parish for some time after her father's death, and it may be that she would then be deemed to have been emancipated. But in my opinion the principle of *Reg.* v. *Elvet* governs this case, and Emma Neep's status, acquired under section 34 by residence

while she was under sixteen, became good on her attaining the age of sixteen. The judgment of the Divisional Court will therefore be affirmed and the appeal dismissed.

ROMER, L.J.—I am of opinion that the appeal fails. I think that this case is governed by the second of the three cases heard together in the House of Lords, *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union*, 38 W. R. 295, 14 App. Cas. 465. That was a decision that a child after emancipation may claim to have acquired a settlement in a parish under section 34 of the Divided Parishes Act by residence therein under the circumstances mentioned in the section, though the child was during a portion of that residence under the age of sixteen. The Lord Chancellor says expressly that the statute knows no distinction between emancipated and unemancipated residence. The other learned lords do not differ, and they all treat *Reg.* v. *Elvet* as an authority on which the case should be decided.

MATHEW, L.J., concurred.

Appeal dismissed.

Solicitor for the appellants, *F. E. Hilleary.*

Solicitors for the respondents, *Callard & Vulliamy*, for *Richard P. Mossop*, Holbeach.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) March 16, 17, 29.

In re FRASER.

LOWTHER *v.* FRASER. (*a.*)

Will—Construction—Excepted gift—Residuary gift—Codicil—Intestacy—Rent-charge issuing out of leaseholds—Chattel real—Vendor's lien for unpaid purchase-money—Next-of-kin—Locke-King's Act, 1854 (17 & 18 *Vict.* c. 113), *s.* 1—*Amending Act,* 1867 (30 & 31 *Vict.* c. 69)—*Amending Act,* 1877 (40 & 41 *Vict.* c. 34), *s.* 1.

When in a will property is specifically excepted from a general gift and is afterwards specifically bequeathed, but the bequest fails by lapse or otherwise, then it is to be taken that the object of the testator in making the exception was simply to give the property to the specific legatee, and, that being the sole object, upon the failure of the bequest it will be held to be included in the residuary gift. If, however, the testator makes no disposition by will of the excepted property, this reasoning does not apply, and the property passes as on an intestacy. Where, therefore, a testator having made a bequest of his personal estate except chattels real, and bequeathed the chattels real to a legatee who predeceased him, subsequently made a codicil in which he referred to the death of the legatee and confirmed his said will, without making any disposition of the chattels real,

Held that the chattels real passed to the next-of-kin, and did not fall into residue.

Held also, that a rent-charge issuing out of leaseholds is a chattel real. A rent-charge of this nature is within the provisions of Locke-King's Act, 1854 *read together with the Amending Acts of* 1867 *and* 1877. *Consequently where a testator, who has contracted to purchase such a rent-charge dies intestate in respect thereof, it passes to the next-of-kin subject to the vendor's lien for unpaid purchase-money.*

Decision of Byrne, J. ([1904] 1 *Ch.* 111), *on this point affirmed.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

This was an appeal against the decision of Byrne, J. (reported 52 SOLICITORS' JOURNAL 383, [1904] 1 Ch. 111).

An application had been made in the court below by the trustees of the will of the late Sir William Augustus Fraser, for the determination of two difficult questions occasioned by the failure, in the events which had happened, of a devise of real estate and chattels real contained in his will and codicils; the first point was whether a rent-charge for £402 issuing out of and charged upon some leaseholds was a "chattel real," in which case this rent-charge admittedly passed to the next-of-kin as undisposed of; and the second question thereupon arose—viz., whether this class of property passed to the next-of-kin subject to an existing liability to discharge the vendor's lien for unpaid purchase-money in accordance with the provisions of Locke-King's Act, 1854, and the subsequent amending Acts, or whether these Acts did not include this property so that the next-of-kin would be entitled to have the purchase-money, £11,110, discharged for them out of the testator's personal estate.

In the month of April, 1898, the testator agreed to purchase a rent-charge issuing out of land held for the residue of a term of 99 years. He died in the month of August, 1898, and in January, 1899, the purchase was completed and the purchase-money of £11,110 was paid out of the general personal estate.

By his will, dated the 1st of December, 1886, the testator gave all the personal estate and effects to which he should at his death be entitled, or over which he should at his death have a general power of disposition (except what he otherwise disposed of by his will or any codicil thereto and except chattels real) to trustees in trust for conversion, and to pay his debts, legacies, and duties, and to invest and accumulate for twenty-one years, and then to hold the capital and accumulations on trusts in favour of various persons *nominatim* for life with remainder to their respective children.

The testator gave and bequeathed all real estate and chattels real in England to which he might be entitled at his death, except what he had otherwise disposed of by that his will, to Charles Crauford Fraser absolutely, for all his estate and interest therein.

Charles Crauford Fraser predeceased the testator, who, by a codicil dated the 21st of July, 1898, referred to C. C. Fraser's death, and after making certain dispositions (not affecting chattels real) in all other respects confirmed his said will.

The trustees took out an originating summons for the determination of the following questions: (1) Whether or not the interest which the testator had contracted to purchase was a chattel real, in which case the testator died intestate in respect thereof; and (2) if so, whether the chattel real passed subject to a liability to discharge the vendor's lien for the purchase-money, or whether the payment of the purchase-money should properly be borne by the testator's general personal estate.

Byrne, J., held that the rent-charge was a chattel real, and that the next-of-kin took it subject, as between them and the other persons claiming through the deceased, to a primary liability to pay the amount of the vendor's lien for unpaid purchase-money.

The next-of-kin appealed.

At the trial in the court below it was assumed by all parties that there was an intestacy, but as will be seen below it was argued in the Court of Appeal that the rent-charge in question fell into residue.

Levett, K.C., and *Byrne*, for the appellant.—This

rent-charge is admittedly a chattel real, and being undisposed of passes to the next-of-kin of the testator. The question is whether the words in section 1 of the Real Estate Amendment Act, 1877 (40 & 41 Vict. c. 34) "any land or other hereditaments of whatever tenure" can apply to this rent-charge. We submit that they cannot. It is not a hereditament, inasmuch as it is not a thing which passes to the heir by hereditary succession: Challis Real Property, p. 43; Termes De La Ley, sub-tit. Hereditaments. Nor is it a subject of tenure: Burton on Real Property (7th ed.), p. 321.

They also referred to Carson's Real Property Statutes, p. 429.

Lecke, for another person in the same interest.

Norton, K.C., and *Merivale*, for the first tenant in tail.—On the true construction of this will the testator was referring to leasehold property by the words "chattels real in England," and not to this rent-charge. A rent-charge is a chattel but not a chattel real, the notion of which involves physical occupancy: see Coke Litt. 1186. But if this be not so, we submit that there is no intestacy, but the chattels real fall into the residue on the lapse of the legacy to Charles Crauford Fraser. In this will the testator gives everything except his chattels real to the trustees, and the chattels real are excepted out of the gift merely for the purpose of the legacy to C. C. Fraser. There is therefore here a true residuary gift which is increased by lapsed or void legacies: *Blight* v. *Hartnoll*, 31 W. R. 535, 23 Ch. D. 218. There must be a clear intention to exclude the excepted property from the residue: *In re Bagot, Paton* v. *Ormerod*, [1893] 3 Ch. 348, 42 W. R. Dig. 78; *Bernard* v. *Minshull*, Joh. 276, 7 W. R. Dig. 104; *Evans* v. *Jones*, 2 Coll. 516. But if this is a chattel real and does not fall into residue, then it is within the Acts of 1867 and 1877, and passes to the next-of-kin subject to a liability for unpaid purchase-money. This an interest which may be described as a hereditament though it does not descend to the heir. In *Tomkins* v. *Jones*, 37 W. R. 328, 22 Q. B. D. 599, it was held that leaseholds were hereditaments within the County Courts Act, 1888, though they do not descend to the heir: see, too, Challis Real Property, App. 1, p. 387. Nor is it necessary that this rent-charge, if it be a hereditament, should be a subject of tenure. In *Great Western Railway Co.* v. *Swindon and Cheltenham Extension Railway Co*, 32 W. R. 957, 9 A. C. 787, Lord Bramwell held that hereditaments of any tenure in the Lands Clauses Act, s. 3, ought to be construed as meaning "hereditaments of whatever tenure, if any." The words "hereditaments of whatever tenure" in section 1 of the Act of 1854 ought to be construed in the same way. If all three Acts be read together, it is plain that they deal with any estate or interest in land: *In re Kidd, Brooman* v. *Withall*, 43 W. R. 51, [1894] 3 Ch. 558. Reading the Acts together, therefore, this rent-charge is within them notwithstanding the omission of the words "next-of-kin" from section 1 of the Act of 1877, and passes to the next-of-kin as "persons claiming through or under the deceased person." It cannot have been the intention of the Legislature that the legatee should take his legacy *cum onere*, but that the next-of-kin should get it discharged from liability.

They also cited *In re Cockcroft, Broadbent* v. *Groves*, 32 W. R. 223, 24 Ch. D. 94.

Levett, K.C., replied.

Cur. adv. vult.

STIRLING, L.J., read the judgment of the court as follows: The first point to be dealt with on this appeal is one which was not taken in the court below. It was contended that the testator's chattels real in England, which formed part of the chattels real in terms excepted from the general bequest of the testator's personal estate contained in his will, have nevertheless fallen into that bequest by reason of the death of the legatee of those chattels real in England under that will—viz., Charles Crauford Fraser—in the testator's lifetime. In support of that contention, *Blight* v. *Hartnoll* was mainly relied on. The law appears to be that, when in a will property is excepted from a general gift of the testator's personal estate and is afterwards specifically bequeathed, but the bequest fails by lapse or otherwise, then it is to be taken that the object of the testator in making the exception was simply to give the property in question to another; and, that being the sole object, there is no reason why upon the failure of the bequest it should not be held to be included in the residuary gift. If, however, the testator makes no disposition by will of the excepted property, this reasoning does not apply, and the excepted property passes as on an intestacy. If this decision turned on the will alone there would be much to be said in favour of the contention referred to. But the testamentary dispositions of the testator include several subsequent codicils, and in particular one of the 21st of July, 1898, which begins by reciting the death of Charles Crauford Fraser (the legatee of the chattels real in England), and contains a confirmation of the will as altered by prior codicils. The effect of this is to bring the will down to the date of the codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils: see *Doe* v. *Walker*, 12 M. & W. 691; *In re Champion*, [1893] 1 Ch. 101, 41 W. R. Dig. 275.

The result in the present case is that the testator has, on the face of the testamentary dispositions existing at his death, excepted the chattels real from the general bequest, and has not really made any bequest, the apparent bequest being on the face of the instruments themselves ineffective. In my opinion, therefore, the doctrine of *Blight* v. *Hartnoll* does not apply. As regards the two points decided by Byrne, J., I agree with him. I have nothing to add to the reasons given by him for holding that the rent-charge in question is a chattel real. As regards the construction of Locke-King's Act, 1854, and the amending Acts of 1867 and 1877, I think that these Acts are to be read together. The language of the first part of section 1 of the Act of 1854, though admitted in itself to be wide enough to extend to all interests in land, was, by reason of the subsequent clauses of the same section being confined to heirs and devisees, held to be limited in its operation to freehold interests: see *Solomon* v. *Solomon*, 12 W. R. 540; *In re Wormsley's Estate*, 25 W. R. 141, 4 Ch. D. 665. By the Amendment Act of 1877, the Legislature has clearly shown that this limitation is no longer to operate, and it has been held that the Acts now extend to leaseholds: *Drake* v. *Kershaw*, 36 W. R. 413, 37 Ch. D. 674. It is true that legatees only are spoken of in the Act of 1877, and not next-of-kin; but, in my opinion, there is in the Act of 1877 enough to show that the Act of 1854 ought no longer to receive the narrow interpretation placed on it in *Solomon* v. *Solomon* and *In re Wormsley's Estate*. Notwithstanding some difficulties arising from the language of the Act of 1877, I think it is decidedly preferable so to construe the Act of 1854 rather than to hold that the next-of-kin escape from a liability to which the legatee would have been subject had he survived the testator.

VAUGHAN WILLIAMS and COZENS-HARDY, L.JJ., concurred in the judgment delivered by Stirling, L.J.

Solicitors, *Rowcliffes, Rawle, & Co.; Bompas, Bischoff, Dodgson, Coxe, & Bompas; Fox, Trotter, Thicknesse, Patteson, & Hull.*

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) } March 2, 3, 5, 23

ATTORNEY-GENERAL *v.* DUKE OF NORTHUMBERLAND AND OTHERS. (*a.*)

Inland revenue—Succession duty—Alienation of succession—Disentailing deed—Devise by alienee—Liability of devisee to duty on original succession—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.

A tenant for life of settled real estate and the tenant in tail in remainder, having executed a disentailing deed, joined in conveying a parcel of land, part of the estate, in fee to a purchaser. The purchaser devised the parcel of land to his wife, who devised it to their daughter, who paid succession duty in respect thereof on her mother's death. Subsequently the tenant for life died.

Held, that succession duty was payable by the daughter on the death of the tenant for life also.

Judgment of Ridley, J. ([1903] 2 *K. B.* 71, 51 *W. R. Dig.* 71), *affirmed.*

In re Cooper and Allen to Harlech, 25 *W. R.* 301, 4 *Ch. D.* 802, *overruled.*

Appeal by the defendants from the judgment of Ridley, J., upon an information by the Attorney-General claiming succession duty ([1903] 2 K. B. 71, 51 W. R. Dig. 71).

The defendants were the Duke of Northumberland, Caroline Frances Murray, and Charles William Bell.

In the year 1816 certain estates in the counties of Northumberland and Middlesex, including the piece of land comprised in the indenture of the 1st of December, 1870, hereinafter mentioned, stood limited (subject to certain charges) to the use of Hugh, second Duke of Northumberland, for life, with remainder to the use of his eldest son, Hugh, then Earl Percy, afterwards third Duke of Northumberland, in tail male. By virtue of two common recoveries in 1816 and of indentures of lease and release dated the 22nd and 23rd of January, 1817, the said estates became limited to such uses as the said second Duke of Northumberland and Hugh, third duke, should jointly appoint.

By an indenture of settlement, dated the 19th of April, 1817, the second and third dukes exercised their joint power of appointment, and limited the estates to uses under which, and by reason of the deaths of the second, third, and successive dukes, the estates at the date of the disentailing assurance of the 19th of December, 1868, hereinafter referred to, stood limited and settled to the use of Algernon George, sixth Duke of Northumberland, for life, with remainder to the use of his eldest son, the seventh and present duke, in tail male, with remainders over.

By an indenture dated the 19th of December, 1868, duly enrolled as a disentailing assurance, the sixth and seventh dukes (the latter being at the time Earl Percy), disentailed the estates and conveyed them to such uses as the sixth and seventh dukes should by deed jointly appoint, and in default of appointment to the uses which under the settlement of 1817 or by reference thereto were then subsisting.

By an indenture of settlement, dated the 21st of December, 1868, the sixth and seventh dukes, in exercise of the joint power of appointment given to them by the indenture of the 19th of December, 1868, appointed the estates to such uses as the sixth and seventh dukes should by deed or deeds jointly appoint, and in default of appointment to the use of the sixth duke for life, with remainder to the use of the seventh duke for life, with remainder to the use of his first and other sons successively in tail male, with divers remainders over in strict settlement.

By an indenture dated the 1st of December, 1870, the sixth and seventh dukes, in exercise of the power given to them by the indenture of the 21st of December, 1868, appointed, in consideration of £250 paid to them, a piece of land, part of the said hereditaments, to the use of Lord James Murray, in fee simple.

Lord James Murray died on the 3rd of June, 1874, seised of the piece of land conveyed by the above indenture of the 1st of December, 1870, free from incumbrances, and by his will, dated the 8th of May, 1868, he gave, devised, and bequeathed all his real and personal estate to his wife, Lady Elizabeth Marjory Murray, in fee simple.

Lady Elizabeth Marjory Murray died on the 11th of October, 1888, seised of the said piece of land, and by her will she devised and bequeathed all her real and personal estate to her daughter, the defendant Caroline Frances Murray, absolutely.

On the death of Lady Elizabeth Marjory Murray, succession duty at 1½ per cent. was paid on the value of the interest of the defendant Caroline Frances Murray (considered as an annuity for life) in the real estate devised to her by her mother, including the piece of land conveyed by the indenture of the 1st of December, 1870.

The sixth duke died on the 2nd of January, 1899.

By an indenture dated the 13th of May, 1902, the defendant Caroline Frances Murray sold and conveyed the piece of land to the defendant Charles William Bell.

The Crown claimed succession duty on the death of the sixth duke in respect of the land conveyed by the indenture of the 1st of December, 1870, at the rate of 6½ per cent., viz. 5 per cent. under section 10 of the Succession Duty Act, 1853, the present duke being a descendant of a brother of the father of the third duke, and 1½ per cent. under section 21, subsection 1, of the Customs and Inland Revenue Act, 1888.

For the Crown it was contended that on a disposition of property being made no title to the property could be free of the duty, though such duty was only payable on the succession coming into possession; that if Lord James Murray had outlived the sixth duke, it could not be denied that duty would have been payable; that this particular case could not be distinguished, and that duty was payable under section 15 of the Succession Duty Act, 1853, either as on a succession which, before the successor became entitled thereto, had become vested by alienation or by a title not conferring a new succession in some other person, or as on a succession the title to which had been accelerated by the extinction of a prior interest.

For the defendants it was contended that no duty was payable beyond that already paid by Miss Murray; that the original succession was dead by reason of the disentailing deed of 1868; that even if it were not so, the succession in this case had become vested in Miss Murray by a "title conferring a new succession"—that was to say, the title derived from her father or mother which conferred a succession on her—and therefore the case did not come within

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

section 15; and that, in any case, a succession to real property could not be subject to double duty.

By section 2 of the Succession Duty Act, 1853, "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

By section 15 it is enacted as follows: "And where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

Ridley, J., gave judgment for the Crown.

The defendants appealed.

Haldane, K.C., Danckwerts, K.C., and *Austen-Cartmell*, for the defendants.

Sir Robert Finlay, A.G., Sir Edward Carson, S.G., and *Vaughan Hawkins*, for the Crown.

Cur. adv. vult.

March 23.—COLLINS, M.R., read the following judgment: In this case the Crown claims succession duty on the death of the sixth Duke of Northumberland in respect of a piece of land, a portion of the Northumberland estates settled in 1817. Ridley, J., has decided in favour of the Crown. The defendants appeal. The material facts are thus stated by Ridley, J.: "By a settlement dated the 19th of April, 1817, large estates in Northumberland were limited to certain uses, and in 1867 (in the events which had happened) they stood limited to the use of the sixth Duke of Northumberland for life, with remainder to his eldest son in tail male. In 1868 disentailing deeds were executed giving a joint power of appointment to the sixth duke and his eldest son, Earl Percy, now seventh duke; and on the 1st of December, 1870, under that power of appointment a parcel of land, which was part of the estates so brought into settlement, was conveyed to Lord James Murray in fee. In 1874 Lord James Murray died, having devised his estates to his wife, and in 1888 the widow died, having devised them to her daughter, Miss Murray, one of the defendants. She paid succession duty under 16 & 17 Vict. c. 51, s. 10 and 51 & 52 Vict. c. 8, s. 21, at the rate of 1½ per cent. on the value of the interest derived from her mother (considered as an annuity) in the real estate so devised to her, including this particular parcel of land. On the 2nd of January, 1899, the sixth Duke of Northumberland died, and it was now contended that succession duty became payable on his death in respect of this piece of land, under the same statutes, at the rate of 6½ per cent. But it was not contended by the Attorney-General, having regard to the date of the sale to Lord James Murray, that section 18 of the Finance Act, 1894, applied, and, therefore, it was asked that the percentage should be calculated on the value of the interest considered as an annuity under section 21 of the Succession Duty Act, 1853."

The contention of the Crown, which Ridley, J., has accepted, is that the second half of section 15 applies to the case, and that duty is payable under that section by Miss Murray in respect of the succession of the seventh Duke, which passed to her father by alienation under the indenture of the 1st of December, 1870, and of which she was in possession at the date of the death of the sixth duke, and that the fact that she has paid succession duty in respect of her own succession upon a devise from her mother, who survived Lord James Murray and took the succession under a devise from him, is no answer to the Crown's claim. The appellants rely on *In re Cooper and Allen to Harlech*, 25 W. R. 301, 4 Ch. D. 802, decided by Sir George Jessel, which, if well decided, governs the present case. They also contend that the disentailing deed of 1868 and the settlement which followed upon it had the effect of destroying the succession of the seventh duke created under the settlement of 1817. Subject to this point the question on this appeal is whether *In re Cooper and Allen to Harlech* was well decided. Before going further it is necessary to refer to certain sections of the Succession Duty Act, 1853. Section 1 provides that "the term 'succession' shall denote any property chargeable with duty under this Act." [His lordship then read section 2, and section 15 from the words "and where, after the time appointed for the commencement of this Act," to the end.] Section 20 provides that "the duty imposed by this Act shall be paid at the time when the successor, or any person in his right, or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof." Section 42 provides that "the duty imposed by this Act shall be a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed."

Subject to the point as to the effect of the disentailing deed, both sides are agreed that the deed of the 1st of December, 1870, was an alienation of the seventh duke's succession to Lord James Murray within section 15, and that had he survived the sixth duke, not having himself transferred it, he would have been liable to pay the duty on the death of the sixth duke. Had he devised it to his daughter and died, she would have had to pay duty in respect of her succession to her father. Does the fact that her father predeceased the sixth duke make any difference? I think the reasoning of Lord Herschell in *Lord Wolverton* v. *Attorney-General*, 47 W. R. 97, [1898] A. C. 535, is conclusive that it does not. By section 42 of the Act of 1853 the duty is a first charge on the interest of the successor. Therefore the succession came to Miss Murray subject to this charge. How has she got rid of it? "If the person has had a succession conferred upon him, he cannot by parting with it prevent it from being a succession; that is, prevent it from being property liable to the duty. It continues a succession, and will be, when the proper time comes, a succession enjoyed in possession, into whatever hands it has come": per Cleasby, B., delivering the judgment of the court in

Solicitor-General v. *Law Reversionary Interest Society*, 21 W. R. 854, L. R. 8 Ex. 233. "I am unable to find in the Act," says Lord Herschell in *Lord Wolverton* v. *Attorney-General*, "any warrant for the view that a succession once created can, by the act of the successor, cease to exist and another succession be substituted for it." But it is only by substituting the new succession of Miss Murray for the original succession of the seventh duke that the appellants can succeed. It is not necessary to examine once again the numerous cases decided upon section 15 before *Lord Wolverton* v. *Attorney-General*, nor to repeat at length here the reasons given by Lord Herschell for his opinion, but they are to my mind conclusive that *In re Cooper and Allen to Harlech* was wrongly decided. Therefore on this, which was the point principally discussed in argument, I am of opinion that the decision of Ridley, J., is right.

Next with regard to the effect of the disentailing deed. Here too I agree with Ridley, J. I think the point is concluded by authority. *Lord Braybrooke* v. *Attorney-General*, 9 W. R. 601, 9 H. L. C. 150, and the other cases cited in the same volume, and *Lord Lilford* v. *Attorney-General*, 15 W. R. 595, 2 L. R. H. L. 63, seem to me to establish that the effect of such a deed and the resettlement which followed was not such as to absolve the seventh duke from the obligation of paying succession duty. "I consider it my duty," says Lord Campbell, "to remind your lordships of the extreme inconvenience which may arise from departing from the broad rule laid down by the Court of Exchequer, that a tenant in tail in remainder cannot vary the succession duty to which he will be liable by barring the entail and resettling the estate": *Lord Braybrooke* v. *Attorney-General*. In that case, on disentailment by tenant in tail in remainder after a life estate in his father, and a resettlement by father and son to such uses as they should appoint, an appointment was made by them to the father for life, remainder to the son for life, remainder to his first and other sons in tail, and on the father's death it was held that the son took a succession under a disposition made by himself under section 12 of the Act. The disentailing deed did not annul the father's life estate. Therefore what the son had to dispose of was a succession liable to duty. The succession was not destroyed by the enlargement of the estate tail into a fee. Lord Campbell, and probably Lord Kingsdown, would have reached the same conclusion under section 15. In other words, the transaction involved an alienation of a succession. So here, if there had been no sale under the power to Lord James Murray, the seventh duke would have taken a succession under a disposition made by himself. The point, therefore, that the succession was wiped out by the disentailment is no longer open. I have dealt with the case without reference to the clause as to acceleration by the surrender or extinction of prior interests in section 15, which certainly does not assist the appellants.

With regard to the point that the duty should be calculated by reference to the life of the original successor, the seventh duke, and not that of the ultimate alienee, Miss Murray, we cannot decide in favour of the appellants without overruling *Solicitor-General* v. *Law Reversionary Interest Society*, decided more than thirty years ago, and continually acted upon since. This I am not prepared to do, even if I disagreed with it, which I do not. The appeal must be dismissed.

ROMER, L.J., read the following judgment: I agree with the judgment of the Master of the Rolls in this case, and only desire to add some observations on certain points.

In the present case a tenant for life and remainder-man conveyed land to such purposes as they should appoint, and then appointed the land to a person in fee. For the purposes we have to consider on this appeal, I think it is clear on the authorities that the case should be dealt with as if they had conveyed the land direct to that person in fee. That being so, the question arising in the present appeal may be stated as follows: A., tenant for life, and B., tenant in tail, alienate land to C. in fee by disentailing deed duly enrolled. C. then enters into possession, and dies in the lifetime of A., having devised the land to D., who thereupon enters into possession, and pays succession duty as succeeding C. Then A. dies, and the question is whether succession duty is then payable by D. as on A.'s death; and, if that question be answered in the affirmative, there is a subsidiary question as to how the duty is to be estimated.

The appellants say that no succession duty is payable. They contend, in the first place, that, even if B. had been tenant in fee, no duty would have been payable; and, as a second point, they contend that, even if duty would have been payable, had B. been tenant in fee, it is not payable, because B. was only tenant in tail.

With regard to the first point, the appellants rely on the fact that D. had to pay duty on C.'s death as his successor; and they urge that, having so succeeded to the land and paid duty, there was in fact no fresh succession by D. on A.'s death, and that D. could not be liable for more than one succession duty; and the appellants rely on the decision of Sir G. Jessel, M.R., in the case of *In re Cooper and Allen to Harlech*. But that decision, and the grounds on which it was based, have since been considered, and, as it appears to me, disapproved of by the House of Lords in the case of *Lord Wolverton* v. *Attorney-General*, and in particular were shown to be unsound by the reasoning of Lord Herschell in his speech in that case. That reasoning appears to me convincing; but, inasmuch as the appellants challenge it, I desire to add a few remarks, even at the risk of repeating part of what Lord Herschell in the last-mentioned case, and the Master of the Rolls in the present case, have said.

In the first place, if I consider the position of C. immediately before he died, it appears to me clear that in strict accordance with the express provision of the second part of section 15 of the Act (16 & 17 Vict. c. 51), the succession of B. had become vested in C. by alienation, and that the duty in respect of that succession thereupon became payable at the same time and rate as the same would have been payable if no alienation had been made; and it is further clear from the section that the alienation of A.'s life estate to C., and the merger consequent thereon, did not operate to prevent the duty being payable. See also section 20 of the Act, which provides that the duty imposed by the Act shall be paid at the time when the successor "or any person in his right" shall become entitled in possession to his succession. The words "in his right" would include purchasers and other derivative owners whose liability to the payment of duty is regulated by section 15. It also follows from the provisions of section 42 of the Act that, inasmuch as C. claimed "in right" of B., the duty became a first charge on the land. That being so, how has that charge been got rid of? As Lord Herschell pointed out, there is nothing whatever in the Act from which it can be inferred that, by any disposition on C.'s part of the land, he could free the land from the charge. He may, of course, dispose of the land so as to create further successions, in respect of which further duty may become payable, but that will not in any way interfere with the duty already charged on the land, subject only to the provision made by section 12 of

the Act in favour of C., if he himself became a successor by virtue of his own disposition. The arguments by which the appellants seek to escape from this result in the present case are founded on a misconception of the true position of D. He has not been required to pay duty twice for one succession. There are two distinct successions and two distinct duties. One duty became payable by reason of C.'s death in A.'s lifetime, when D. succeeded C. by virtue of C.'s disposition, and in that case duty became payable by D., taking from C. as his predecessor. How the amount of that duty should have been estimated, and whether or not by reference to the suggestion that D. only then succeeded as it were during the rest of A.'s lifetime, we are not now concerned with, though I am by no means suggesting that the Crown was wrong in estimating that duty in the way it did. The next succession occurred by reason, not of C.'s death, but of A.'s, and then the duty already charged on the land in C.'s hands became payable under section 15 of the Act, and that duty is assessed without in any way being concerned with C. as a predecessor. In the same way two distinct successions would have occurred, and two distinct duties would have been payable if C. had died after A. On A.'s death in that case C. would have paid duty as successor; and then, if C. had died, D. would have had to pay duty as successor of C. The true position of affairs is somewhat obscured by reason of the merger of A.'s estate and B.'s estate, because they were both aliened to C. The true way to regard the case (especially having regard to the provisions as to merger in section 15) is to consider how matters would have stood if there had been no merger. C. obtained possession of the land, not because he had acquired B.'s estate, but because he had acquired A.'s estate. On C.'s death in A.'s lifetime, D., claiming through C. as owner of A.'s life estate, took possession, and had to pay duty. B.'s estate in remainder expectant on A.'s death had nothing to do with that possession or duty. But, inasmuch as the remainder had been aliened to C., and D. had become owner of that remainder by reason of C.'s devise to him, when he succeeded on A.'s death, he had to pay duty; for it is clear that, if the owner of a remainder charged with duty devises it, the devisee only acquires that remainder subject to the duty. The general question may be further illustrated by considering how matters would have stood if A.'s estate and B.'s estate had been acquired by D. at different times. For example, if C. had only acquired A.'s estate, and then had died in A.'s lifetime, having devised that estate to D., succession duty would have been payable by D. In that case B.'s estate in remainder would have clearly remained liable to its duty on A.'s death, and, if B. had, after C.'s death and before A.'s death, aliened the remainder to D., duty would have been payable by D. as alienee on A.'s death. But it is unnecessary to multiply cases bearing on the point now before me. All I need say is that I am satisfied with regard to the first point taken on behalf of the appellants that, if B.'s estate had been a remainder in fee, duty would have been payable on A.'s death.

The next point then arises, whether the duty ceased to be payable, because B.'s estate was one in tail, and was barred by the disentailing deed. The appellants contend that the effect of that deed was to destroy B.'s estate in tail, and to create an entirely new estate in C., which was not liable to the duty to which the estate tail was liable. This contention appears to me unsound, and is really disposed of by authority. Since the Fines and Recoveries Act, especially having regard to section 15 of that Act, which expressly provides that a tenant in tail shall have full power to dispose of the entailed land for an estate in fee simple absolute, it appears to me that it cannot properly be said that a tenant in tail alienating by disentailing deed under the Act thereby destroys for the purposes of succession duty the interest he possessed in the estate. What he did, by disentailing by exercise of the powers vested in him, was to render that estate perpetual, and the effect of such a deed may be quite different from that caused by a fine being levied or a common recovery suffered prior to the Act. It was on this ground that the case of *Lord Lilford* v. *Attorney-General* was decided in the House of Lords. In that case Lord Chelmsford said, after referring to section 15 of the Fines and Recoveries Act: "The disentailing deed did not operate to destroy the interest of which he was the successor, but enabled him, by the exercise of the power which that interest gave him, to render it perpetual"; and Lord Cranworth dealt with the point as follows: "The power of barring the entail, and so becoming competent to dispose of the property by will, was incident to the estate tail which Lord Lilford took . . . and therefore, when he executed the disentailing deed . . . he may be treated as having, in the language of the twenty-first clause, been competent to dispose by will of a continuing interest in the property. He may be treated, for the purpose of succession duty, as if he had been a devisee of the fee simple." Lord Colonsay also addressed the House to the same effect: see also the observations of Lord Campbell, L.C., and of Lord Kingsdown in *Lord Braybrooke* v. *Attorney-General*. The effect of the statement by Lord Campbell in that case that "the tenant in tail in remainder, when he bars the entail, may, if he pleases, alienate the estate, and no succession duty will be payable by him," has, I think, been misunderstood by the appellants' counsel. I think that all Lord Campbell meant was that, as between the tenant in tail and the alienee, the latter would have to pay the duty. A tenant in tail may of course by disentailing deed, in the same way as he could have done if he had been a tenant in fee, resettle land so as to cause a new succession to arise under that settlement, and so that the persons claiming under that settlement could not be said to be alienees under an alienation within the meaning of the word "alienation" as used in section 15 of the Succession Duty Act. But it appears to me clear that, if a tenant in tail by disentailing deed simply assures the fee absolutely to a person, that person takes under an alienation within the meaning of the section.

The only case which at first appeared to me to occasion difficulty was the *Attorney-General* v. *Cecil*, 18 W. R. 949, L. R. 5 Ex. 263; a case much relied on by the counsel for the appellants. But having examined that case carefully, I come to the conclusion that it does not really assist the appellants in the present case, nor occasion any difficulty, at any rate on the ground on which it appears to me to have been decided. I think that case was decided on the ground that there was a resettlement by Lord Cranbourne, the tenant in tail, under which Lord Eustace Cecil took an interest, and such an interest that he could not be said to be entitled to it as an alienee under an alienation by Lord Cranbourne within the meaning of section 15 of the Succession Duty Act. This appears to me clear, when the judgments of the barons who decided it are considered. Kelly, C.B., said: "A new succession was conferred on Lord Eustace Cecil. The case is exactly the same as if, on the purchase of a property . . . the purchaser had created a term out of the estate so created by him. Being thus excluded from the operation of the 15th

section, the case is left to the operation of the second section; it is a succession in which Lord Cranbourne is the predecessor, and the Crown is entitled to duty on that footing"; and Martin, B., observed, referring to section 15: "But it appears to me that the clause relied on has no application to the present case; it refers not to the creation of an interest by way of settlement, but to an alienation in the ordinary sense, as if, for instance, the late Lord Cranbourne had sold the whole of his interest to some third person before it came into possession"; and, to make his view even more clear, he added: "Whether, inasmuch as Lord Cranbourne, if he had survived without making this appointment, must have paid duty on the whole property, a double duty is not payable, first on the whole interest out of which this term is carved, and then upon the charge itself, is a matter on which I give no opinion." Channell, B., said: "I think . . . the Attorney-General is right in saying that a new succession has been created, which prevents the case from falling within the second branch of the 15th section"; and lastly, Cleasby, B., ended his judgment as follows: "I think the Crown is entitled to judgment: first, I am not satisfied that this is a case where the succession of Lord Cranbourne has become vested in any other person; and, secondly, if it has, it is by a title which creates a new succession." I think this view of the case was also that taken by the House of Lords in *Lord Wolverton* v. *Attorney-General*. It appears to me, therefore, that the Crown is right in contending that duty was payable in the present case.

The only remaining point is as to the amount of duty; whether the amount is calculated upon the enjoyment of the property which the person actually taking is expected to have. I think it is. The precise point was decided in *Solicitor-General* v. *Law Reversionary Interest Society*, and that case was, in my opinion, rightly decided for the cogent reasons given by Cleasby, B., in delivering the judgment of the court, and those reasons I need not repeat. It follows that in my judgment the appeal must be dismissed.

MATHEW, L.J., read the following judgment: I agree in the comments made by the Master of the Rolls and Romer, L.J., upon the authorities cited in the course of the argument. I propose to state briefly the grounds upon which I am satisfied that this appeal should be dismissed.

Under the deed of 1817 and the Act of 1853 succession duty became payable upon the death of the sixth Duke of Northumberland in respect of the estates, the subject of the deed. Under section 42 the duty was a first charge upon the property in respect of which it was assessed. Under the disentailing deed of 1868 the duty remained payable, and would have been due to the Crown upon the succession of the seventh Duke of Northumberland if no change had been made meanwhile in the disposition of the property. After the deed of 1868 the sixth and seventh Dukes of Northumberland, as respectively tenant for life and tenant in fee of the estates, in effect conveyed the lands in respect of which the duty has been assessed to Lord James Murray in fee. Under section 15 the duty then charged upon the lands became payable at the same time and at the same rate as if no such alienation had taken place—namely, upon the death of the sixth duke. Lord James Murray died in the lifetime of the sixth duke, and before the duty had become payable; and his estate passed to his daughter, who paid succession duty on the value of her interest. Upon the death of the sixth duke the succession duty charged upon the estate was claimed by the Crown, but payment was refused, and these proceedings were taken to make the defendants accountable.

The grounds upon which it was contended that the defendants were not liable were submitted in an elaborate and lengthy argument, in which the learned counsel for the defendants struggled in vain to escape from the clear language of section 15.

It was, as I understood, admitted that, if Lord James Murray had survived the sixth duke, the duty would have been payable. But it was said that his death in the lifetime of the tenant for life made all the difference. The result, it was contended, was that only one succession duty, namely, that paid by the daughter, was claimable. But the answer seemed clear that two duties were due, because there had been two successions: (1) the duty payable upon the succession of the seventh duke, and (2) that payable upon the succession of the daughter.

It was further contended for the appellants that the estates comprised in the disentailing deed were by that instrument relieved of the succession duty previously charged upon them. The deed, it was said, created a new estate, and swept the charge away. No authority was referred to in support of this argument. The previous decisions pointed to a different conclusion. The old fine and recovery were alleged to have created a new estate, and the disentailing deed, it was said, must be taken to have had a similar operation. But the former method of disentailing was only a clumsy mode of expanding the estate tail into an estate in fee. It had in reality no greater effect than the later method of accomplishing the same result. It might as well be argued that the deed would have relieved the estates of any mortgages upon them. It seems to me that nothing has occurred to discharge the duty now claimed, and therefore the Crown is entitled to our judgment.

I agree that the amount of the duty must be calculated in the manner pointed out by the Master of the Rolls.

Appeal dismissed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for defendants, *Bell, Steward, May, & How.*

High Court of Justice.

Chan. Div. }
Farwell, J. } April 13.

In re REPINGTON.
WODEHOUSE *v.* SCOBELL. (*a.*)

Inland Revenue—Legacy duty—Incidence.

The assignment of a specified portion of a mortgage debt belonging to the residuary personal estate of a testator, and upon which estate legacy duty is payable, does not free such portion of its proportionate liability for legacy duty. In such a case the legacy duty is not an incumbrance covered by the assignor's covenant for further assurance.

Summons.

A person entitled in reversion to part of the residuary personal estate of a testator assigned his interest in a certain part of a mortgage debt that formed portion of the residuary estate, to the trustees of his marriage settlement, which contained the usual covenant for further assurance.

Thereafter the reversioner became absolutely entitled to his share of the residuary personal estate subject to the payment of legacy duty.

(*a.*) Reported by H. STEPHEN, Esq., Barrister-at-Law.

The summons was to determine the question whether the trustees of the marriage settlement were entitled to the full amount of the portion of the mortgage debt assigned to them, or whether that portion should bear a rateable proportion of the legacy duty payable on the whole residuary estate.

Bryan Farrer, for the trustees of will.

McSwinney, for the trustees of the settlement, contended that the effect of the covenant for further assurance was to cast the payment of the duty upon the remainder of the residuary estate; it was the intention of the settlor that the trustees thereunder should have a fund absolutely clear of all duties.

He referred to *In re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 461, 41 W. R. Dig. 90, 143, 62 L. J. 996, 69 L. T. 45.

M. Romer, for the assignor.—Legacy duty is not an incumbrance affected by a covenant for further assurance; the settled fund was chargeable with a rateable proportion of the duty.

He referred to *Bliss* v. *Putnam*, 7 Beav. 40; *In re Shaw, Tucket* v. *Shaw*, 42 W. R. 315, [1895] 1 Ch. 343, 64 L. J. Ch. 283, 71 L. T. 873.

FARWELL, J.—The legacy duty must be borne by the settled portion of the mortgage debt rateably with the remainder of the residuary estate. The settlor assigned a specified portion of a mortgage debt, not a specified sum of money; in other words, two-thirds of the sum to which the settlor was entitled in reversion had been assigned by him. Had the assignment been of the whole of the settlor's interest in the reversion, the duty must have been borne by the assignees; the covenant for further assurance does not help the trustees of the marriage settlement. The case is distinguishable from *In re Jones*, where a mortgage was an incumbrance. When a vendor assigns a reversionary interest, upon which legacy duty is payable, both vendor and vendee know that legacy duty must be paid by the assignee. The portion of the mortgage debt assigned must bear its duty with the remainder of the debt.

Solicitors, *Ellis & Ellis*; *Nicholl, Manisty, & Co.*

Chan. Div. } Joyce, J. } Feb. 3, 4, 5, 8.

COLWELL *v.* ST. PANCRAS BOROUGH COUNCIL. (*a.*)

Nuisance — Vibration — Electric generating station — Statutory powers of borough council — Provisional order under Electric Lighting Act — Injunction — "Temporary" nuisance.

The defendant council, under the powers of a provisional order, erected an electric generating station in proximity to houses of which the plaintiffs were lessees or occupiers. The order provided that nothing therein should exonerate the undertakers from an action for nuisance in the event of any being occasioned by them. In an action for an injunction it was admitted by the defendants that the vibration of their machinery created an actionable nuisance unless such nuisance was excusable as being of a merely temporary nature, but they alleged that after experiments and alterations of the machinery the nuisance would abate, and that as the machinery was not yet completed in its final form, but only in course of construction, an action would not lie against them.

Held, that the nuisance was not merely temporary within the principle of Harrison *v.* Southwark and Vauxhall Water Co., [1891] 2 *Ch.* 409, 39 *W. R Dig.* 140, *and that the defendants were not entitled to carry out their works unless they could do so without creating a nuisance, and that an injunction must go.*

One of the plaintiffs having sub-let for all his term less the last three days,

Held, entitled to an injunction in respect of damage to his reversion.

Witness action.

This was an action for an injunction to restrain the defendant council from causing nuisance to the plaintiffs and damaging the value of their houses hereinafter mentioned by vibration and noise from a generating station of electricity erected by the council, and from interfering with the plaintiffs' use and enjoyment of such houses.

The facts were shortly as follows: Five of the plaintiffs were the lessees and occupiers of houses in Great College-street, in the parish of St. Pancras. The sixth plaintiff, one Stone, was the lessee of a like house who had sub-let for all the residue of his term less three days. All the houses were three storeys high and many years old. The ground-floors were used as shops, the upper parts were residential. The defendant council had acquired the freehold of all the houses subject to the leases thereof.

Some 50 to 100 feet from the plaintiffs' houses the council, acting under a provisional order under the Electric Lighting Act, 1882, had, in 1894, built an electric generating station, and from that time onwards had supplied electricity to the neighbourhood. In 1902 the council proposed to erect new works and increase their plant and machinery. The plaintiffs objected to this on the ground that it would increase the nuisance and annoyance from the vibration of the machinery from which they already suffered, but of which they had not previously complained. Notwithstanding the objection, the council erected their new plant and machinery, which included two engines of 750 h.p. each, and which they began using in May, 1903. There was evidence that before 1902 the plaintiffs had suffered, and that since the new works their annoyance from vibration and noise had greatly increased and was now an intolerable nuisance, destructive of comfort and injurious to health. The council's evidence went to show that at present the new engines were not properly balanced and did not run smoothly in consequence, but that the defects could be remedied in a reasonable time, though possibly several months would elapse. Further, they contended that until the machinery was perfected the works were not completely constructed, and that until then no action would lie.

The provisional order in question provided that nothing therein should exonerate the council (in effect) from proceedings for nuisance, if nuisance were caused.

Hughes, K.C., and *Beaumont*, for the plaintiff.

Bousfield, K.C., Younger, K.C., and *A. B. Marten*, for the council.—All that has been done has been done in discharge of a statutory duty. The nuisance is merely temporary and will soon be remedied. The engines and plant are the best type known, and when they are in thorough working order the nuisance will abate. People who live in a town or an industrial centre must submit to some inconvenience in the interests of the public at large.

They cited *Sutton* v. *Clarke*, 6 Taunt. 29; *St. Helen's Smelting Co.* v. *Tipping*, 13 W. R. 1083, 11 H. L. C. 642; and in support of a suspension of any injunction. *Shelfer* v. *City of London Electric Lighting Co.*, 43 W. R. 238, [1895] 2 Ch. 388.

(*a.*) Reported by ALAN C. NESBITT, Esq., Barrister-at-Law.

Hughes, K.C., in reply.

Cur. adv. vult.

Feb. 8.—JOYCE, J.—This action was begun on the 30th of November, 1903, and it was virtually admitted before me—it could hardly have been denied—that by reason of the vibration caused by the defendants' works at various times between the months of May and December the plaintiffs had a right to complain of the annoyance to which they had been subjected unless it was merely a temporary annoyance. That, as I say, was practically admitted, but at all events, if necessary I decide on the facts that it is so. In other words, it appears to me that by the vibration caused by the defendants' works and machinery so much annoyance has been occasioned to the plaintiffs as to justify the action, unless the defendants can show that they are excused by reason of its being, as they allege, a temporary nuisance or within the principles laid down in the case of *Harrison* v. *Southwark and Vauxhall Water Co.* I am of opinion that the amount of the annoyance caused has occasioned material interference with the comfort of the plaintiffs. As Jessel, M.R., said in *Broder* v. *Saillard*, 24 W. R. 1011, 2 Ch. D. 692, 701: "The law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house; if his neighbour makes such a noise"—and of course if he causes such vibration—"as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance or disturbance, the occupier of the dwelling-house is entitled to be protected from it." I am of opinion that there has been such annoyance in this case. But it was suggested—rather mildly, I think—that the defendants were entitled to be excused by reason of the passage I have referred to in the judgment in the case of *Harrison* v. *Southwark, &c., Co.* Were the annoyances occasioned within the principle of that statement of the law? In my opinion they were not. The principle is stated and worked out, and no doubt correctly, by Bramwell, B., in *Bamford* v. *Turnley*, 3 B. & S. 83, and the same judgment deals satisfactorily to my mind with the question whether a defendant is entitled to be excused on the mere ground that the annoyance which he occasions is temporary. In this particular case the annoyance caused has not been a mere temporary and occasional personal inconvenience, but in my opinion is such as is calculated (I do not say it has done that, but it is calculated) to work material injury to the property of the plaintiffs, and beyond all question, if that be a ground of action (which I do not think it is) most seriously to depreciate the value of the plaintiffs' property. Now, I am not aware that it has ever been suggested that nuisance by vibration, actual physical shaking of the plaintiffs' house or property, is within the principle referred to above and dealt with by Bramwell, B. In this particular case there is a clause in the order that authorizes the works which says "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being occasioned by them." What it really comes to is this—that notwithstanding that order it is suggested that for months, it may be for years, after the first erection or construction of the works the defendants are entitled to make the neighbourhood uninhabitable or to cause serious annoyance to the neighbours, until the time shall have arrived when they have contrived or managed in some way or other to carry on their works without creating a nuisance. What is to happen in such a case or in this case, if they never succeed in doing that, no one has told me.

However, that proposition or suggestion was not laid down very positively, and it is to me entirely novel and strange, and one to which I am quite unable to accede. I would rather say that after the construction of their works, if not before, the owners of those works, particularly under an order such as this, are not entitled to carry them on at all unless or until they can do so without occasioning a nuisance to the neighbouring owners of property.

As to the old machinery, it appears it is still used occasionally during the night. At all events, it has not been running long enough for the defendants to acquire a right as against any of these plaintiffs to work that machinery so as to occasion a nuisance, although it is quite clear they would not have been able to get an injunction on an interlocutory application; but at the hearing delay is immaterial, unless it be long enough—twenty years, or something of that kind—to create a right in the defendants. Under these circumstances there must be an injunction, not distinguishing in any way between the old machinery and the new. The injunction will be to restrain the defendants from carrying on these works in such a way as to cause a nuisance or injury to the plaintiffs—that is, during the continuance of their leases.

As regards the plaintiff Stone, I hold that there is a nuisance calculated to injure the reversion. It is calculated to destroy the houses. I grant an injunction in Stone's case in respect of vibration as to his reversion.

Younger, K.C.—I ask for a suspension of the injunction.

JOYCE, J.—You may have six months.

Solicitors, *Beaumont & Son; Cunliffes & Davenport.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) March 2.

REX v. HIS HONOUR JUDGE WHITEHORNE AND HUMPHREYS.
Ex parte ROGERS. (a.)

County court—Equitable jurisdiction—Agreement to purchase house property worth more than £500 subject to a mortgage—Price for equity of redemption agreed at £75—Specific performance—Jurisdiction—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *ss.* 67, 126.

Held, that the county court had jurisdiction under section 67, *sub-section* 4, *of the County Courts Act*, 1888, *to hear an action brought on a contract for the sale of an equity of redemption agreed at the value of* £75 *although the value of the property that was the subject of the sale would, but for the charge upon it, have exceeded* £500.

In this case a rule in the nature of a *mandamus* had been granted calling upon his Honour Judge Whitehorne, the judge of the Birmingham County Court, to show cause why he should not hear and determine an action of *Rogers* v. *Humphreys*, in which the learned judge had decided in the circumstances he had no jurisdiction to entertain.

The action was brought under the equity jurisdiction of the county court for specific performance of a contract to purchase certain house property from a trustee of a creditors' deed. The consideration for the purchase was the payment of a sum of £75 to the creditors. The property was heavily mortgaged, and

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the purchaser was to buy it subject to the charge. Evidence was given that the property, if it had not been mortgaged, would have been worth from £1,500 to £1,700.

The County Courts Act, 1888, by section 67, gives the county court jurisdiction in such a case where the value of the property does not exceed £500.

In the county court the point was taken by the defendant that what was proposed to be bought was property of the estimated value of more than £500, subject to a charge, and therefore property of greater value than the limit imposed by the statute.

For the plaintiff the contrary was argued.

The county court judge was of opinion that the defendant's contention was the correct one, and, accordingly, that he had no jurisdiction, and he declined to hear the action.

The plaintiff thereupon obtained this rule, and the question was argued whether when property exceeding £500 in value is so charged that the value of the equity of redemption is under £500, a contract for the sale of the equity of redemption is within the jurisdiction of the county court.

H. Sutton, against the rule.—The purchase-money must be taken in a technical sense, and not at the amount fixed or agreed upon for the sale of the equity of redemption. Here the sale passed the ownership in property, subject, no doubt, to a charge of greater value than £500. And section 67 (4) of the Act of 1888 expressly limits the power of the county court to cases where the value of the property "shall not exceed the sum of £500." By section 126 of the same Act power is given to the High Court or any judge thereof to order the removal into the High Court, by *certiorari* or otherwise, of any action commenced in the county court, if the High Court or a judge should deem it desirable. Provision, therefore, is made to have such a case as this commenced in the county court tried in the High Court. Moreover, the *ad valorem* stamp on the conveyance would be payable, not on £75, but on the estimated capital value—that is, on a sum greater than £500. The county court judge was therefore right in refusing to hear and determine the action, and the rule should be discharged.

H. A. McCardie, in support of the rule.—The rule should be made absolute, for all that is agreed to be purchased here is the equity of redemption. The price to be paid for that is less than £500. The matter therefore comes within the jurisdiction given to county courts by section 67. If any difficulty arises the remedy is by *certiorari* under section 126.

Lord ALVERSTONE, L.C.J.—I think the learned county court judge in raising this point calls attention to what I will not call a defect, because it may very likely be right as to jurisdiction, but to a point which may require further consideration—namely, the question whether or not it was intended or is desirable that the county court should have jurisdiction in a case where the subject of the contract, the purchase-money of an equity of redemption in this case, is below £500, but the value of the property which is actually being transferred subject to the charge may be very much larger. In this question of difficulty the only safe rule, in my opinion, to follow is to give the best construction we can to the language of the section, and not to put an artificial construction upon the section unless we see the consequences are such that we are driven to the conclusion that the Legislature has used the words in a limited sense. As has been pointed out, the section is a general section relating to all classes of property, and, of course, would include chattels as well as real property; therefore it is not specially directed to the cases in which the purchase-money of land only would be the subject of the consideration. The language is "For specific performance of, or for the performing, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property where in the case of a sale or purchase the purchase-money, or in the case of a lease the value of the property, shall not exceed the sum of £500." It seems to me that as the section contemplates all kinds of things being sold, we must assume *primâ facie* that the words "purchase-money" mean the purchase-money for what was the subject of the purchase and sale, and to a certain extent that view is justified by the following words, "or in the case of a lease, the value of the property"—being a special exception where they could not get, so to speak, the standard of purchase-money. Under these circumstances it seems, though it may be but indirectly, the court has been given *primâ facie* and subject to the power of removal, a jurisdiction in cases in which the questions will really affect property to a much larger sum than £500. I do not think that it would be safe to put an artificial construction on the words "purchase-money" but we ought to look at what was the purchase-money, the subject of the contract sought to be performed or cancelled. In these circumstances I think the facts of this case show that what was being sold here was the equity of redemption for £75, and therefore I think we must hold that the learned judge had *primâ facie* jurisdiction; I think, moreover, it is not material, as has been pointed out during the argument, that there are powers of removal if it should turn out that the interest in much more valuable property is at stake. I quite follow the line of argument which impressed the county court judge, which Mr. Sutton very clearly brought before us; that for a long period of years, when property is sold subject to a charge, for the purposes of stamp duty the consideration and purchase-money is to be taken to be the total amount including the charge. I do not think the Stamp Acts can be said to be *in pari materia;* but whether they be so or not, if it was intended to draw such a distinction here, I think it must be done in clearer language than is used in this section, and I feel constrained to give the natural meaning to the words "in the case of a sale or purchase the purchase-money, or in the case of a lease, the value of the property, shall not exceed the sum of £500," and to say that the county court judge had jurisdiction. I quite understand his feeling of doubt upon the matter, and I think we ought to give him assistance by saying that in such a case we think the jurisdiction exists, and ought to be exercised unless the case has been removed. If it is thought the result of our judgment is to give the county courts jurisdiction which they ought not to have, it must be altered by amending the Act so as to make this matter clearer than the language of this present section makes it.

WILLS, J.—I am of the same opinion. There is nothing to guide us as to what the meaning of the Legislature is except the words they have used in the specific sub-section, because to my mind the Stamp Acts do not throw any light upon it. The Stamp Acts are Revenue Acts, and they are always, or at any rate generally, framed with the view of getting as much out of the subject as can possibly be got, and, therefore, it is very natural that they should use language which will cover the amount upon which duty is to be charged—namely, the whole value of property, including the sum by which its real value is diminished, which is the charge upon it. Therefore I do not feel that the Stamp Acts give me any assistance whatever. Then we are driven back to give the words their natural meaning. "Property" is a very

large word. Certainly it would include the equity of redemption, and I think if anybody were asked with respect to this transaction what property was being sold, his answer would be "the equity of redemption"—that is made even more clear, I think, by the use of the words "the purchase-money." That means the purchase-money for the property, and the reference to the purchase-money, I think, makes the sum which has been agreed to be given between the parties the standard of what the property is worth—the property which is the subject of sale; and in that way throws a reflected light upon the interpretation which ought to be given to "property." I think, therefore, this really was a contract for the sale of the equity of redemption for £75, and therefore that it is within the jurisdiction of the county court judge.

KENNEDY, J.—I agree. It seems to me very much as my brother Wills has put it, that the natural and proper rule in this case is, as far as you can, to follow the natural and fair meaning of the words in their position as used in the sentence, and if anybody had said in this case "What money did you purchase the equity of redemption for?" he would have said "£75"; and it is enacted that if the purchase-money does not exceed a certain limit that the county court judge has jurisdiction. In this case the limit apparently was not reached.

Rule made absolute against the defendants with costs.

Solicitors, *Solicitor to the Treasury; Field, Roscoe, & Co.*, for *Sherwin & Rodgers*, Birmingham.

K. B. Div. (Channell, J.) Feb. 25.

ROBINSON *v.* BURNELL'S VIENNA BAKERY CO. AND ANOTHER. (*a.*)

Company—Debentures—Floating security—Execution—Agreement by company with sheriff to pay off judgment debt by instalments to avoid sale—Right to money.

Under a writ of fi. fa. *the goods of a limited company were seized in execution of a judgment debt. In order to avoid a sale the company agreed with the sheriff, with the assent of the judgment creditor, that in consideration of his not selling the goods they would pay the sheriff out of the daily takings £3 5s. a day—£3 to go towards the paying off of the debt and 5s. for sheriff's charges. A receiver was subsequently appointed in a debenture-holders' action, and he claimed the sum of £75, the net amount in the hands of the sheriff.*

Held, that the judgment creditor was entitled to retain the moneys.

Robson *v.* Smith, 43 *W. R.* 632, [1895] 2 *Ch.* 118, *discussed.*

In this case an order was made by Lawrance, J., at chambers upon interpleader proceedings directing the question of law to be set down for hearing, and the point argued was whether under the circumstances the claim laid by debenture-holders to certain payments made to an execution creditor by the company was one that could be enforced.

The company was registered as a limited company on the 23rd of February, 1903, the capital being 3,500 shares of £1 each.

On the 27th of February, four days later, five debentures were issued for £100 each. The company got into difficulties, and Mr. Robinson obtained a judgment against the company. The money was not paid, and on the 24th of October the sheriff went into possession under a writ of *fi. fa.*

The company, in order to avoid a sale of the stock, agreed with the sheriff, with the assent of the creditor, that in consideration of his not selling the goods, the company would pay him £3 5s. a day from the daily takings, of which 5s. was for the sheriff's charges.

On the 21st of November an order was made by Farwell, J., appointing a Mr. Hillman, the claimant in these interpleader proceedings, receiver and manager on behalf of the debenture-holders of the undertaking and property of the company in a debenture-holders' action.

On the 24th of November the receiver claimed the sum of £75, the net amount in the hands of the sheriff under the agreement with the company. An interpleader summons was taken out, and upon the hearing of the summons the master decided against the receiver's claim. Upon appeal to Lawrance, J., at chambers the learned judge directed the question of law to be set down for hearing.

Colam, for the claimant.—The receiver and manager for the debenture-holders is entitled to the money that has been paid to the sheriff and can recover it because it was not paid to him as a legal officer under an order of the court, but merely as agent for the execution creditor. Until the money was paid over to the execution creditor it was *in gremio legis* and was still in the debtor's possession: *Davey & Co.* v. *Williamson & Sons* (*Limited*), 46 W. R. 571, [1898] 2 Q. B. 195; *In re Opera* (*Limited*), 39 W. R. 398, [1891] 3 Ch. 260; and *Taunton* v. *Sheriff of Warwickshire*, 43 W. R. 35, [1895] 2 Ch. 319.

Muir Mackenzie, for the execution creditor.—Money paid to avoid a sale is in the same position as money paid under a garnishee order, and becomes, when paid, the absolute property of the execution creditor. This is not a case of goods in charge of the sheriff, which would be no doubt subject to the rights of the debenture-holders. Debentures give the holders thereof a floating charge on all the assets of the company, subject to a licence to use the said assets in the ordinary course of business. In *Robson* v. *Smith*, 43 W. R. 632, [1895] 2 Ch. 118, it was held that money, even though paid under compulsion in the ordinary course of business, cannot be recovered, and here there was an express agreement on good consideration under which the money now sought to be recovered was paid.

Stock v. *Holland*, 22 W. R. 661, L. R. 9 Ex. 147, and *Simultaneous Colour Printing Syndicate* v. *Fouweaker*, [1901] 1 K. B. 771, 49 W. R. Dig. 25, were also referred to.

Colam replied.

CHANNELL, J.—No doubt this case presents some difficulty, and as none of the authorities precisely cover it, I have to form my own opinion, and the conclusion I have come to is that the claim of the execution creditor must prevail. My reasons for coming to that conclusion are because I think it must be taken that these daily payments of £3 out of the takings of the business are payments to the judgment creditor on account of his debt made to him in consideration of his not pressing on his execution. Mr. Colam said that a compulsory payment such as this was not a payment in the ordinary course of business. The company were, however, in no way bound to make this agreement, nor was the judgment creditor compelled to forego his right to take the goods in the sense that the money was either paid or received under compulsion at all. It was apparently

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

paid day by day as part payment of the company's debt, and I must take it that the sheriff entered into that arrangement with the assent of the execution creditor. The object of that arrangement, as it seems to me, was to benefit all parties concerned by providing a way by which the business could be carried on, and it seems to me that under that agreement the money paid was paid as part payment of a debt of the company. *Robson* v. *Smith* is an authority for saying that money so paid cannot be recovered. It is quite true that the debenture-holders have got a floating security over the whole of the goods of the company, but this being an agreement made by the debtor company whilst the debtor company was in fact carrying on business, and the purpose of the agreement being, as I have said, to enable it to carry on its business, the licence given by the debenture-holders to the company to carry on their business in the ordinary way was not determined. That being so, my judgment must be for the execution creditor with costs.

Solicitor for the claimant, *A. H. Crickmay.*

Solicitors for the execution creditor, *Hatchett-Jones & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) Dec. 9, 10.

GARBUTT (*Appellant*) v. STANDING JOINT COMMITTEE, &c., OF DURHAM (*Respondents*). (*a.*)

Police — Pension — Superannuation of constables — "Approved service"—Police Act, 1890 (53 & 54 *Vict.* c. 45), *s.* 1.

By section 1 *of the Police Act,* 1890, *it is enacted that "every constable in a police force, if he has completed not less than twenty-five years' approved service . . . shall . . . be entitled without a medical certificate to retire and receive a pension for life."*

Held, that such "approved service" must be a continuous service, and that, in computing the twenty-five years, separate and broken periods of service cannot be added together.

Case stated by the justices for the county of Durham.

This was an application made to the said justices, at quarter sessions, on behalf of the appellant, a retired police constable, by way of appeal against the refusal of the Standing Joint Committee to admit his claim to a pension under the provisions of the Police Act, 1890.

On the hearing of the application the appellant relied on a certificate of approved service for upwards of twenty-five years, which was produced in evidence, and a copy of which formed part of the case.

The certificate was dated the 1st of July, 1903, and was headed as the return of service of the appellant "recommended for an ordinary pension." The details of the certificate showed that the appellant joined the force on the 7th of September, 1876, and resigned on the 30th of April, 1881, making four years 236 days; that he was reinstated police constable on the 27th of August, 1881, and was called on to resign on the 9th of February, 1889, making a further period of seven years and 167 days; and that on the 1st of April, 1889, he was reinstated as a constable, and he retired as "long and faithful service class, the 1st of March, 1897," this making a further period of thirteen years and sixty-one days. "Total approved service, twenty-five years ninety-nine days." Below this was the following: "I certify that the term of approved service entered above has been diligent and faithful service within the meaning of section 4 of the Police Act, 1890. (Signed) H. WEBSTER, Acting Chief Constable."

(Footnote).—"If the constable has been advanced in class, promoted or reduced, state the date when. If he had quitted the service and rejoined, state the dates."

Details so required were all filled in in the above certificate.

The respondents tendered evidence to the effect that the service of the appellant during the said period had not in fact been diligent and faithful service, and contended that the certificate related to the period of service and was not conclusive evidence, and that the acting chief constable could not certify as to character which appeared from the police records, and that the joint committee were entitled to exercise their discretion as to granting or withholding a pension on the ground of misconduct. The appellant contended that it was not open to the respondents to contradict the certificate, and that such evidence was therefore inadmissible.

On this point the justices agreed with the contention of the appellant and refused to receive evidence as to the character of the appellant.

The respondents further contended that upon the true construction of the Act it was necessary that the whole period of service of twenty-five years should be continuous in order to entitle the appellant to a pension in respect thereof.

The appellant contended that the period need not be continuous, and further contended that, even so, the certificate of approved service once given precluded the respondents from raising this point.

The justices considered that the Act required that the whole period should be continuous, and, inasmuch as the certificate showed on its face that there had been two breaks in the period of service, they considered that it was open to the respondents to raise this point, and they accordingly dismissed the application of the appellant.

The question for the opinion of the court was whether the justices were right in dismissing the application on the ground stated, and if they were not right, whether they were right in rejecting the evidence tendered on behalf of the respondents.

Pickersgill (*Simey* with him), for the appellant.—The service need not be a continuous service. The certificate given to the appellant is conclusive in the appellant's favour, and therefore he is entitled to a pension. Section 1 (*a*) provides that a constable who has completed twenty-five years' approved service shall be entitled to a pension for life. Section 4 (1) defines "approved service" as such service as may, after deductions in respect of sickness, misconduct, or neglect of duty, be certified under the order of the police authority. The certificate given to the appellant certifies that his "term of approved service" had been "diligent and faithful service within the meaning of section 4," and the respondents, therefore, have bound themselves to treat the appellant's service as "approved service." Section 5, sub-section 5, clearly shows that the service need not be continuous, as it refers to the time elapsing between retirement and commencement of service again as not to be reckoned as approved service in respect of the provisions as to pension. All separate periods of service may be added together in computing the twenty-five years.

He referred also to section 30, sub-section 8, and *Walker* v. *Simpson*, [1903] A. C. 208, 51 W. R. Dig. 115.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Montague-Shearman, K.C. (*Meynell* with him), for the respondents.—There is nothing in the Act which says whether the service must be continuous or not, but various sections indicate that the Legislature must have intended that in order to be entitled to a pension for life the constable's service should be a continuous service. Section 5 shows that unless the suspension is recognized by the Act it shall not count as continuous service. Section 4, sub-section 5, and section 21 clearly show that the service must be continuous.

Lord ALVERSTONE, L.C.J.—This case is not free from difficulty, and I certainly think it is very desirable that the matter should be put beyond all question by some amending statute or by some regulation, if such can be made, which will produce that result. I am, however, of opinion that, upon the construction of the Act, the service referred to must be continuous service. In this case there is, as far as I can gather, no certificate of the "police authority," and no order of the "police authority" under section 4, sub-section 1, has been produced before us. The document before us is the certificate signed by the acting chief constable of the police under sub-section 2 of section 4, and it shows a service of twenty-five years and ninety-nine days made up of three periods, there being a break of four months in 1881, when the constable resigned on the 30th of April and was reinstated on the 27th of August. Then he was called upon to resign in February, 1899, and was reinstated in April of the same year. We must take it that either he was called upon to resign or that he did resign, therefore what we have to consider is whether "approved service" in this Act means continuous service or service that may be made up by several separate periods, and although I do not come to this conclusion without doubt, I think, looking at the Act, that there are certain clauses which show that it must have been meant to have been continuous service. Section 1 speaks of a constable completing not less than twenty-five years' "approved service." That of itself does not decide the case, but it rather points to the period being completed as a continuous period. Therefore we have got to see what light is thrown upon it by the other provisions. Section 4, sub-section 1, says that: "The service of a constable for the purposes of this Act shall be subject to such deductions in respect of sickness, misconduct, or neglect of duty as may be made therefrom in pursuance of the regulations of the force to which the constable belongs; and the expression 'approved service' shall for the purposes of this Act mean such services as may after such deductions as aforesaid (if any) be certified under the order of the police authority to have been diligent and faithful service." This rather supports Mr. Shearman's view, because it speaks of deductions in respect of sickness, misconduct, or neglect of duty which would refer to the period when the man was serving, but it is not conclusive, because it is quite possible to apply these words to the several periods of service, and to make a deduction for each period so that the total of the various periods will total twenty five years. We have thus an enactment which is not a conclusive one, but which I think favours the view of the service being continuous. If the learned counsel's argument on behalf of the appellant is correct, that all periods are to be added together, then why should sub-section 5 be added, which enacts, shortly, that where a constable with the knowledge of the police authority belongs to the army reserve, and is called out for training or for permanent service, he shall be entitled, on returning to the police force, to reckon any approved service which he was entitled to reckon at the commencement thereof. Yet one sees that in such a case it has to be provided for by express enactment that the man should be entitled to add together his separate periods of service. That seems to show that absence without leave shall not be considered as part of the approved service in the force. Then, in section 5, which is the section which deals with disablement and incapacity during service, we find a corresponding provision, which, again, I think, is absolutely unnecessary if Mr. Pickersgill's argument that all the separate periods of service may be added together. In the face of these two provisions I think it is a strong thing to say that if a man chooses to absent himself from the force, for however long a period or for whatever purposes he likes, he can claim that the twenty-five years service can be made up of separate and broken periods. Then section 21 refers to a man being retired without a pension and it says that: "If a constable, not having been dismissed, leaves a police force without a pension or gratuity, the police authority may, if it seems to them just, pay him the whole or part of the rateable deductions which have been made from his pay. Again, I think that section is not conclusive because it may be said that if a man does not claim any repayment of the deductions, he ought to be allowed when he goes on service at the latter period, to add the two, three, or four periods together. I agree that that section is not conclusive, but it does seem to me to support the view that the Legislature was dealing with continuous service, and was therefore providing for a man going out of the service before the time when he is in a position to claim a pension. For these reasons I think the decision of the justices was right and that this appeal should be dismissed.

LAWRANCE, J.—I am of the same opinion. It is impossible to say, reading these sections, that they are consistent with the argument that any number of separate periods of service may be added together for the purpose of procuring the pension. It is an instance among very numerous instances in Acts of Parliament where by the insertion of one word the framers of the Act might have made their meaning perfectly clear, whereas, in this instance, in order to see what the meaning of the Act is, it is necessary to look through a number of sections to see whether the service was intended to be a continuous service or not. If the framers of the Act have used the words "continuous service" there would have been no difficulty whatever.

KENNEDY, J.—I think it is strange, and also very unfortunate, that the Legislature in passing this Act has left to those who have to adjudicate upon it to infer that which is obviously a most important part of the scheme—namely, whether the right to pensions is dependent upon a continuous and uninterrupted service, or whether the service may be made up of various terms of service with breaks between them. It would have been very easy to have inserted in the Act, as my brother Lawrance has pointed out, the words "continuous service." I am not prepared to dissent from the judgment which has been pronounced by my Lord and by my brother Lawrance, but it is not absent from my mind that that decision certainly cannot tend to enhance the popularity of the police service which is of the highest importance to the community.

Appeal dismissed with leave to appeal.

Solicitors for appellant, *Bell, Brodrick, & Gray*, for *A. Geipel*, West Hartlepool.

Solicitors for respondents, *Maude & Tunnicliffe*, for *Simey, Son, & Iliff*, Sunderland.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) April 19.

WILSON v. TWAMLEY. (a.)

Landlord and tenant—Lease—Public-house—Covenant by lessee—Not to do or suffer to be done any act whereby licence may be lost—Offence against Licensing Acts by sub-lessee of assignee—Action against assignee.

A lease of a licensed public-house contained a covenant by the lessee on behalf of himself, his heirs, executors, administrators, and assigns, that he or they would not do or suffer to be done on the premises any act whereby the licence might be forfeited or the renewal withheld. The lessee assigned the lease, and the assignee sub-let the premises. The sub-lessee was convicted of an offence against the Licensing Acts, and in consequence thereof the licence was not renewed. In an action by the lessor against the assignee for breach of the covenant,

Held, that the assignee could not be said to have "suffered" an act done by his sub-lessee.

Appeal from the judgment of Kennedy, J., on further consideration after the trial of an action with a jury.

The action was brought to recover damages for breach of a covenant contained in a lease of a licensed public-house, in consequence of which the licence was lost.

On the 29th of August, 1892, the plaintiff's late husband granted a lease of a public-house known as the "Green Man and Still," in Cowcross-street, Smithfield, for the term of thirty-five years from the 29th of September, 1892, at a yearly rent of £80. By the terms of the lease the lessee covenanted on behalf of himself, his heirs, executors, administrators, and assigns, that he would use the premises as a public-house or beerhouse only, and that he would carry on or suffer on the premises or any part thereof no other trade, business, or manufacture without the previous consent in writing of the lessor, and would not do or permit to be done on the premises or any part thereof any act or thing which might be a nuisance to the lessor or adjoining occupiers, and particularly would not do or suffer to be done on the said premises or any part thereof any act whereby the licences necessary for using the premises as an inn, beerhouse, or public-house, with billiards, as then used, might be forfeited, endorsed, or the renewal withheld, and would at all times take proper legal steps and proceedings and endeavour to procure a renewal of the necessary licences for so using the same.

By a deed dated the 5th of December, 1892, the lessee, with the consent of the lessor, assigned his interest in the lease to the defendant.

On the death of the lessor in 1894 the freehold of the premises became vested in the plaintiff.

At some time prior to 1901 the defendant granted a sub-lease of the premises to one Kingston. The sub-lease contained a similar covenant with regard to the licence to that contained in the original lease.

On the 7th of December, 1901, Kingston was convicted of an offence under section 13 of the Licensing Act, 1872, with the result that the licence of the house was indorsed, and a renewal of it was subsequently refused by the licensing justices.

The plaintiff alleged that the loss of the licence constituted a serious injury to the reversion of the property, and that the act bringing about this result being done by the sub-tenant of the defendant, constituted a breach by the defendant of the covenant not to suffer any act to be done on the premises, whereby the licence might be forfeited or indorsed, or the renewal withheld.

At the trial the jury provisionally assessed the damages at £150.

On further consideration Kennedy, J., came to the conclusion that the defendant had not "suffered" the act to be done on the premises, and was therefore not liable. He accordingly directed judgment to be entered for the defendant.

The plaintiff appealed.

English Harrison, K.C., and *C. Herbert Smith*, for the plaintiff.—The learned judge treated the case as governed by *Bryant* v. *Hancock & Co.*, 46 W. R. 386, [1898] 1 Q. B. 716, [1899] A. C. 442, 48 W. R. Dig. 88. The decision of the Court of Appeal in that case turned on the word "wilfully," which occurred in the covenant there, but which does not occur in the covenant in this case. The stress laid on that word shows that, if it had been absent, the decision would have been otherwise.

Bray, K.C., and *Frank Russell*, for the defendant.—A lessee is not the servant or agent of his lessor; and the lessor cannot be said to have "suffered" an act done by the lessee: *Toleman* v. *Portbury*, 18 W. R. 579, L. R. 5 Q. B. 288.

COLLINS, M.R.—This is an action by the lessor of a public-house against an assignee of the lessee for breach of the following covenant on the part of the lessee: "And will use the said premises as a public-house or beerhouse only, and will carry on or suffer on the said premises or any part thereof no other trade, business, or manufacture during the said term without the previous consent in writing of the lessor, and will not do or permit to be done on the said premises or any part thereof any act or thing which may be a nuisance or annoyance to the lessor or adjoining occupiers . . . and particularly will not do or suffer to be done on the said premises or any part thereof any act whereby the licences necessary for using the said messuage and premises as an inn, beerhouse, or public-house, with billiards, as now used, may be forfeited or indorsed or the renewal withheld, and will at all times take proper legal steps and proceedings, and endeavour to procure a renewal of the necessary licences for so using the same." The defendant sub-let the premises, and during the sub-lessee's tenure of the premises an offence was committed against the licensing laws, in consequence of which a renewal of the licence was subsequently refused. Kennedy, J., held that the plaintiff failed to prove any breach of covenant, because, the defendant having sub-let the premises, there was no connection of agency between him and the sub-lessee by virtue of which the act of the sub-lessee could be said to be an act suffered by the defendant. The learned judge thought the case was concluded by the decision in *Bryant* v. *Hancock & Co.* The same case is also relied on by the plaintiff, who contends that it is really in his favour. But when I look at the terms of the covenant in *Bryant* v. *Hancock & Co.* I do not think that the decision in that case is applicable as suggested by the plaintiff. The covenant there was a peculiar one and consisted of two parts, the first part being absolute in its terms and the second being qualified by the introduction of the word "wilfully." Stress was laid on that word as showing that what would *primâ facie* come within the terms of the first part of the covenant could not be intended to do so, and that the subject-matter of the first part must be limited in order that effect might be given to the second

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

part, which was qualified by the word "knowingly." That word does not occur in the covenant in this case, and in my opinion its presence or absence is immaterial, as the reason why so much stress was laid on it in *Bryant* v. *Hancock & Co.* is irrelevant to this case. The defendant cannot be said to have done or suffered to be done the act on which the plaintiff relies as a breach of covenant, because the relationship of sub-lessor and sub-lessee does not at all involve the relationship of principal and agent. If the defendant had put in a manager of the public-house, and the manager had done or suffered the act in question, the case would have come within the covenant. The manager would have been the defendant's *alter ego* on the premises, and the defendant must have taken the risk of what happened through his acts. But, the defendant having sub-let the premises, the case is different. I am of opinion that the words "do or suffer to be done" *primâ facie* involve the doing of some act or some abstention from action by the covenantor himself or by some person standing in the relation of agent to him, and that a lessee does not stand in the relation of agent to his lessor. The case of *Toleman* v. *Portbury* is an authority to this effect. I therefore think that the appeal fails.

ROMER and MATHEW, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Pearse & Rowse.*

Solicitors for the defendant, *Beaumont, Son, & Bigden.*

From Chan. Div. (Vaughan Williams, Romer, and Stirling, L.JJ.) — Jan. 13; March 7.

KEITH *v.* GANCIA. (*a.*)

Landlord and tenant—Lease—Estoppel in pais—*Mortgage by sub-demise before Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41)—*Lease by mortgagor—Foreclosure—Underlease—License—Representation.*

A lessee granted a mortgage by way of sub-demise for the residue of the term comprised in his lease except the last three days thereof before the Conveyancing Act, 1881. *He subsequently granted a sub-lease of the mortgaged premises to G., without the consent of the mortgagee; and this sub-lease contained a provision for re-entry in case the sub-lessee became bankrupt. The mortgagee foreclosed, and after the foreclosure received the rent from G. G. granted another underlease with the license of the mortgagee. In the license it was stated that the reversion expectant on the determination of G.'s term was vested in the mortgagee. The mortgagee subsequently assigned his interest to the plaintiff. G. having become bankrupt, the plaintiff claimed a right to determine the sub-lease granted to G.*

Held, that G. and his underlessee having altered their positions on the faith of representations made by the mortgagee that G.'s lease was subsisting, the plaintiff, who stood in the shoes of the mortgagee, was estopped from disputing its validity.

Decision of Joyce, J., *affirmed.*

This was an appeal from a decision of Joyce, J.

By a lease, dated the 11th of December, 1880, vaults and offices under the Princess Theatre were, with other hereditaments, demised to Walter Gooch, as to part thereof for a term of 60¼ years from the 6th of April, 1880; as to another part thereof for the term of 60 years from the 9th of July, 1880; and as to the residue thereof for the term of 59¼ years from the 6th of April, 1881, at the rent therein mentioned.

By a deed dated the 9th of March, 1881, Walter Gooch demised the premises comprised in the lease of the 11th of December, 1880, to W. T. Neve for the residue of the several terms of years granted thereby, except the last three days of each term, by way of mortgage for securing payment of £20,000, with interest thereon. The deed gave the mortgagee a power of sale, and it was provided that in the event of a sale the mortgagee would stand possessed of the last three days of the terms respectively in trust for the purchaser.

The premises comprised in the lease became before the 24th of March, 1892, vested in Harriet Gooch for the residue of the several terms of years, but subject to the mortgage to Neve. By a lease dated the 24th of March, 1892, Harriet Gooch purported to demise the vaults and offices, which were part of the premises comprised in the lease of December, 1880, to the defendants R. Gancia & Co. (Limited) from the 25th of March, 1892, for twenty-one years at the yearly rent of £140. This deed provided that if the defendant company should be wound up under the provisions of the Companies Acts the lessor might re-enter upon the demised premises, and thereupon the term thereby granted should absolutely determine. Gancia & Co. entered into possession of the premises thus demised to them.

A foreclosure action was brought by Neve against Harriet Gooch, and on the 21st of March, 1895, an order was made that she should henceforth stand absolutely foreclosed from all right and equity of redemption of and in the premises comprised in the mortgage of the 9th of March, 1881. From the date of this order until the death of Neve, Gancia & Co. paid to him the rent of £140 reserved by the lease of the 24th of March, 1892.

Neve died on the 8th of March, 1899. On the 9th of August, 1900, Neve's executors assigned to the plaintiff B. F. Keith the premises comprised in the lease of December, 1880, for the residue then unexpired of the several terms of years thereby granted, except the last three days of each of the terms, and for all such estates and interests in the nominal reversions expectant on the determination of the same terms respectively as the executors had power to assign, and the assignment was expressed to be made subject, as to such parts of the premises as were subject thereto, to, but with the benefit of, the lease of the 24th of March, 1892. Subsequently to the 9th of August, 1900, Gancia & Co. paid the rent of £140 to the plaintiff.

On the 27th of October, 1899, Gancia & Co. had executed an underlease of part of the premises comprised in the lease of the 24th of March, 1892, to the defendant Sinclair from the 25th of December, 1899, for a term of thirteen years and three months less ten days then next ensuing at a rent of £240.

This underlease was made in persuance of a licence dated the 13th of October, 1899, by which the executors of Neve, describing themselves as "the persons in whom the reversion expectant on the determination of the term granted by the lease of the 24th of March, 1892, is now vested" granted a license to Gancia & Co. to demise to Sinclair the vaults, &c., for the residue of the term of twenty-one years granted by the lease of the 24th of March, 1892, less the last ten days thereof.

Sinclair was in possession of the premises comprised in this underlease.

The London and Westminster Bank, as equitable mortgagees of Gancia & Co., were in possession of the remainder of the premises comprised in the lease of the 24th of March, 1892.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

On the 8th of October, 1902, an order was made by the High Court for the winding up of Gancia & Co. under the Companies Acts.

The plaintiff then brought the present action against Gancia & Co., their equitable mortgagees, and the defendant Sinclair, claiming possession of the vault and premises comprised in the lease of the 24th of March, 1892, on the ground that by reason of the winding-up order a right had accrued to him to re-enter on the vaults and premises and determine the tenancy of Gancia & Co., and that he had served a notice upon them demanding possession accordingly.

The defendant Sinclair counterclaimed, asking for relief against the forfeiture under the Conveyancing Act, 1881, and for an order that the vaults, &c., comprised in the deed of the 27th of November, 1899, should vest in him for the residue of the term thereby granted and upon the conditions thereof.

The other defendants also took out a summons asking for relief against the forfeiture, and this summons came on for hearing with the trial of the action and counterclaim.

Joyce, J., dismissed the action. The order as drawn up declared that the underlease of the 24th of March, 1892, was binding on the plaintiff, and ordered that the defendants be relieved against the forfeiture of that underlease occasioned by the winding up of Gancia & Co.

The plaintiff appealed.

Levett, K.C., and *Simpson*, for the appellant.—The mortgage of the 9th of March, 1881, having been made before section 18 of the Conveyancing Act, 1881, came into operation, the lease of the 24th of March, 1892, does not bind the mortgagee, as it was granted without his consent. The only effect of the payment of rent to the mortgagee and its acceptance by him is to create a yearly tenancy upon the terms of the lease so far as they are consistent with a yearly tenancy. The license to sub-let cannot operate as a new lease or an agreement for a new lease, and the grant of the license creates no estoppel against the plaintiff.

Hughes, K.C., and *F. L. Wright*, for Gancia & Co. and their mortgagees.—The plaintiff claims through Neve's executors and he can be in no better position than they would have been in this action. By their license to the sub-lease, Neve's executors in fact represented to both Gancia & Co. and to Sinclair that the lease to Gancia & Co. was valid, and Gancia & Co. and Sinclair altered their positions on the faith of this representation. This creates an estoppel *in pais* which precludes the plaintiff from now disputing the validity of the lease to Gancia & Co. We also submit that under the foreclosure absolute Neve placed himself in exactly the same position as Mrs. Gooch, and cannot dispute a lease which she granted.

Younger, K.C., and *E. Ford*, for the defendant Sinclair.

Levett, K.C., replied.

The following authorities were cited in course of the arguments: *Brown* v. *Storey*, 1 Man. & Gr. 117; *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16, 35 W. R. Dig. 38; *Picard* v. *Sears*, 6 Ad. & E. 469, at p. 474; *Willmott* v. *Barber*, 28 W. R. 911, 15 Ch. D. 96; *Heath* v. *Pugh*, 29 W. R. 904, 6 Q. B. D. 345; *Freeman* v. *Cooke*, 2 Ex. Rep. 654; *Cairncross* v. *Lorrimer*, 3 Macqueen 827, 9 W. R. Dig. 1; *Corbett* v. *Plowden*, 32 W. R. 667, 25 Ch. D. 678; *Tarn* v. *Turner*, 39 Ch. D. 456, 36 W. R. Dig. 138; *Cuthbertson* v. *Irving*, 6 H. & N. 135; Carson's Real Property Statutes, p. 516; Burton on Real Property, par. 850; Smith's Leading Cases, vol. 2, Notes to *Duchess of Kingston's case*; Woodfall's Law of Landlord and Tenant (17 ed.), p. 236; Foa's Law of Landlord and Tenant (3rd ed.), p. 429; and Ashburner on Mortgages, p. 241.

Cur. adv. vult.

March 7.—VAUGHAN WILLIAMS, L.J., after stating the facts, said: Now, Joyce, J., in dealing with the action, puts it in this way. He says, suppose in November, 1899 (that is to say, before the assignment to the plaintiff), the executors of Neve and Gancia & Co. and the Sinclairs had entered into a tripartite agreement which recited that the executors of Neve were the reversioners of Gancia's underlease, and that they had been asked to consent under the terms of that underlease to the granting of the sub-lease by Gancia & Co., and that Gancia & Co. had thereby agreed expressly to grant the sub-lease to the Sinclairs; if such a document as that had been made and executed by the three parties, it is absolutely clear that the executors of Neve could not after that have turned round and asserted their paramount title as mortgagees, or as representing mortgagees, and have asserted or objected that Gancia had no underlease at all. Nor could they have asserted that either as against Gancia or against Sinclair. The learned judge, having said this, goes on to say that in his opinion what happened is really equivalent to such an agreement in fact, and he held that the executors of Neve, whose testator had foreclosed, were, as reversioners of that underlease, in truth and in substance parties to the sub-lease to Sinclair and fully concurred in it. I am not quite sure what this means. In the first place, I assume that in the supposed tripartite agreement the learned judge means that Gancia & Co. had agreed to grant a sub-lease, and that the executors had agreed that Gancia & Co. should do so, and that he does not mean by the supposed agreement that the executors agreed themselves to grant a lease to the Sinclairs. If I am right, the supposed agreement would have been carried out, so far as the grant of the lease by Gancia to the Sinclairs is concerned; and the only agreement which it could have been said that the executors had broken would have been an implied agreement that they would not, in contravention of the recitals, deny that they were reversioners of Gancia's underlease, and invalidate the consent which they purported to give, as reversioners of Gancia's lease, to his sub-lease by the assertion of a paramount title inconsistent with the subsistence of Gancia's sub-lease. But this view of the tripartite agreement, even if it can be supported, is hardly consistent with the result indicated by Joyce, J., as following on the assumption that what happened was equivalent to such an agreement in fact, because he says: "I hold that the executors of Neve, whose testator had foreclosed, were, as reversioners of Gancia's underlease, in truth and in substance parties to the sub-lease to Sinclair and fully concurred in it." Such a result would not follow as the consequence of a breach of an implied covenant not to invalidate the sub-lease to be granted by Gancia to Sinclair. Such an implied covenant would not make the executors parties to the sub-lease, or make them concur in it, in the ordinary sense of that word. I am not quite sure that the learned judge, in the passages which I have quoted, has not somewhat confused the agreement which he suggests with the estoppels arising on it, which I will consider presently; but it is sufficient to say at present that no estoppel preventing the executors from denying that they were the reversioners of Gancia's lease could operate as a grant by them of a lease to Sinclair on the terms of the sub-lease granted by Gancia to Sinclair. There is the

difficulty also that the sub-lease, whoever granted it, was required by the Real Property Act, 1845, to be under seal, and that any agreement relating to land has, by the Statute of Frauds, to be in writing; and it is not easy to extract from the documents any implied agreement which would support the learned judge's view. Moreover, I am not satisfied that any agreement can be suggested, as having been entered into without writing, which could be supported by part performance, and which would afford a defence in this action.

I propose now to deal with the question whether estoppel will enable the defendants to successfully defend this action. If the conduct of the plaintiff enables the defendants to do so, I do not trouble myself about the exact form of the pleadings. It is plain that all parties came into court prepared to try the question of what is the effect of the plaintiff's assuming the character of reversioner and inducing the defendants to alter their position. That being so, all necessary amendments must be treated as made. That there is an estoppel preventing Neve's executors, the plaintiff Keith's predecessors in title, and therefore Keith, from averring as against Gancia & Co. or Sinclair that he really was not such reversioner I do not doubt, for it seems to me plain that the executors by their words and conduct wilfully caused both Gancia and Sinclair to believe in the existence of that state of things, and induced them to act on that belief, so as to alter their own previous position; and it seems to me that Keith, who claims through the executors, is concluded from averring against either Gancia or Sinclair a different state of things as existing at the same time. Now it is true that, where there is an estoppel *in pais* of this sort, the estoppel cannot go further than to prevent the party estopped from putting the party who has acted on his representation in a worse position than he would have been if that representation had been true. Then what would have been the position of Sinclair if Neve's executors had really had vested in them the reversion expectant upon the determination of Mrs. Gooch's lease to Gancia? And observe this is quite a possible state of things, because there is no reason why they, being the assignees by way of sub-demise of Mrs. Gooch's lease of the 11th of December, 1880, from Bailey, should not have taken an assignment from her of the reversion expectant upon the determination of the underlease granted by her to Gancia. I take it that Neve's executors, as the assignees of Mrs. Gooch, would no more have been entitled, as between Gancia (Limited) and themselves, to deny Mrs. Gooch's title than Mrs. Gooch herself would have been. The result of this is that the plaintiff's action fails. He is not entitled to recover possession of the premises, because he is estopped from denying that he is reversioner in respect of the lease granted by Mrs. Gooch to Gancia, and not the less so because at the time he represented himself as such he was as mortgagee entitled to say that the lease by Mrs. Gooch to Gancia did not bind him. I think that this estoppel against the plaintiff arises equally as between himself and Sinclair and also as between himself and Gancia. Both Sinclair and Gancia (Limited) altered their positions by reason of the assertion by Neve's executors that the reversion attendant upon the determination of Gancia's lease was vested in them. By reason of this assertion Gancia granted and Sinclair accepted the sub-lease. This did not make either Gancia or Sinclair the tenant of Neve's executors. The estoppel simply prevents Neve's executors, or their successor, the plaintiff, from denying that Mrs. Gooch's reversion was vested in them as alleged by them, or from setting up an overriding title inconsistent with the license by them as reversioners authorizing the sub-lease to Sinclair. Moreover, the conduct both of Neve's executors and of the plaintiff since the granting of the sub-lease of 1899 is only consistent with a continued assertion by them respectively of their position as reversioners and the validity of the sub-lease. I refer to the assignment to the plaintiff being expressly subject to the sub-lease of 1899, and to the plaintiff's notice to Gancia (Limited) to repair. I do not think that it makes the slightest difference that, on the admitted facts, and in particular the payment of the rent reserved under the underlease of 1892 to Neve's executors and to Keith, a tenancy from year to year under Neve's executors or Keith would ordinarily be inferred. This would be only part of the truth which the plaintiff would be estopped from denying. There is no evidence whatever that Gancia was aware of the true position of affairs.

For the reasons which I have given I think that the judgment of Joyce, J., ought to be supported and this appeal dismissed with costs. I should wish to add that I entirely agree with the judgment so far as it relates to the relief against forfeiture. And with regard to the counterclaim by Sinclair for a vesting order, which Joyce, J., had ordered to stand over, I see at present no reason why such order should not be made under section 4 of the Conveyancing Act of 1892.

ROMER and STIRLING, L.JJ., concurred.

Solicitors, *Batten, Proffitt, & Scott; C. M. Barker; Routh, Stacey, & Castle.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Feb. 29; March 1.

TOWERS v. AFRICAN TUG CO. (LIMITED). (a.)

Company—Directors—Payment of interim *dividend out of capital—*Ultrà vires*—Mistake—Acquiescence by shareholders—Shareholder's action—Form—Proceeds of* ultrà vires *act in plaintiff's possession—Right to maintain action.*

A shareholder in a limited company, who has received an unearned interim *dividend paid by the directors out of capital under a* bonâ fide *mistake, knowing full well that it was an* ultrà vires *payment, and that the directors would eventually repay the amount, cannot afterwards, suing either individually or on behalf of all the other shareholders, maintain an action against the directors for the repayment of this dividend into the coffers of the company, if at the time of bringing the action he had the proceeds of the* ultrà vires *act in his pocket.*

Decision of Byrne, J. (*reported* 20 *Times L. R.* 28), *reversed.*

Dictum *of* Brett, L.J., *in* Flitcroft's case, 31 *W. R.* 174, *on p.* 176, 21 *Ch. D.* 519, *on pp.* 534, 535, *approved.*

This was an appeal from a decision of Byrne, J. (reported 20 Times L. R. 28).

The plaintiffs were W. H. Towers and P. Wedlake. Towers was at one time the secretary of the defendant company, and Wedlake was a director of the same company, and they sued on behalf of themselves and the other shareholders of the company, except those that were defendants—viz., the company itself and the other two directors, named Alexander and Wood, claiming payment by the two defendant directors, as due to the company, first, of a sum of £375, which they alleged ought to have been recovered

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

against an ex-director instead of compromising with him, and secondly, of £127 10s., which they affirmed had been wrongfully paid as a dividend out of capital. Afterwards all the other shareholders were joined as defendants by order, as they stated they acquiesced in both the compromise and the dividend.

The defendants counterclaimed recovery of the shares of the dividend received by the plaintiffs, if they should succeed on the dividend point, which liability was not disputed.

The company was incorporated in 1896, and there were three directors, the plaintiff Wedlake and the two defendants Alexander and Wood, Towers being, as above stated, the secretary. On the balance-sheet for 1899, made up to the end of July (the end of the company's financial year), there was a debit balance of £756 10s. 11d.

In March, 1900, the plaintiff Towers stated that between the 1st of August and the 31st of December, 1899, the company had made a profit of £300, but that until the debit balance was paid off the interim dividend which it was proposed to pay would be payable out of capital, and would be therefore an illegal payment. However, a resolution having been signed by the defendants Alexander and Wood in favour of paying this dividend, it was paid. The plaintiff Wedlake was not a party to this transaction. On the assets side of the balance-sheet up to the 31st of July, 1900, there was an entry of "Dividends not earned, £127 10s.," and to make this correspond with the liabilities there was an entry on the other side of the ledger "Profit and loss account, as at the 31st of July, 1899, £756 10s. 11d., less profit for year, £245 18s. 4d., equals £510 12s. 7d." Both the directors and shareholders approved these entries at a meeting in September, 1900, although they had before them the auditor's report, which explained these items, that the interim dividend was unearned and therefore illegal, and that the directors would be liable as it was payment out of capital. The plaintiffs claimed payment of this interim dividend, viz., the sum of £127 10s., by the defendants Alexander and Wood to the company, as its directors and trustees.

Byrne, J., held at any early stage that the first claim of the plaintiffs could not be sustained; but with regard to the second claim he held that the directors must replace the sum of £127 10s., with interest at 4 per cent., but as the company had recently received a windfall, he decreed that the order should not be acted on until after the next general meeting, as in the meantime it was possible to put the accounts in a form which would render it unnecessary to have the amount actually paid. His lordship further found that there was no question as to the dividend having been paid *bonâ fide*. The defendants were granted judgment on their counterclaim, but their order would be stayed also.

The defendant directors appealed.

Eve, K.C., and *Ashton Cross*, for the appellants.

They cited *In re Exchange Banking Co.* (*Flitcroft's case*), 31 W. R. 174, 21 Ch. D. 519; *In re Alexandra Palace Co.*, 31 W. R. 808, 21 Ch. D. 149; *Russell* v. *Wakefield Waterworks Co.*, 23 W. R. 887, 20 Eq. 474; *Ramskill* v. *Edwards*, 34 W. R. 96, 31 Ch. D. 100; *Moxham* v. *Grant*, 48 W. R. 130, [1899] 1 Q. B. 480, [1900] 1 Q. B. 88.

Norton, K.C., and *F. Evans*, for the respondent company.

They cited *In re Alexander and Automatic Telephone Co.*, 48 W R 546, 2 Ch. D. 56; *Ashbury Carriage Co.* v. *Riche*, 24 W. R. 794, 9 L. R. Exch. 264, L. R. 7 H. L. 653.

Eve, K.C., replied.

VAUGHAN WILLIAMS, L.J.—On the whole, I do not think the plaintiffs are entitled to any relief here. It would not be very satisfactory if we had to determine this case ultimately upon the pleadings. I quite feel the force of what counsel for the respondents said as to there being the allegation in paragraph 14 of the statement of claim in the action that "the plaintiff Wedlake was never consulted as to or took part in the declaration of payment of the said 5 per cent. dividend." I quite agree that when you come to look at the defence there is no denial of the allegation in the 14th paragraph of the statement of claim. But it does not seem to me that that disposes of the whole case—I mean, it does not dispose of the whole of the case, even if you take the allegation in paragraph 14 as having been admitted by the defendants, because the truth of the matter is that that allegation in paragraph 14 is quite consistent with Wedlake having received this dividend with full knowledge of all the facts. If that is so, the matters in paragraph 14 do not in any way negative the incapacity of the plaintiff (Wedlake) to sue in this action. But that is, in all probability, the true state of things. I mean that it is in all probability true that although Wedlake may not have been consulted as to the declaration and payment, he was perfectly well aware of all that was being done, and that is strongly confirmed by the fact that the counterclaim alleges in so many words that the dividend paid to the plaintiffs on their holdings amounted to so and so, giving the figures, which the plaintiffs took and have ever since retained with full notice of all the facts relating thereto. I believe that that is true, not only because the plaintiffs, when they come to plead to the counterclaim, seem to me, on the face of the pleadings, to admit the truth of that, but also when one turns to the minute book and sees the minutes which are there, and in particular the minute of the meeting of the 14th of September, 1900, at which Wedlake was present. I cannot doubt that he must have been perfectly well aware of all the facts connected with the declaration and payment of this dividend and the state of the accounts at the time. In that state of things, what ought to be done in this action? There is no doubt that the payment of this interim dividend was an *ultrà vires* payment. I start with the assumption that one is bound to make, that if you have got an act done by a company which is *ultrà vires*, no confirmation by a shareholder—not even by every member of the company—can convert that which was *ultrà vires*, into something *intra vires*. It always must be *ultrà vires*. As is pointed out in one or two of the cases, the result of that is, if the company are plaintiffs, no amount of acquiescence or resolution by the shareholders can form an answer to the action by the company for the reinstatement of things in the state in which they would have been but for the *ultrà vires* act complained of. But, to my mind, it is a different thing where the action is brought by a shareholder on behalf of himself and other shareholders. I am assuming in this case that this was one of those cases in which the facts were such that the men ought to be able to sue in a representative action for the purpose of preventing things being done in reference to the company in which they are interested, and which might damnify the company by reason of their being *ultrà vires*. I assume that an action not only to prevent, but to remedy, matters that have been done *ultrà vires* is an action which can be brought in the form in which this action is brought. But although that is so, my own judgment is that this is an action which has to be

brought by the plaintiffs personally. It is an action which they cannot bring without having an interest; it is an action which a stranger could not bring. Under these circumstances, what is it we have to ask ourselves here? If it be the fact, as I think it is, that these plaintiffs knew of all these things which have been done, received the dividends with full knowledge of all the facts, and then brought this action with the money in their pockets, ought they to be allowed to bring this action in consequence of their personal interest in the matter? I think not. I think that an action could not be brought by an individual shareholder, complaining of this matter which is *ultrà vires*, if he himself had in his pocket, at the time he brought the action, the proceeds of that very *ultrà vires* act. I think, in the same way, it does not alter matters that he says he is suing on behalf of himself and others. I think that that which ought to make us say he ought not to bring the action, ought equally to make us say that he ought not to be the peg upon which the action is to be hung for the benefit of others. Assuming that to be so, what answer is sought to be made here? I think counsel for the respondents was disposed to put the only logical answer that could be put, and to say that that the very wrongdoer himself, who had got the proceeds of his wrongdoing in his pocket, might, if the matter was a matter which was *ultrà vires*, sue as a plaintiff to have it put right, and bring this action against the other shareholders who had benefited by it, and compel them to restore the capital which had been wrongfully paid out of them. But I do not think that is right, and if that is not right, I think that the return of the capital in the course of the trial after the action has been brought does not make things any better. Admittedly these dividends were still in the pockets of these people when they brought the action and were still in their pockets when the action came to be tried. It is quite true that in the course of the trial they said they were prepared to pay this money back. I think the form of admission was that they were content that judgment should go against them personally in respect of it; but I do not think that would make an action good which was not otherwise a good action in its inceptive. I must say in this particular case there is a strong inclination in my mind, not to give the plaintiffs the relief which they ask, because, starting with the fact that capital had been distributed in the payment of this interim dividend, that fact has been recognized by the company and by the shareholders, it appears on the face of the balance-sheet, and they were minded to replace this capital, and had every prospect of doing so, even out of the very current year's profits. Under these circumstances this action was wholly unnecessary and wholly uncalled for. It seems to me the court is not bound, when it sees that this *ultrà vires* act is in course of being put right, and will very shortly be put right, to give relief to a plaintiff of this sort, who has acquiesced in the wrong and who has got part of the proceeds of the wrong in his pocket. Under these circumstances I think the appeal ought to succeed.

STIRLING, L.J.—I also think this appeal ought to succeed. I desire to rest my decision on the particular facts in this case, and to abstain from laying down, so far as possible, any general rule on the question whether a shareholder, who has been party to the payment of a dividend out of capital, or who has taken the dividend with knowledge of all the facts, can, or cannot, come to the court afterwards and complain that the dividend has been paid out of capital, and seek to make either the directors or his fellow shareholders restore what they have paid or received with notice that the dividend has been improperly paid. Now, the facts are these: According to the balance-sheets of the company down to the 31st of July, 1899, there was a debit to the company—a loss—of £750 odd. In March of the following year, that is 1900, the company had made a certain amount of profit, but not enough to wipe out the debit balance of the 31st of July, 1899. In these circumstance the directors thought fit to pay an interim dividend, the amount of which was £127—a small sum. On the 31st of July, 1900, it appeared that the profit for the year amounted to £245 18s. 4d. That, of course, was not nearly enough to wipe out the debit balance of the previous year of over £750. The auditor made his report on the 20th of August, and pointed out by his report that they had no right to pay this dividend, and he, in drawing up the balance-sheet, put on the face of the balance-sheet an entry which shewed this—"overpaid dividend £36 odd." "Dividend not earned"—which is the question—"£127 10s." That balance-sheet is submitted to the shareholders and is approved by them; therefore it stands recorded on the face of the transactions of the company that a dividend has been improperly paid, and in any future dealing, supposing it was honest, the credit against the company has to be wiped out before any dividend can be properly paid.

That being so, in July, 1901, a further profit is made, which amounts to £510 odd, and on the 31st of July, 1902, the debit balance was completely wiped out, but not enough was made to pay a dividend. Then this took place in March, 1903, Towers, who was one of the plaintiffs, and who had been secretary and manager of the company, is dismissed from his office. Thereupon, on the 20th of March following, he and one of the directors, Wedlake, bring this action, and they charge that an *ultra vires* act had been committed, and that the £127 which had been lost by the company ought to be brought back into the coffers of the company, and that is the object of the action. Now, it is proved beyond all contradiction by documents under the hand of Towers that he was perfectly well aware of the circumstances in which the dividend was paid. It is not true that he is was in the same condition as Wedlake, but I think, having regard to the admissions which Wedlake made by not denying the allegation in the counterclaim, that he received his dividends with full notice of all the facts relating thereto, and submitted to judgment against himself on that footing; and also the high probabilities of the case, that inasmuch as he did not choose to go into the box and deny it, we ought to assume that, like his co-plaintiff, Towers, he knew the facts under which the dividends were declared. Now the form of action is one by the plaintiffs against the company and other shareholders, originally all the shareholders were not made parties, but at the request of the other shareholders they ultimately were made defendants to the action. So that we have here all the shareholders of the company. I think this is a form of action which, no doubt, in certain circumstances may be maintained. That a shareholder who had received a dividend without knowing anything of the illegality of it might maintain such an action I do not doubt; whether he ought not to return what he had received in respect of dividend is another question, and that may depend upon whether he had notice at the time when he took it of the acts complained of. Why is it that this form of action is allowed? The proper plaintiffs *primâ facie*, where it is sought to bring back the property of the company into its own coffers, is the company itself.

But there are exceptions to that rule, and what is the reason or meaning of the exceptions? Sir George Jessel, in the case which has been referred to of *Russell* v. *Wakefield Waterworks Co.*, 23 W. R. 887, L. R. 20, Eq. 674, says this: "The exceptions turn very much on the necessity of the case—that is, the necessity of the court doing justice." Now this is a case, to begin with, in which no one suggests any fraud or dishonesty on the part of the directors or any one else. The directors who paid this dividend made a mistake, but no one charges anything more than a mistake. Everything was perfectly open. The fact was disclosed by the balance-sheet of 1900, the first balance-sheet which was submitted to the shareholders after the payment of the dividend. Further, the subsequent dealings seemed to show that the company did not intend to overlook the fact that the dividend had been improperly paid, or that there was an intention on the part of any one to do anything other than that which was right, and to make good the deficiency in the capital of the company which had been created by the payment of that dividend. That seems to me to have been the result of the subsequent balance-sheets. Moreover, what do we find the plaintiffs themselves doing? They acquiesce in this course being taken by the company from the 14th of September, when they certainly knew it, down to March, 1903, when this action was brought. It does not seem to have ever been suggested by any one party that an action should be brought by the company to recover this deficiency of the capital, and I think we ought to infer that what commended itself to the plaintiffs, as well as to the other shareholders, was to go on; the company was prosperous, it was wiping out year by year a great part of the deficiency, and ultimately, when the whole deficiency, including this deficiency in capital, had been replaced, to pay a proper dividend, and not until then. I do not think there was any necessity shown, looking at all the circumstances of the case, for the intervention of the court to compel the payment of this small sum—for such it really was—in the way in which the plaintiffs seek to throw the duty upon the court of acting. In truth, Byrne, J., although he gave a judgment in favour of the plaintiffs, was so far from desiring to press it that he directed it not to be enforced, in order to see what might be the result of the further trading, and whether the deficiency in capital would not be wiped out in the ordinary course. I think, on the whole, that justice would have been done if this action had been dismissed on the ground of the personal conduct of the plaintiffs.

COZENS-HARDY, L.J.—I am of the same opinion. In my view there is no question really here which admits of argument on one part of it—namely, that this was an illegal payment because it was a payment out of capital. Nor do I think that it can be contested, and it certainly was not contested by counsel for the appellants, that a transaction of that kind cannot be ratified by the shareholders. But in order to consider what is relevant in this case one must go further. An action in respect of, or arising out of an *ultrâ vires* transaction ought properly to be brought by the company, but it has been long well established that there are cases in which such an action may be maintained by a shareholder suing on behalf of himself and all other shareholders against the company as defendants. I will not pause to consider under what particular circumstances such an action may be maintained, but I assume that this is one of those cases in which such an action may be maintained, I mean in point of form. But I think it is equally clear that the action cannot be maintained by a common informer. A plaintiff in an action of this form must be a person who is really interested. Where you get that fact clearly established it seems to me impossible to avoid taking the next step, that all personal exceptions against the individual plaintiff must be gone into and considered before relief can be granted. Here I have no intention of going through all the facts again. I think it is clearly proved, as it is certainly admitted on the counterclaim, that both the plaintiffs took the dividend with full notice of all the facts relating thereto. It is also clear that they had the dividends, which they took with full notice that it was payment out of capital, in their pockets at the date when this action was commenced. Now, can a shareholder who has, with full notice of all the material facts, received part of the capital by way of dividend, and who still retains that money in his pocket, maintain an action against the directors who have paid the dividend? I think the true answer to that question is, he cannot. It may be that there is no direct authority on the point, but the *dictum* of Brett, L.J., in *Flitcroft's case*, 31 W. R. 174, 21 Ch. D. 519, is really, I think, very nearly in point. [His lordship referred to the case and a portion of Brett, L.J.'s, judgment on p. 535.] The view of Brett, L.J., was that shareholders who assumed to ratify could not have individually complained, and it seems to me to follow that a shareholder, having the money in his pocket which he knows is wrongfully there, ought not to be allowed to complain, and he cannot get any greater right of complaint because in form his action is an action by himself and all other the shareholders in the company. In fact he must succeed by his own merits, and not by the merits of the shareholders. Whether this action could have been maintained by these plaintiffs if before action brought they had repaid the amount of the dividend which they had received it is not necessary for us to decide. Speaking for myself I doubt whether that payment could have sufficed to put the plaintiffs in the right. Here, however, nothing of the kind happened. There is actually a judgment against the plaintiffs upon the counterclaim for payment of these sums. In my view, the judgment of the learned judge in the action ought to be set aside, the judgment on the counterclaim, with costs, being the only part of the order which can stand.

Appeal allowed.

Solicitors, *Gibson & Weldon*, for *Hannay & Hannay*, South Shields; *Smith, Rendall, & Dods*, for *H. Wilson Paton*, Swansea.

High Court of Justice.

Chan. Div. Kekewich, J. — March 12.

In re FARNHAM'S TRUSTS.
LAW UNION AND CROWN INSURANCE CO. *v.* HARTOPP AND JAFFRAY. (*a.*)

Settlement—Capital and income—Cost of repairs—How borne as between them.

Where repairs are done in accordance with the provisions of the Public Health (London) Act, 1891, *to property subject to a marriage settlement, by persons other than the trustees of the settlement—who are not in a position to execute them—the costs cannot be claimed by the trustees as representing the* corpus.

(*a.*) Reported by ALFRED C. THOMAS, Esq., Barrister-at-Law.

Adjourned summons.

By an indenture of settlement made in 1882, on the occasion of his marriage, Mr. W. B. Farnham became entitled to a life interest in the income arising from moneys the subject of the settlement or from stocks and securities representing the same, and by the said indenture power was given to the trustees to invest moneys subject to the trusts in the purchase of lands or hereditaments of freehold or leasehold tenure.

In pursuance of such powers freehold and leasehold property, being 39, 40, and 41, Foster-lane, in the City of London, were purchased.

The plaintiffs were mortgagees of the life interest of the said W. B. Farnham, and by an order made in 1897 the said W. B. Farnham and his wife were absolutely debarred and foreclosed of all equity of redemption of, in, and to the mortgaged hereditaments therein mentioned, which included the said premises, 39, 40, and 41, Foster-lane.

In November, 1902, a notice was served under the Public Health (London) Act, 1891, and came to the hands of the defendants, the present trustees of the settlement, requiring certain sanitary works to be carried out on the said premises, 39, 40, and 41, Foster-lane, and as a result of correspondence that passed between the plaintiff company and the solicitors for the trustees, the plaintiff company took upon themselves the duty of completing the said sanitary works without prejudice to the question as to the liability of the said trustees.

The question for the court to determine was whether the trustees as representing the *corpus* of the settled estate, or the plaintiff company as representing the life interest of W. B. Farnham, was liable for the cost of executing the sanitary works carried out on the said premises, 39, 40, and 41, Foster-lane.

Warrington, K.C., and *E. Ford*, for the mortgagees.—The cost of the work done in accordance with the order of the City of London should be paid by the trustees, who could afterwards indemnify themselves out of the *corpus: In re Tucker's Settled Estates*, [1895] 2 Ch. 468; *In re Lever*, [1897] 1 Ch. 32; *In re Copland's Settlement*, [1900] 1 Ch. 326; *In re Barney*, [1894] 3 Ch. 562.

Lawrence, K.C., and *Church*, for the infants.—Work done ought to be payable out of income. The infants were not bound by any arrangement made by trustees with tenant for life. Here the trustees have incurred no liability, and so are not asking to be indemnified: Public Health (London) Act, 1891, s. 121. Here expenses were incurred by somebody not the trustees, so that the cases cited are not in point. If the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25, clauses 1-18, be relied on, then it is objected that the trustees have no money in hand: *In re Millard's Settled Estates*, [1893] 3 Ch. 116; *In re Thomas*, [1900] 1 Ch. 319.

Stamp, for the trustees.

KEKEWICH, J.—There is no money in the hands of the trustees, so section 15 of the Settled Land Act, 1890, cannot be relied on. The sanitary authority continually insists on repairs being done, and on drainage being put right, and the court deals with the costs of such works on this principle—when the tenant for life does them, he comes to the court, which, by its officer, goes through the improvements done, and sees whether they are such as come within the terms of the Settled Land Act. Drainage is not a permanent improvement within its terms. As regards the present case, there is a difficulty in the applicant's way. The case is not like *In re Lever*. There the trustee did the work, and applied to be indemnified out of the whole estate. It is on the point of indemnity that Stirling, J., came to a decision in granting the application. Here the trustees have not done the work. They were too prudent to spend their money.

The trustees do not come within *Lever's case*, so the application of the plaintiffs as representing the tenant for life must fail.

Order made without prejudice to claims that might be made under the Settled Land Act when the trustees have moneys in hand.

Solicitors, *Robins, Hay, Waters, & Hay; Church, Adams, & Pryor.*

Chan. Div.
Warrington, J. } April 28.

In re LORD STAFFORD'S SETTLEMENT AND WILL. GERARD *v.* STAFFORD. (*a.*)

Settled land—Compound settlement—Heirlooms—Sale—Application of proceeds—Discharge of incumbrance—Heirlooms vested in tenant in tail—Settled Land Act. 1882 (45 & 46 *Vict. c.* 38), *s.* 37, *sub-sections* 1, 2; *s.* 2, *sub-section* 9; *s.* 21, *sub-section* (ii.); *s.* 53.

By his will S. bequeathed pictures and heirlooms to trustees upon trust to permit the same to be used and enjoyed by the person who, under S.'s marriage settlement, should for the time being be entitled to certain landed estates, but so that they should not vest absolutely in any tenant in tail male by purchase of the said landed estates who should not attain twenty-one or die under that age leaving male issue at death. Under the said marriage settlement the said landed estates stood settled to X. for life, remainder to Y. for life, remainder to Z in tail. One of the pictures had been sold and the proceeds paid to the trustees of the will and invested by them. It had been held that the settlement and will constituted a compound settlement. X. directed the trustees of the compound settlement to apply part of the said proceeds in discharge of a mortgage on the said landed estates.

Held, that the said proceeds were, under the Settled Land Act, 1882, *s.* 37, *sub-section* 2 (2), *capital money arising under the Act; that they were applicable under section* 21, *sub-section* (ii.); *that the trustees of the compound settlement had not yet invested the said proceeds; and that X. was entitled, in virtue of the discretion conferred upon him by section* 53, *to direct the trustees of the compound settlement to apply part of the said proceeds in discharge of the said mortgage.*

By his will, dated the 23rd of August, 1884, Lord Stafford bequeathed certain pictures and other heirlooms to trustees upon trust to permit the same to be used and enjoyed by the person who by virtue of his marriage settlement should for the time being be entitled to the hall and estate at Costessey to the end that the same might be held as heirlooms with Costessey Hall by the successive owners of the said hall, but so that they should not vest absolutely in any tenant in tail male by purchase of the said hall under the said settlement who should not attain the age of twenty-one or die under that age leaving male issue at the time of his death.

Lord Stafford died on the 30th of November, 1884. Under the marriage settlement referred to, the said hall and estate now stood settled to the present Lord Stafford, the tenant for life for the time being, with remainder to one of the respondents for life, with remainder to Wilhelmina Plowden in tail. One of the pictures bequeathed under the will had been sold

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

recently and the money paid to the trustees of the will under an order of court and had been invested by them.

Upon a summons taken out by the tenant for life Byrne, J., held that the settlement and will constituted a compound settlement and appointed the trustees of the will trustees for the purposes of the Settled Land Acts of the settlement of the heirlooms. The tenant for life directed the trustees of the compound settlement to apply £15,000, part of the proceeds of the sale of the picture, in discharge of a mortgage on the land settled by the marriage settlement. The summons now came again before the court on the question whether money arising under the will ought to be applied for the benefit of land held under the settlement. The heirlooms were vested in Wilhelmina Plowden, the tenant in tail in remainder, who was a female infant, and therefore not within the proviso of the will.

Levett, K.C., and *Ingpen*, for the tenant for life.

Norton, K.C., and *Stokes*, for the trustees of the compound settlement and of the will

Rowden, K.C., and *Ashton Cross*, for the tenant in tail in remainder.

Duka, for the next tenant for life.

WARRINGTON, J., stated the facts, and proceeded to give judgment to the following effect: Section 37, sub-section 1, of the Settled Land Act, 1882, empowers the tenant for life of the land to sell the chattels therein referred to. It has nothing to do with the disposition of the proceeds of sale. "The land" in that sub-section must be the land with which the chattels are to devolve or in which some person (in whom the chattels also vest) becomes "entitled to an estate of freehold of inheritance." Applying that to the present case, the land here referred to must be the land settled by the settlement mentioned in Lord Stafford's will. By section 37, sub-section 2, the money arising by the sale of the chattels is to be capital money arising under the Act. And section 2, sub-section 9, defines capital money as "capital money arising under this Act, and receivable for the trusts and purposes of the settlement." Now, the money arising by the sale of the chattels is "capital money arising under this Act." The proceeds of sale of this picture are "capital money arising under this Act," and accordingly their application is regulated by section 21 of the Act. Sub-section 2 of that section provides that capital money shall be applied "in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement." Therefore, as this money is applicable in discharge of the incumbrance on the inheritance of the settled land, one has to find what is meant by "the settled land." If the land and the chattels were comprised in the same settlement—in the same document, that is—it is laid down in *In re Duke of Marlborough's Settlement*, 33 W. R 871, 30 Ch. D. 127, 34 W. R. 377, 32 Ch. D. 1, that the proceeds of sale of the chattels might have been applied in discharge of incumbrances on the land. The only possible distinction between that case and the present would then have been that in this case the chattels vest in an infant female tenant in tail at birth. It is said that the *Duke of Marlborough's case* is distinguishable also by the fact that the land and the chattels are not in this case settled by the same instrument. But when you consider the wording of section 21, sub-section (ii.) —"the inheritance of the settled land"—and compare that with section 37, sub-section 9, it is impossible to avoid the conclusion that the land referred to in section 21, sub-section (ii.), as "the settled land" is the same as that which in section 37 is referred to as the land with which the chattels devolve or to an estate of freehold of inheritance in which the person in that section referred to is entitled. In my opinion, therefore, independently of the cases which have been decided on the question of a compound settlement, I should have come to the conclusion, on the construction of section 37 and section 21, sub-section (ii.) taken together, that the applicant was entitled, subject to certain minor points, which I will refer to presently, to have the proceeds of the chattels applied in discharge of the incumbrances affecting the inheritance of the land. But I think the case is made clear by the authorities. The strongest case is *In re Byng's Settled Estates*, 40 W. R. 457, [1892] 2 Ch. 219. That case was a remarkable one, because the two documents there in question were what I may call independent documents. There was no connection between them except that the limitations in them were the same except as to certain terms of years. It was held that the will and the deed in that case constituted a compound settlement, so that the capital money arising under the deed could be applied in paying the cost of improvements executed upon the land devised by the will. Section 21, sub-section (iii.) was operative there. That is not the same sub-section as the one applicable here, but I think for substantial purposes it is the same. Now, if that is so, we get it back to this—that the matter is to be treated exactly as if the land and the chattels had been settled by one document. The case would then have been covered by the *Duke of Marlborough's case*, which, in my opinion, is not excluded by the distinction arising here as to the estate taken by the infant tenant in tail.

It has been further contended that even assuming that the money in question is applicable for this purpose, the tenant for life, who, under section 53, was to act as a trustee for all the persons interested under the settlement, is not fairly exercising the discretion given to him by directing the application of the money in the mode now in question. It is said, this is money to which, if the two tenants for life died at the present moment, this tenant in tail would be absolutely entitled, and that the present tenant for life is in fact taking the money of this female infant tenant in tail to pay off incumbrances on land to which she may not become entitled. The answer to that was given by Chitty, J., in the *Duke of Marlborough's case*. He says: "But it appears to me that the right view is that the tenant for life is to have regard to the interest of all parties. A good illustration of what was meant could be taken from a similar case to the present which came before me in chambers"—then he gave an instance of a large landed estate which was in bad condition, but there were some valuable pictures which the tenant for life desired to sell for improving the estate. Then he says: "It seems to me that if he did that—that is, sold the pictures and applied the money under section 35 to improving the estate—so far from it being fairly said that he disregarded, he would be really regarding the true interests of the persons entitled under the settlement." Now, allowing for the difference between the interest of the infant here and that of the person entitled in the *Duke of Marlborough's case*—and I may say that I was very considerably impressed with that difference—I do not think I can say that this would be an improper application of the money in the sense that the tenant for life would not be acting in a due exercise of the very wide discretion given him by the Settled Land Acts.

There is only one further point. It is said that the

money in this case has been already applied under section 21, sub-section (ii.), and that there is no provision in the Act, when once that application has been made, for any further application of the money by direction of the tenant for life except where the trustees concur in allowing such application. I think that is answered (if it were necessary to go so far for an answer, as to which I do not propose to express any opinion) by the last argument of Mr. Levett. The money here was not invested by "the trustees" in the technical sense, but by the trustees of the will before they had been appointed trustees of the settlement in the ordinary sense. The fund now representing the proceeds of the sale of the chattels is for the first time to be applied under section 21.

The conclusion I come to is that section 21, sub-section (ii.), applies to the present case, but the "land" referred to in that sub-section is in this case the land by reference to the limitations of which the heirlooms were settled; and that accordingly the applicant is entitled to have the £25,000 odd applied in the manner proposed.

Solicitors, *Fooks, Chadwick, Arnold, & Chadwick; Few & Co.; Slaughter & Colegrave.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) — Feb. 4.

STRICKLAND *v.* WHITTAKER. (*a.*)

Licensing Law—Sale of liquors—Sale on unlicensed premises—Order taken by traveller—Duty of traveller to forward order to principal—Goods appropriated at and sent from licensed premises—Offence—Executory contract of sale—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

An order was taken by a brewer's traveller at a customer's house for beer to be supplied from the appellant's brewery, to be paid for by the customer on or after delivery. It was a rule in the brewery that no order taken at a customer's house would be executed until the traveller had sent into the office the name and address of the customer and the order had been entered and passed through the books and directions given to the carman in the ordinary way.

Held, that an order taken by the appellant's traveller, and so executed, did not constitute evidence of a sale at the premises of the customer, and therefore the appellant was wrongly convicted of an offence under section 3 *of the Act of* 1872. *Whether, on other facts, an executory contract of sale would come within section* 3 *was discussed, but not decided.*

Walker *v.* Walker, 67 *J. P.* 452; *and* Stephenson *v.* Rogers (Limited), 63 *J. P.* 230, 47 *W. R. Dig.* 101, *considered.*

Case stated by the Court of Quarter Sessions of Lancaster, raising the question whether an offence was committed under section 3 of the Licensing Act, 1872, by a brewers' traveller taking orders at customers' houses and transmitting them to the licensee, by whom the beer was set aside and delivered to the customer.

The facts, so far as material, stated in the case were that the appellant had been convicted by the justices sitting at Preston and fined £50. On appeal to quarter sessions the fine was reduced to £20, but the conviction was confirmed, and a case stated for the opinion of the High Court.

(1) The appellant was a brewer licensed to sell by retail at his premises at Nelson, Lancashire, but not for sale at Rishton. He had in his employment a traveller named Cooper, whose business it was to obtain orders for beer, or other liquors, from persons residing at Rishton and elsewhere. In obtaining such orders Cooper was required to observe certain rules, which were to the effect that no carter or other person in the employ of the appellant should deliver liquor in any quantity to any person unless the same had been previously ordered, and the correct name and full postal address of the customer handed in at the office, except where the liquor was ordered at the office itself. (2) No money to be received by any carter or other person receiving orders until the goods ordered were delivered. (3) The full name and address of all persons ordering must be entered in the books and sent into the office the day before the orders were executed. The existence of these rules was not known to Plant, or any other customer, nor was any limitation on Cooper's authority to make sales or take orders on behalf of the appellant communicated to or known to Plant, the general course of business dealing being that when Cooper accepted orders the customers expected them to be, and they were in fact, executed. The appellant supplied Cooper with post-cards containing price lists for customers to fill up and send to the office, and Cooper occasionally, but not invariably, took out such post-cards and gave them to persons on whom he called for orders. Before the 5th of November, 1902, Mr. Plant, of Walmisley-street, Rishton, had from time to time ordered, by letter, stout from the appellant. On that date Cooper called on Plant and obtained from him an order for two gallons of stout, price 2s. 4d., and Cooper thereupon entered the order in his book, and on the following day posted to the appellant the order book, with a summary of all the orders obtained by him at Rishton and the neighbourhood, including Plant's; and also posted to the appellant a number of gummed labels bearing the names of persons who had given orders, to be affixed to the vessels. On the receipt by the appellant of the order book summary and labels, on the 7th of November, the appellant's servants selected and appropriated a jar of stout to fulfil Plant's order, and affixed thereon the label bearing Plant's name. On the same day the jar was delivered in one of the appellant's carts by one of his servants.

It was contended for the appellant that there was no evidence of any holding out that Cooper had authority to accept orders; that he had no authority in fact; that an executory contract was not sufficient in law to bring the case within the provisions of the Act, for an executory contract was not complete until accepted at the licensed premises. It was further contended that, though the jar was delivered in pursuance of an order given by Plant to Cooper, there was no contract until Cooper's order-book was received by post at Nelson and accepted by the appellant; that the jar of stout had been appropriated and set apart by the appellant at Nelson, and that the sale took place at the licensed premises. Also, that although the order for the stout was given to Cooper on the 5th of November, there was no contract until Cooper's order-book, &c., was received by post and accepted by the appellant and the stout appropriated to the customer, and that the sale took place, therefore, at Nelson and not at Rishton. It was contended for the respondent that the sale, or the contract for the sale, was completed at Plant's house at Rishton, and that, on the facts proved, Cooper was the agent of the appellant to sell to Plant and to make a contract with him for the sale of the stout, and that he had been held out as such agent to Plant by the appellant.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The court of quarter sessions was of opinion that, on the facts proved, an executory contract for the sale of the stout was made at Plant's house at Rishton, and that the court was bound, by the authority of *Stephenson* v. *Rogers* (*Limited*), 15 The Times L. R. 148, 47 W. R. Dig. 101, to hold that an offence had been committed within the meaning of section 3 of the Licensing Act, 1872.

Roskill, K.C. (*W. Mackenzie* with him), for the appellants.—The present case is almost exactly on all fours with *Walker* v. *Walker*, 67 J. P. 452, decided in this court since this case was before the quarter sessions, and on that authority this conviction should be quashed. There is a distinction between an actual sale and an agreement for sale, *i.e.* an executory contract, followed by delivery, after the goods to satisfy the order have been appropriated on the licensed premises—which is clearly drawn in the cases of *Pletts* v. *Campbell*, [1895] 2 Q. B. 229, 44 W. R. Dig. 90; *Pletts* v. *Beattie*, [1896] 1 Q. B. 419, 44 W. R. Dig. 90; *Hewett* v. *Jarvis*, Law Journal Newspaper, the 18th of July, 1903; and the principles laid down in those cases show that as Cooper had no authority in fact to enter into a contract on behalf of his employer, the sale took place at Nelson and not at Rishton. The argument on the other side was founded mainly on the judgment of Channell, J., in *Stephenson* v. *Rogers* (*Limited*), 63 J. P. 230, 47 W. R. Dig. 101, that an executory contract of sale made at a customer's house was an offence under section 3 of the Act of 1874. If the facts here showed that such an executory contract had in fact been made by Cooper we should not contend that an offence had not been committed. Possibly an agreement to sell liquor even if not followed by delivery would constitute an offence if made on unlicensed premises.

Bankes, K.C. (with him *Whateley*), for the respondent.—The only question raised in the case is whether an executory contract comes within the Act. The magistrates found that, in so far as the purchaser was concerned, the contract was completed when the order was given to Cooper. That is a finding of fact supported by the evidence, and therefore we start here with an executory contract. There is no express assent by the purchaser that the goods should be appropriated at the vendor's premises. Therefore *Pletts* v. *Beattie* does not apply. And in that case the loss of the goods in transit would have fallen on the purchaser, while here the loss would have fallen on the vendor. *Walker* v. *Walker* can also be distinguished, for there the licensee exercised his own judgment whether he should accept the order or not. *Stephenson* v. *Rogers* shows that an executory contract followed by delivery is not sufficient to bring the case within the statute unless something was said when the goods were ordered that brings the case within *Pletts* v. *Beattie*. The magistrates have not so found, and the conviction therefore should stand.

Roskill, in reply.—The court is not bound by a finding of fact, for they have a discretion under section 2 (2) of the Judicature Act, 1894. The facts here amount to this, that Cooper took the order subject to his master's approval. Therefore until that approval was given there was no contract—no sale made on the unlicensed premises—and the conviction cannot stand.

Lord ALVERSTONE, L.C.J.—It is extremely important in licensing cases, when principles are laid down by the court in deciding them, that those principles should be applied in subsequent cases where the facts are substantially the same. *Walker* v. *Walker* has been relied on by Mr. Roskill as an authority in his favour on all points, but I do not think he is quite entitled to use it in the way he desires to. It is quite true that it is very difficult to find any substantial difference in the facts of the two cases, but on the other hand it is quite plain from the report that the argument with reference to an executory contract being sufficient was not present to the mind of the court when giving its decision, and was not the point on which that decision was based; the real contention there was that there was no appropriation of the goods, and that the property did not pass until actual delivery, the facts being that the order was taken to the licensed premises, accepted there by the licensee, a setting aside of the goods by him, and their subsequent delivery. It seems to me on the authorities that those facts did not show a sale off the premises, but that the contract, if any, was made on the licensed premises. That brief statement of the judgment shows that the judges in *Walker's case* were not applying their minds to the point, which indeed does not seem to have been raised before them, whether or not an executory contract by the agent of the licensed person would be sufficient to constitute an offence within the statute. I would point out that Channell, J., was a party to the judgment, and in all probability, if any question had been raised on this point he would have directed attention to the case of *Stephenson* v. *Rogers*. That being so, we shall probably have to decide some day whether an executory contract made by the traveller with the authority of the licensed person brings the latter within the Act. The inclination of my mind at present, after hearing the arguments on this point that have been urged on both sides to-day, is that it would do so—that is to say, I am inclined to the opinion indicated by Channell, J., in *Stephenson* v. *Rogers*, and probably intimated by Wright, J., in *Pletts* v. *Campbell*. But as I really do not think that the point arose in this case, I must not be supposed to express a definite opinion now, and I desire to reserve my decision until some future day when it must come before the court again on probably a set of facts that directly do raise it.

The conclusion I have come to here is that there was no evidence upon which the magistrates ought to have found that there was an executory contract entered into by Cooper on the occasion of his interview with Plant; there was at most evidence of the acceptance of an order to be transmitted to his principal, who might himself act upon it. I see nothing in what passed between Plant and Cooper to show any acceptance of a contract of sale. What were the facts? As I have before said, we must not draw fine distinctions in dealing with licensing matters. Travellers canvassing for orders are undoubtedly common incidents in the wine and spirit trade, as in other trades, and I think it would be a startling proposition to say that the mere forwarding of an order is sufficient evidence of the acceptance of a contract by the traveller. The course of business here prescribed that no order was to be accepted in the sense of a contract, nor goods delivered until the orders were handed in to the office and entered in the order book, and that any person infringing that rule would be instantly dismissed, points to the fact that it was not intended that the taking of an order to be afterwards transmitted should be the acceptance of a contract.

I think the magistrates, in stating this case, meant to say that Cooper was a person who was to canvass for orders, and they set out the restrictions or rules and then they found that Thomas Plant had not any notice of these restrictions or of any limit of Cooper's authority. Looking at these facts, and comparing

them with the facts in *Walker* v. *Walker* I think there is no evidence on which the magistrates ought to have come to the conclusion that there was an executory contract for the sale of beer. There was no evidence, in fact, of Cooper's authority to accept contracts, so far as the written rules went, and so far as the previous practice went there was no evidence that the appellant had authorized him to accept. The inference I think the magistrates ought to have drawn was that Cooper was there to take orders and transmit them to headquarters, where they might be accepted or not by the appellant. I do not know that much is to be gained by referring to the authorities which have been cited beyond saying that in *Pletts* v. *Campbell* the court on the facts stated came to the conclusion that all the substantial part of the transaction took place at the customer's place of business or at any rate not on the licensed premises. In *Pletts* v. *Beatty* where a postcard had been sent, the court came to the conclusion that there had been no sale off the licensed premises. In *Stephenson* v. *Rogers* they came to the same conclusion, and the same was the result in *Walker* v. *Walker*. The setting aside of the goods at the place where the order was given is also a matter to be taken into consideration. Looking fairly at the facts I can see no evidence of anything more than an acceptance of an order, forwarding it to headquarters, and the dealing with the order by the principal, so as to show that the contract was not made—even the executory contract—until the order had been entered and the authority of Cooper to make it ratified.

For these reasons I think that the principle acted on in *Walker's case* applies to this case; that there is no sufficient evidence of an executory contract for sale by Cooper, so as to raise the point which was discussed by Channell, J., in the case I have referred to. I therefore think that this appeal should be allowed.

WILLS, J.—I agree. With regard to the question whether an executory contract made at the purchaser's house answers the words of the section constituting an offence, I would rather reserve anything like a judgment; but the impression left on my mind by the arguments is rather in favour of the view that it would be sufficient. I desire, however, emphatically to keep an open mind on the question, in case it should come forward again, because it is impossible to my mind, however experienced in judicial matters, to approach a question which it is not necessary to solve in the same spirit as if it had to be solved. On the question whether there was really any evidence of a complete sale at Rishton, my opinion has, I confess, somewhat fluctuated during the course of the argument, but I have ultimately come to the conclusion that the view expressed by the Lord Chief Justice is correct.

KENNEDY, J.—I am of the same opinion. Upon the point whether an executory contract, as it has been called, would be sufficient without more to constitute a violation of the section in question, I desire entirely to reserve it for careful consideration, if it ever directly arises, and I would rather therefore not say, as it seems quite useless, what at present is the inclination of my opinion.

Appeal allowed; conviction quashed.

Solicitors, *Busk, Mellor, & Norris*, for *Procter & Sons*, Burnley; *Bower, Cotton, & Bower*, for *Ainsworth, Sanderson, & Howson*, Blackburn.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) — Feb. 1, 2.

REX v. JUSTICES OF WEST RIDING. (a.)

Licensing law — Justices — Appeal — Employment of county solicitor—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29—*Licensing Act*, 1902 (2 *Ed.* 7, *c.* 28), *s.* 20.

The quarter sessions of West Riding, on the hearing of two appeals against the refusal of the licensing justices to renew a licence, dismissed one appeal and allowed the other appeal, but in both cases made a special order disallowing the profit costs of the solicitor employed by the justices, on the ground that they should have employed the county solicitor.

Held, that the quarter sessions had no jurisdiction to do so, and that the justices were not bound to employ the county solicitor.

Rules *nisi* for *certiorari* and mandamus granted at the instance of the justices for the licensing sessions of East Morley.

The following facts appeared from the affidavits:

At the quarter sessions for the West Riding, held on the 16th of April, 1903, one Squire Briggs appealed against the refusal of the licensing justices of East Morley to renew the licence of the "Crown Point Hotel," and at the same sessions an appeal was heard against the refusal of the same justices to renew the licence of the "White Hart." It had been the custom for many years in the West Riding of Yorkshire to have an official known as the county solicitor, and that officer was now appointed under section 3, sub-section 10, of the Local Government Act, 1888, by the county council of the West Riding. It is the duty of that officer, who receives a salary out of the county funds, to act for the justices in all judicial business, and as a matter of fact the county solicitor had always acted for the justices in appeals from their decisions. The licensing justices, however, in the present case, instead of employing the county solicitor, employed their clerk, who is a solicitor, to act for them in the two appeals in question. The court of quarter sessions having ascertained that fact, expressed their opinion that the licensing justices had acted wrongly in disregarding the former practice, which was beneficial and economical to the inhabitants of the riding, and made an order in both appeals (one of which had been dismissed and the other allowed) which provided that the personal professional charges of the solicitor in question should be disallowed.

The licensing justices obtained rules of *certiorari* and mandamus on the ground that the justices in quarter sessions had no power to deprive the solicitor in question of the costs to which the licensing justices were entitled in the first appeal by virtue of the Alehouse Act, 1828, s. 29, and in the second appeal by virtue of the Licensing Act, 1902, s. 20.

By section 29 of the Alehouse Act, 1828, it is provided that "In every case where notice of appeal against the judgment of any justice in or concerning the execution of this Act shall have been given, and such appeal shall have been dismissed or the judgment so appealed against shall have been affirmed, or such appeal shall have been abandoned, it shall be lawful for the court to whom such appeal shall have been made or intended to have been made, and such court is hereby required to adjudge and order that the party so having appealed or given notice of his intention to appeal shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum by way of costs as shall,

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

in the opinion of the court, be sufficient to indemnify such justice from all costs and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal." By section 20 of the Licensing Act, 1902, it is enacted that "In every case of appeal against the decision of any licensing justice, the court to which such appeal is made shall adjudge and order that the treasurer of the county or place in and for which such justice whose decision is appealed against shall have acted on the occasion when he gave such decision shall pay to such justice such sum as, in the opinion of the court, shall be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been so put, and which cannot be recovered from any other person, and the said treasurer is hereby authorized to pay the same, which shall be allowed to him in his accounts. The order of the appellate court may be made either at the sessions when the appeal is heard, or at the next ensuing sessions, and the costs may be taxed either in or out of sessions."

Danckwerts, K.C., and *Compston* showed cause.—The justices properly disallowed these profit costs as being costs not being properly incurred: *Reg.* v. *Winder*, 48 W. R. 605, [1900] 2 Q. B. 666, and *Huxley* v. *West London Railway Co.*, 37 W. R. 235, L. R. 14 App. Cas. 26. In the next place the justices have here exercised their discretion, and as it was within their jurisdiction it is not open to review in this court: *Reg.* v. *Middlesex Justices*, [1895] 1 Q. B. 616.

J. W. Williamson, for the licensee, took no part in the argument.

Macmorran, K.C., and *Greenwood*, in support of the rules.—Quarter sessions here went beyond their jurisdiction. They intended by their order to deprive the licensing justices of the indemnity to which they were entitled. But for the direction in the order the costs would have been taxed in the ordinary way.

They cited *Reg.* v. *Worcestershire Justices*, [1900] 2 Q. B. 576.

Lord ALVERSTONE, L.C.J.—I have come to the conclusion these orders go too far and cannot be supported. It was admitted that the effect of section 20 of the Licensing Act, 1902, is to place the licensing justices in the same position with regard to being indemnified against costs when their decisions are reversed as they are under section 29 of the Alehouse Act, 1828, when their decisions are upheld. The two cases before the court are therefore in the same position, and it is only necessary to refer to section 29 of the Act of 1828. I think if Mr. Danckwerts had made good his contention that this was a case in which the justices had acted under that section and had fixed a sum which in their opinion would indemnify the licensing justices from the costs to which they had been put, we could not have interfered. The justices would then have exercised their discretion. That, however, is not the way in which the matter comes before us. The form of each order shows that it was not an ordinary order as to costs, but an order made, as is stated on the face of it, in view of particular matters having been brought before the court. It is quite clear on the affidavits what was meant by "in view of particular matters brought before the court"—namely, that neither order embodies a taxation made by the justices, or the fixing of such an amount as the quarter sessions thought sufficient to indemnify the licensing justices, but is a special order made because the court of quarter sessions thought that the licensing justices should have engaged the county solicitor to act for them on the appeals. It seems to me, therefore, that the case is not one of mere taxation, and raises the question as to whether the court of quarter sessions could refuse to make an order under section 29 of the Act of 1828, because the licensing justices had employed a solicitor other than the county solicitor. There is no rule or law which compels the licensing justices to employ a particular solicitor. I am of opinion that the orders drawn up under the circumstances of the case were not orders under section 29 of the Act of 1828, and section 20 of the Act of 1902, and therefore the objection raised to the rules being made absolute does not hold good. The orders must therefore be quashed, and since the court of quarter sessions have not considered the question of costs the matter must be sent back to them.

WILLS, J.—I am satisfied that the justices at quarter sessions had no jurisdiction to compel the licensing justices to employ a particular solicitor. It is quite clear the licensing justices are not deprived of their right to be indemnified from costs merely because they did not employ a special solicitor. The court of quarter sessions has assumed certain powers which it did not possess. What has been done, as appears upon the face of the orders, is not a matter of taxation, but an application of an erroneous principle.

KENNEDY, J.—I agree, and have nothing to add.

Rules made absolute.

Solicitors: *Farmer, Rawson, & Co.; Walker & Rowe*, for *E. O. Wooler & Co.*, Leeds; *Clements, Williams, & Co.*, for *Trevor Edwards*, Wakefield.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) — Jan. 26.

TOWER JUSTICES v. CHAMBERS AND OTHERS. (a.)

Licensing law—Beerhouse—Privileged beerhouse—Sale of spirits without a licence—Conviction—House closed—Application by owners of beerhouse for grant of licence—Application refused on a ground other than one of those specified in section 8 *of the Wine and Beerhouse Act*, 1869—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 15.

The holder of a licence to sell by retail beer to be consumed on or off the premises was convicted for the first time of selling spirits without a licence. The house had been licensed for the sale of beer and wine prior to the 1*st of May*, 1869, *and the licence had been regularly renewed from time to time, the last renewal having been made to the then tenant at the general annual meeting on the* 13*th of February*, 1903. *The tenant having been convicted on the* 30*th of July following, the owners of the house applied at the next special sessions, under section* 15 *of the Licensing Act*, 1874, *for a grant of a provisional licence in respect of the premises. The application was refused on a ground other than one of the four grounds specified in section* 8 *of the Wine and Beerhouse Act*, 1869.

Held, that the case was governed by Ex parte Flinn, 48 *W. R.* 29, [1899] 2 *Q. B.* 607, *and that the justices could only refuse the application upon one of the four grounds specified in the Act of* 1869.

Reg. *v.* West Riding Justices, 36 *W. R.* 855, 21 *Q. B. D.* 258, *discussed.*

This was a special case stated by the court of quarter sessions for the County of London, that court having upon appeal set aside the decision of the Tower licensing justices, the present appellants, who had

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

refused to grant to the respondent, R. H. Coburn, a certificate authorizing the grant to him of a licence to sell by retail beer and wine to be consumed on or off the premises known as the "Coach and Horses," Backchurch-lane, in the parish of St. George-in-the-East.

It appeared from the special case that the house was a beerhouse, licensed before 1869 and had been continuously licensed ever since down to July, 1903, when the then tenant, Joseph Arch, was convicted of selling spirits without a licence, and thereupon became disqualified under the statute to hold any licence, and the house was closed.

On the 18th of September, 1903, an application was made to the magistrate at Thames-street under section 15 of the Act of 1874 for authority for R. H. Coburn to carry on the business until the next special licensing sessions, but at the suggestion of the magistrate that application was withdrawn.

On the 28th of September, being the special licensing sessions of the justices for the Tower division, an application was made on behalf of the owners, Messrs. Chambers Brothers & Co., for the grant of a licence to Coburn, he being the resident occupier in the house. The justices refused to grant the licence upon grounds other than the four specified in the Wine and Beerhouse Act, 1869, there being no evidence before them which would bring the case within any of those grounds.

The present respondents thereupon appealed to quarter sessions, which court decided that in the circumstances stated the jurisdiction of the licensing justices was limited to refusing the licence on one or more of the four grounds specified in section 8 of the Act of 1869 already referred to, and therefore granted the licence.

Against that decision the licensing justices now appealed.

Macmorran, K.C. (*Leycester* with him), for the appellant justices. — The question here is whether the conviction of Arch did away with the old licence in such a way that the house cannot be any longer said to be "privileged," *i.e.*, to have been licensed from 1869 down to the present time, and therefore the discretion of the justices to grant or refuse a licence is no longer limited to the four grounds mentioned in section 8 of the Act of 1869. There is authority for saying that upon the conviction of Arch the old licence ended. In *Reg.* v. *West Riding Justices*, 36 W. R. 855, 21 Q. B. D. 258; *Traynor* v. *Jones*, 42 W. R. 201, [1894] 1 Q. B. 83; and *Freer* v. *Murray*, 41 W. R. 450, [1894] App. Cas. 576, it was laid down that the discretion of the licensing justices in granting or refusing a renewal or transfer of a licence to a beerhouse under the Act of 1869 was only limited to the four specified grounds in cases where there was a licence actually existing at the time the application was made: see particularly judgment of Lord Herschell in the House of Lords in *Freer* v. *Murray*. The only case that is in conflict with these decisions is *Ex parte Flinn & Sons*, 48 W. R. 29, [1899] 2 Q. B. 607, and that decision is inconsistent with the *West Riding case*, which appears never to have been questioned. In *Flinn's case* no one appeared for the respondents, and the *West Riding case* was not cited.

Foote, K.C. (with him *Bruce Williamson*), for the respondents.—The case of *Ex parte Flinn* and that of the *West Riding Justices*, when examined, are really not in conflict. The latter would be decisive against the respondents here were they not protected under section 15 of the Act of 1874, for that decision has no reference to cases under that section which gives special rights to the owners of the premises where there has been a conviction for one of four separate offences, one of which is the selling of spirits without a licence, as has happened here. In the *West Riding case* the conviction was for allowing the house to be used as a brothel, which is not one of the four offences mentioned in the section, and there are obvious reasons why such an offence attached an odium to the premises as well as to the licence-holder, and why, therefore, the discretion of the justices should be let in. Whether *Ex parte Flinn* was rightly decided is another question and need not be considered in deciding merely whether it is at variance in fact with the *West Riding case*. The only irregularity that can be alleged against Coburn is that he did not get authority from the court of summary jurisdiction to carry on until the next licensing sessions, but the explanation of that apparent omission was because it took some weeks to get Arch out of the house, and when Coburn had been introduced the licensing sessions had nearly come round, and the magistrate suggesting that the step was not necessary to preserve the licence, the application before him was not proceeded with. [Lord ALVERSTONE, L.C.J.—The section says that there may be a further application made to the licensing sessions, which looks as if there were two steps. If the first application to the magistrate had been refused could you still have said when you came to make your application for transfer that the justices were still limited to the four grounds?—Yes. Even though the house had not got a licence?—Yes; because the house had a licence, if my view is right, although it for a time had been forfeited.] The distinction between a forfeited licence and an expired licence is pointed out clearly in *Freer* v. *Murray*. [He was stopped.]

Macmorran, in reply.—I submit that when a licence has been forfeited there is such a break in its continuity as lets in the full discretion of the justices in dealing with it. That was really the principle applied to the *West Riding case*. I do not contest the right of the owners to apply under section 14 of the Act of 1869—that was assumed in the *West Riding case*—but I say that it was there held that the justices' discretion was unlimited. Section 15 of the Act of 1874 only gives the right to apply under section 14 of the Act of 1869, and therefore the present case and that decision are on all fours.

Lord ALVERSTONE, L.C.J.—As this case has not been fully argued on the part of Mr. Foote because I intimated that we were inclined to think that the *West Riding case* and *Freer* v. *Murray* were not authorities against the respondents, and that *Ex parte Flinn & Sons* gave the sessions a right to deal with the application, I do not propose to discuss the matter at any length. I only wish to make three observations which indicate why I think we are bound by *Flinn's case*. This case illustrates the difficulty which the courts have in construing the licensing laws and applying them; but, on the other hand, one must not forget that it is a very thorny subject, and it is an extremely difficult subject for the Legislature to deal with. Therefore while we have to discharge that duty we cannot, and ought not, to blame anybody for the way in which the Acts of Parliament stand. I think it is quite plain that from one point of view Mr. Macmorran's argument may be said to go a little too far, because I do not think he gives sufficient effect to the consequences of allowing a person to apply, after a conviction. It is quite plain that if the conviction has forfeited the licence there must be a break in the case, and therefore it would seem to me that the section contemplates under some circumstances a state of things in which the principle of the *West Riding case* could not apply, because there must be a suspension

in cases in which the licence has been absolutely forfeited. Mr. Macmorran says it gives the right to apply but leaves unfettered the discretion of the court — the magistrate or sessions to whom application is made—as to the grounds on which they may refuse the grant or continue the grant of the licence. On the other hand, of course, it is said that the effect of allowing the man to apply in respect of an old beerhouse is to give him the privileges which a person applying under section 19 of the older Act would have, of the tribunal being limited to the four grounds of section 8. That being the question to be raised, I think we could not deal with Mr. Macmorran's argument without overruling at any rate the principle, and I think myself the authority, of *Flinn's case*. It may be, for the reasons which I have mentioned, that the *West Riding case* does proceed on different lines, but I must say I think that *Flynn's case* is so much an authority that we could not really deal with this case contrary to that principle without practically overruling it, and of course we cannot do that, and in a case where there is an appeal I prefer to say I think we are bound by the principle of the decision in *Flinn's case*, and therefore we must affirm this decision of the quarter sessions.

I may add that in my opinion this is a case which obviously ought to go further and be more fully discussed, and therefore, if there is to be an appeal, that is the ground upon which I put it, that we do not overrule the decision of a court of co-ordinate jurisdiction.

WILLS, J.—I am entirely of the same opinion. I think with respect to *Flinn's case* that it is so exactly in point in all its circumstances that it really must be followed. The only distinction between *Flinn's case* and this that I can see is that in the former case it was an application in the first instance to a court of summary jurisdiction, and this is an application to the special sessions. I cannot think myself that the Act of Parliament meant to make any distinction whatever between the rights of the parties on those two occasions, and therefore it seems to me that *Flinn's case* is really exactly in point and must be followed. I confess I think myself that *Flinn's case* is really difficult to reconcile with the *West Riding case*. I have heard what Mr. Foote has said about it, but still, after all is said and done, it seems to me that in the one case the court held, under circumstances which are very closely analogous to these, that the expression "be in force" in the 19th section of the Act of 1869 was not satisfied, and that in *Flinn's case* they held it was. It seems to me extremely difficult to reconcile those two decisions. All I can say is, after having, besides listening to the arguments, spent a couple of hours myself since yesterday in going into these sections, it seems to me a matter of extreme difficulty and perplexity, and I am glad to take refuge in the fact that I am bound by *Flinn's case*.

KENNEDY, J.—I agree. I think it right to say that I see no reason, while saying that we are bound by *Flinn's case*, to intimate that I feel any reason to dissent. Although there may be no difference between that case and this—I do not think there is in substance for the reasons my lord has given—it seems to me that this is doing what the Acts of Parliament expressly authorized, when the Acts are read together—namely, that up to the time of the special sessions, in a case of this kind, the licence may be treated as alive, and there is a power to transfer, to allow the owner to carry on in the meantime. It was in an application of that sort by the owner in *Flynn's case* that the matter arose. I think there is no essential difference. The question which there arose was a question which to my mind was rather more difficult—if I may say so—than the present case here. The time for applying in a case of this kind appears to me to be at a special sessions at which this application was made and refused, the decision being reversed by the court of quarter sessions; and in *Flinn's case* it seems to me a somewhat more difficult question arose, because it was an application to a magistrate in the meantime by the owner to carry on the business. It seems to me that, whether such an application is granted or refused, there is a licence to be dealt with, and, on the principle in *Flinn's case*, to be dealt with as the court of quarter sessions have held in the decision we have now affirmed.

Appeal dismissed with costs, and with leave to appeal.

Solicitor for the appellants *E. W. Beal.*

Solicitors for the respondents *Maitland, Peckham, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) — Jan. 12.

ESCOTT *v.* NEWPORT CORPORATION. (*a.*)

Local government—Street—Power of local authority to erect pillar for overhead tramway wire—Pillar sunk in soil of pavement—Trespass to private property—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 19—*Newport Corporation Act,* 1900, *s.* 51.

Where a local authority requires to open up the soil of a street, the surface only of which has been dedicated to the public, they do not commit a trespass on private property so long as the act to be done is within the area of their statutory powers.

Held, therefore, that no trespass was committed by the digging of a hole in the footway in which to place a pole to carry the electric wire for a tramway scheme authorized by a private Act which incorporated the provisions of the Lands Clauses Act, the act complained of not amounting to a taking of land but only to the exercise of a right in the nature of an easement.

This was the defendants' appeal from a judgment of Judge Owen sitting at the Monmouth County Court, in favour of the plaintiff. The action was for damages for an alleged trespass by the defendants upon the plaintiff's property by the erection of an iron pillar for carrying an overhead electric cable used for tramcars and for a mandatory injunction to remove the pillar.

The plaintiff was lessee for the residue of a term of years of a plot of ground abutting on Chepstow-road, upon which he built a house. There was a space of about ten feet in width between the house and the road originally intended for a forecourt, but instead of using it as a forecourt, the plaintiff, with the consent of the ground landlord, paved it and put down a line of kerbing immediately adjoining the road. The public passed over this forecourt. The pillar had been fixed in the pavement in front of the plaintiff's shop, wholly within the boundary of the plot of land demised to him. It was thirty-one feet in height, ten inches in diameter at the base, and about six feet of its height was sunk in the ground.

The placing of this pillar was the trespass complained of.

The defence pleaded was that the pillar had been erected by the defendants under and pursuant to

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

authority given them by the Newport Corporation Act, 1900, which incorporated the Lands Clauses Acts, and provided that the several words and expressions to which in the Public Health Act meanings were assigned should in that Act have the same respective meanings.

Section 51 (i.) of the Newport Corporation Act, 1900, provides that "for the purpose of working any of the corporation tramways by mechanical power . . . the corporation may, subject to the provisions of this Act, construct, lay down, place, erect, maintain, renew, and repair, on, in, over, or under any street or road in which any corporation tramways are for the time being laid," certain works and appliances including "poles, posts," and the defendants were further empowered to make such alterations in any existing tramways of the corporation . . . as might be necessary or expedient for adapting the some to be worked by mechanical power."

It was admitted that the roadway of Chepstow-road and the footpaths on each side were together a street within section 4 of the Public Health Act, 1875, and the defendants contended that by section 149 of the Act the Chepstow-road, including the pavement in front of the plaintiff's house and the place where the pillar had been fixed, had become vested in them, and that they were empowered by section 51 of their Act of 1900 to erect the pillar without the consent of the plaintiff and without making him compensation.

The learned county court judge held, upon the authority of *Coverdale* v. *Charlton*, 27 W. R. 257, 4 Q. B. D. 104, and *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434, 45 W. R. Dig. 92, that the defendants were only the owners of so much of the soil as was necessary for the ordinary user of the street and not of anything more, and as in his opinion section 51 of their Act of 1900 did not empower the defendants to place the pillar in the plaintiff's subsoil without paying him compensation, that the defendants had committed a trespass on his property.

The defendants appealed.

Macmorran, K.C., and *J. Carver*, for the defendants.

A. T. Lawrence, K.C., and *John Sankey*, for the plaintiff.

Cur. adv. vult.

Lord ALVERSTONE, L C.J.—The point raised in this case is one of very considerable importance, because it might well apply to many cases, and therefore, as we are only dealing with this one particular case, I want to limit my remarks to the facts here and not be taken to say anything not actually brought before us. [After stating the facts his lordship continued:] The question is, whether under those circumstances the erection of the post, which penetrated the ground to a considerable depth, constitutes a trespass. It must be taken that the county court judge found that the plaintiff had dedicated to the public a right of way over the pavement, subject to such interruption as might be caused by furniture being from time to time placed thereon. Therefore the place, so far as the surface was concerned, was vested in the defendants. The plaintiff contended that the pole went down into the ground to a greater depth than was vested in the local authority or was necessary for the proper user of the place as a right of way for the public, and that there had been an occupation of his land by the defendants and a taking of his property that amounted to a trespass. If that were the true view, then I think the plaintiff would be right, and that he would be entitled to a declaration, and in certain circumstances to an injunction, for the plaintiff is not bound to sue for compensation and could require the local authority if they required his land to give him notice to treat under the Lands Clauses Act. Therefore this court has to consider whether or not what the local authority have done, and which they contended they were justified in doing by the powers conferred on them by section 51 of the private Act of 1900 amounted, as the plaintiff contends, to a taking of land. It seems to me that section 51 contemplated something being done on private property which involved something less than the occupation of the land by the defendants. I cannot conceive it possible to contend successfully that because the pole requires a support on the plaintiff's land there must necessarily be a taking of the land by the authority which placed it there under a statutory right. If the support of the pole constitutes an injurious affection on the plaintiff's land, he has his remedy under the Lands Clauses Act. I therefore come to the conclusion that there has been no taking of land here by the local authority, and that what they did was within the statutory powers which have been given to them for the purpose of working their tramway system.

For the reasons I have given I think the appeal must be allowed.

[His lordship added that his brother Wills, J., who was absent, concurred in the opinion he had expressed.]

KENNEDY, J.—I am of the same opinion. It was contended by the plaintiff that although the defendants might do those things which were authorized by section 51 of their Act of 1900, yet there was reserved from that which they were authorized to do any interference, except by permission or licence, with soil not vested in them. In my opinion that proposition is true to this extent: that while under the section no right in the property passed, the defendants nevertheless had a right within the area under their control to enter under their statutory powers and to do the work authorized in, over, or under any street or road. That proposition seems to be the basis of the judgment in *Fareham Local Board* v. *Smith*, 7 Times L. R. 443. In that case the local board had entered into a contract with an electric light company to light the town of Fareham. No licence from the Board of Trade or provisional order had been obtained by the company under the Electric Lighting Acts of 1882 and 1888, but they erected their poles and overhead wires under a licence from the local board. The defendant objected to the erection of a pole opposite his drawing-room window, and claimed to be entitled as owner in fee to the subsoil of the adjoining half of the highway, and claimed a right to treat the plaintiffs as trespassers. In that case an injunction was granted to restrain the defendant interfering with the plaintiffs. I think that case does not conflict with the cases—*Coverdale* v. *Charlton*, 27 W. R. 257, 4 Q. B. D. 104, and *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434, 45 W. R. Dig. 92, relied on by the plaintiff before the learned county court judge. In my view all that has been done here by the local authority is not a taking of the soil, but an exercise by them of a statutory right in the nature of an easement within an area which prevented an act of trespass being committed by reason of the fact that it was within the zone contemplated by the statute which gave them that right.

If, therefore, any damage has been caused to the plaintiff through injurious affection of his land he has a good claim for compensation under the Lands Clauses Acts. An action for trespass, however, seems to me one that a plaintiff cannot maintain. If we were so to hold, it would appear to follow that a

public authority would have to serve notices under the Lands Clauses Acts on the frontagers every time it might be necessary for them in the execution of their statutory duties—laying a sewer and the like—to penetrate below the surface of the soil of a street. There is nothing which I think could justify us in coming to such a conclusion. I think, therefore, that the decision of the county court judge was wrong and that the appeal should be allowed.

Appeal allowed; leave to appeal granted.

Solicitors for the defendants, *Cole & Jackson*, for *A. A. Newman*, Newport.

Solicitors for the plaintiff, *Ley, Lake, & Ley*, for *Morgan & Co.*, Newport.

Court of Appeal.

From K. B. D. (In Bkcy.). (Vaughan Williams, Romer, and Stirling, L.JJ.) } Nov. 20, 21, 23, 24; Feb. 22.

In re BEAUCHAMP.
Ex parte BEAUCHAMP. (a.)

Bankruptcy—Bankruptcy notice—Creditor's address for service—Power of the Bankruptcy Court to go behind the judgment—Irregularity—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g); *s.* 7, *sub-section* 3; *s.* 143—*Bankruptcy Rules,* 1886 *to* 1890, *Appendix, Form No.* 6—*Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.

The Court of Bankruptcy possesses the power, on the hearing of a bankruptcy petition founded on a judgment debt, to go behind the judgment to inquire into the consideration for the debt. But the judgment is conclusive unless the consideration can be questioned. If a creditor who issues a bankruptcy notice occasionally leaves the address which he has given in the notice, this will not of itself render the notice bad if the address is such either that he can be found, or the debtor is able to pay or compound for the debt, there during the seven days limited by the notice. Nor does it matter if this address is only a temporary address, such as an hotel, if the creditor has no permanent home, or that he left that address on the last of the seven days limited by the notice. But if he abandons such an address this will render the notice inefficient.

In re Stogdon, Ex parte Leigh, [1895] 2 *Q. B.* 534, 44 *W. R. Dig.* 13, *discussed.*

If at the date of the trial of an action for tort a female defendant is unmarried a judgment can be obtained against her creating a personal debt.

This was an appeal by the debtor, Lady Violet Beauchamp, from a receiving order in bankruptcy made against her by Mr. Registrar Giffard, dated the 31st of October, 1903.

The facts were as follows: The appellant was formerly the wife of Sir Richard Beauchamp, Bart., but on the 7th of May, 1901, a decree *nisi* was made for the dissolution of the marriage, on the husband's petition, on account of his wife's adultery with a Mr. Hugh Watt. Previously to this Lady Violet Beauchamp had written a letter, which it was alleged contained a libel on Mrs. Watt, the wife of co-respondent, and on the 25th of July, 1901, Mrs. Watt commenced an action in the King's Bench Division against her for libel. In the writ in the libel action and in the pleadings the defendant, Lady Violet Beauchamp, was described as a "married woman," the decree *nisi* not having then been made absolute.

On the 25th of November, 1901, the decree *nisi* was made absolute.

On the 30th of October, 1902, the libel action was tried, after the decree *nisi* had been made absolute, when the jury awarded the plaintiff £5,000 damages, judgment being given for that amount. The judgment, as entered, was headed with the title of the action, in which the defendant was described as a "married woman." Application having been made to the Court of Appeal by the defendant in the libel action for a new trial on the ground (*inter alia*) that the damages were excessive, that court on the 17th of June, 1903, ordered the case to be retried unless the plaintiff would consent to reduce the damages to £1,500.

The plaintiff consented to this, and the judgment was therefore amended on the 19th of July by the master, £1,500 being substituted in lieu of £5,000, although the original date of the judgment—the 30th of October, 1902—remained unaltered.

The judgment as drawn up was in the form of a judgment against a man or an unmarried woman, notwithstanding the defendant was described in the title as a "married woman," and not in the form of a judgment against a married woman in respect of her separate estate as settled by the Court of Appeal in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120.

The defendant neglected to pay the £1,500, so on the 28th of July the plaintiff served a bankruptcy notice on her, requiring her to pay, or compound for the judgment debt, with interest from the 30th of October, 1902, within seven days. In the notice the plaintiff described herself as of "The Hans-crescent Hotel, Hans-crescent, London," where she was in the habit of staying, although she did not permanently retain rooms there.

By the notice the plaintiff claimed principal, interest, and costs due on a final judgment in the King's Bench Division, amended by order of the Court of Appeal. In August, 1903, on the last of the seven days limited by the bankruptcy notice, the plaintiff left the hotel and went to France, leaving no address behind her, except to her solicitors. The defendant did not pay the debt nor comply with the requirements of the bankruptcy notice. Accordingly, on the 24th of August, 1903, the plaintiff presented a bankruptcy petition against her, founded on the act of bankruptcy committed by non-compliance with bankruptcy notice, and also on the judgment debt.

On the hearing of this petition the registrar made the receiving order in question.

The defendant debtor appealed.

H. Reed, K.C., and *F. Mellor*, for the appellant debtor.—The creditor of a married woman has two remedies. If she has any separate estate, the creditor may sue her alone as to that separate estate, under section 1, sub-section 2, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), or he can bring an ordinary common law action against both husband and wife as co-defendants. The defendant cannot be made bankrupt upon this judgment against her alone in respect of her separate estate: *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120. The plaintiff has elected to sue under the Married Women's Property Act, and the only damages recoverable from the defendant are against her separate estate, and the judgment must be in the form settled in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120; *Softlaw* v. *Welch*, 47 W. R. 626, [1899] 2 Q. B. 419, 424. These cases seem to show that the Act makes the married woman's separate

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

estate the debtor. A married woman cannot be made bankrupt on a judgment in the form in *Scott* v. *Morley*: see *In re Lynes*, 41 W. R. 488, [1893] 2 Q. B. 113; *In re Frances Handford & Co.*, 47 W. R. 391, [1899] 1 Q. B. 566, 570. The judgment here is in a wrong form, as it purports to be against a married woman, though it is in the ordinary form against an unmarried woman. The Court of Bankruptcy can go behind the judgment to see if there was a real debt. [VAUGHAN WILLIAMS, L.J.—In bankruptcy administration.] Whatever the form of judgment against a married woman, it is only against her separate estate under the Act, and her being discovert after the commencement of the action is immaterial. There is an appeal pending to the House of Lords, and if the receiving order is upheld an adjudication of bankruptcy against the debtor will follow. Secondly, the creditor claims interest on the £1,500 from the day on which judgment was given in the action. But the £1,500 was given by the Court of Appeal: *Fisher* v. *Dudding*, (1841) 3 Man. & Gr. 238. Thirdly, the debtor, if she had wished to pay the debt on the last of the seven days, could not have done so, not knowing where the creditor was: *In re Stogdon, Ex parte Leigh*, [1895] 2 Q. B. 534, 44 W. R Dig. 13. The debtor is entitled to know where to find the creditor.

They also cited *Seroka* v. *Kattenburg*, 34 W. R. 542, 17 Q. B. D. 177. 34 W. R. Dig. 85; *Earle* v. *Kingscote*, 49 W. R. 3, [1900] 2 Ch. 585, 589; *Warnford* v. *Heyl*, 23 W. R. 849. L. R 20 Eq. 321. 324. [By VAUGHAN WILLIAMS, L.J.—*Fairhurst* v. *Liverpool Adelphi Loan Association*, 9 Exch. 422].

Muir Mackenzie and *T. Mathew*, for the respondent creditor on the third objection.—On the last point a mere irregularity has been committed. No injustice has been done, and therefore the proceedings are in order: section 143 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52); Form No. 6 in Appendix to Bankruptcy Rules, 1886 to 1890. The debtor made no attempt to pay. In *In re Stogdon* the address given was no address at all. Here the creditor was not bound to remain at the address given, during the whole of the seven days.

They cited *In re Murrieta, Ex parte South American and Mexican Co.*, (1896) 3 Man. Bkcy. Reps. 35; and *In re Low, Ex parte Gibson*, 43 W. R. 405, [1895] 1 Q B. 734.

Reed, in reply.—The notice was issued before the hotel was the creditor's address. The objection is not purely technical. This address is not a matter of mere description, and if not, it is a matter of substance—for instance, a man may have a shooting box in Scotland, which he occasionally visits, but that would not be a proper address. The address must be one where either the creditor is personally present, or the time of his return or present whereabouts can be found. You cannot call an hotel where you stay occasionally your place of residence for service of a bankruptcy notice.

He referred to *In re Howes Ex parte Hughes*, 40 W. R. 647, [1892] 2 Q. B. 628, 632.

VAUGHAN WILLIAMS, L.J.—It is important that this rule of practice should be settled definitely. We reserve judgment.

Cur. adv. vult.

Feb. 22.—VAUGHAN WILLIAMS, L.J., read the judgment of the court as follows: This is an appeal from a receiving order made against a divorced wife, who at the time of the making of the order was a single woman. The objections raised are three. First, that there is no judgment debt effectual as against the Court of Bankruptcy, which does not regard estoppel binding the debtor, but has a right to inquire into the real debt. Secondly, it is objected that there is no act of bankruptcy, because the act of bankruptcy relied on, which is failure to comply with a bankruptcy notice, is invalidated by the fact, as alleged, that the notice contained no such address of the judgment creditor as was intended by the Act should be given. Thirdly, it was objected that the bankruptcy notice was bad, because the amount of the judgment as therein stated was wrong by reason of including interest prior to the date when the Court of Appeal amended the judgment by reducing the damages from £5,000 to £1 500.

As to the first point, undoubtedly the Court of Bankruptcy has the power on the hearing of a bankruptcy petition to go behind the judgment and to inquire into the consideration for the judgment debt, not only at the instance of the trustee, but also at the instance of the judgment debtor himself. This power is founded on section 7, sub-section 3, of the Bankruptcy Act, 1883, which gives the Court of Bankruptcy, on the hearing of a bankruptcy petition, a discretion for "any sufficient cause" to dismiss the petition. But, in my judgment, the fact that the judgment may be irregular or wrong in form is no sufficient reason for going behind the judgment and dismissing the petition. The action in the present case is an action for a tort committed by a woman during coverture; it is for a libel published by her while she was a married woman. Now, by the common law, independently of the Married Women's Property Act, 1882, a married woman was liable to be sued for a wrong committed by her, and the husband, strictly speaking, was not liable to be sued at all for such tort. His only liability was to be sued jointly with her, because of the universal rule that the wife during coverture cannot be either a sole plaintiff or a sole defendant; and it was decided in *Capel* v. *Powell*, 13 W. R. 159, 17 C. B. N. S. 743, 13 W. R. C. L. Dig. 54, that a husband who has obtained a divorce is not liable to be joined in an action of tort for a tort committed by his wife during coverture. It is manifest, therefore, that, in the present case, in which the defendant at the date of the trial and judgment had been divorced, she alone remained liable for the tort, and the amendments, if any, which were required in the writ or pleadings went merely to the form and not to the substance of the cause of action. The case is very different from the case of a breach of contract entered into by a wife during coverture. In such a case coverture is a plea in bar and not in abatement, and the cause of action given by the Married Women's Property Act, 1882, and the remedy thereon are new, being created by Act of Parliament; whence it follows that, if the husband dies or obtains a divorce, this will not affect the statutory cause of action or the remedy thereof, but the remedy will remain a remedy against the wife's separate property, and the judgment in such an action will not create a personal debt from her, and therefore will not support a bankruptcy notice under the Bankruptcy Act, 1883, s. 4, sub-section 1 (*g*). It is true that in the present case we have not to deal with the setting aside of a bankruptcy notice, because the judgment in form creates a personal debt; but if in substance the action had been one in which no judgment could have been obtained creating a personal debt by the wife, I am disposed to think there would have been sufficient cause to dismiss the petition. But in the present case no such question arises. It is plain that the objection to the judgment, if any, is one of form only, and that the power of the Court of Bankruptcy to go behind a judgment is a power to inquire into the consideration for and not into the form of the

judgment. The judgment, to my mind, is conclusive unless the consideration can be questioned. The first objection therefore fails. The third objection—that is to say, the "interest" objection—is also concluded by the judgment. The Court of Bankruptcy cannot, I think, question the discretion of the court in such a matter.

The only remaining objection is the objection founded on the insufficiency of the address given by the judgment creditor in the bankruptcy notice. The objection is based upon the judgment of the Court of Appeal in *In re Stogdon*, [1895] 2 Q. B., 534, 44 W. R. Dig. 13. Now in that case the judgment creditor, who was out of England at the time the notice was served, and so continued during the seven days that it was running, inserted in the bankruptcy notice as his address "White's Club, St. James's, S.W."; and the Court of Appeal decided that the bankruptcy notice was bad, holding that the notice must describe the creditor as of an address where the sum claimed can be paid to him or secured or compounded for, not merely where he could be heard of, and that the address of "White's Club" was not under the circumstances such an address; and the question which we have now to decide is whether the address given by Mrs Watt is such an address as is required by the Act, having regard to the decision in *In re Stogdon*.

Now what are the facts? Mrs. Watt appears to have been in the habit for some time of staying in the Hans-crescent Hotel whenever she came to London, but she did not continuously keep a room there. Sometimes she left an address to which her letters could be sent, sometimes she did not. At the date of the issue of the bankruptcy notice she was not in fact at the Hans-crescent Hotel; she seems to have come there on the evening of the 28th of July, so that the seven days mentioned in the notice would not run out till the end of the 4th of August. She left the hotel on the morning of the 4th of August in a motor-car, and went to Newhaven and thence to Dieppe; she did not return to England till the end of September, and she went on the 30th of September to the Hans-crescent Hotel. She left on the 4th of August no address to which her letters could be sent, and in fact they were not sent after her. In order to see whether this address fulfils the conditions laid down in *In re Stogdon*, one must ascertain what is the principle of that decision; and it is the more necessary to do so because it will govern the practice of the Bankruptcy Court hereafter.

It is plain that it is not sufficient for the creditor merely to give an address where he can be heard of, but it must be an address where he can be paid, or where by agreement the debt can be secured or compounded. Now what does this mean? Suppose a creditor gives as his address his home where he permanently lives. Is he bound to remain at home all day, or never to go out without leaving word where he proposes to go, but, for the matter of that, might not succeed in going? This is impossible. What, then, are the necessary conditions of the address? I think that the address must be of a place where the creditor is to be found during the seven days, and this is so whether that address is of the residence or of the place of business of the creditor; and I think that, if the address given in the bankruptcy notice is such an address at the date of the service of the notice, occasional absence of the creditor from such place, even for a whole day, will not render the bankruptcy notice inefficient, unless the absence is such as to deprive the creditor of a reasonable opportunity of paying or securing according to the terms of the notice. And I do not think that it would make any difference that the address was the temporary home of the creditor who happened to have no permanent home, or that the absence relied on as depriving the bankruptcy notice of its efficiency happened to occur on the last day of the seven. On the other hand I think that, if the creditor, after the service of the notice, abandoned his place of address, so that it ceased to be a place where at reasonable times the creditor could be found (or some authorized agent on his behalf) to receive payment of the judgment debt, or to deal with the question of security, the bankruptcy notice would cease to be efficient. It was urged in the present case that when Mrs. Watt started on her journey to the Continent she abandoned her temporary address, and ceased to have any address where she, or any agent authorized to act on her behalf in the matter, could be found. My brethren think that, having regard to her practice of residing at the Hans-crescent Hotel, and to the fact that her letters would be likely to be delivered there after her departure, this contention on behalf of the debtor fails in fact; and I do not think I ought to differ from them on a question of fact; so this appeal will be dismissed with costs.

I wish to add that the decision of the Court of Appeal in *In re Stogden* seems to me, so far as the observations contained in the judgments are concerned, to be difficult of practical application. Perhaps it might be considered whether the rules and forms might not be somewhat altered.

ROMER and STIRLING, L.JJ., concurred.

Appeal dismissed.

[Counsel for the debtor asked for a stay of execution pending an appeal which had been presented to the House of Lords against the judgment in the libel action.

THE COURT gave leave to Lady Violet to appeal to the House of Lords from their present order, and stayed the proceedings under that order in the meantime, on her undertaking to present her petition of appeal within fourteen days.]

Solicitors for the appellant, *M. Abrahams, Sons, & Co.*

Solicitors for the creditor, *Charles Russell & Co.*

From K. B. Div. (In Bkcy.) (Vaughan Williams, Stirling and and Cozens-Hardy, L.JJ.) — Feb. 12.

In re THOMAS WILLIAM HANCOCK.
Ex parte HILLEARYS. (*a.*)

Bankruptcy—Receiving order—Bankrupt presenting his own petition—Creditors—Right to annul adjudication—Abuse of process of the court—Rescission of receiving order—Adjudication not for benefit of creditors—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 7, 8 (1), 35.

A debtor, having had various committal orders made against him on judgment summonses, presented his own petition in bankruptcy, upon which a receiving order was made. The only creditors were a firm of solicitors, to whom he was indebted for a little over £200. They applied under section 35 *of the Bankruptcy Act*, 1883, *that the adjudication made on the debtor's petition should be annulled, as being an abuse of the process of the court.*

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

Held, that the presentation of such a petition by the debtor under the circumstances of the case was not an abuse of the process of the court, and did not entitle the court to annul the adjudication.

In re Roberts, 48 *W. R.* 132, [1900] 1 *Q. B.* 122, *approved.*

Ex parte Painter, In re Painter, 43 *W. R.* 144, [1895] 1 *Q. B.* 85; *and* In re Betts, Ex parte Official Receiver, 49 *W. R.* 447, [1901] 2 *K. B.* 39, *distinguished.*

This was an appeal by Messrs. Hilleary, solicitors and creditors, from an order of Mr. Registrar Hope of the 20th of January, 1904, dismissing their application to annul the bankruptcy proceedings. The application was made under section 35 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). The debtor was a salesman in a cabinet factory, and the applicants acted as his solicitors, in the years 1895 and 1896, when certain costs were incurred by him in litigation and other matters amounting to £209 7s. 8d. The accounts were sent to the debtor on the 4th of January, 1897, but as he refused to take any notice of repeated applications for the amount, a judgment in default of appearance was obtained against him for the amount, with £4 14s. costs. No steps were taken for enforcing the judgment until 1902, when a judgment summons was issued, and Phillimore, J., before whom the matter came, after having fully examined the debtor as to his position and income, directed payment of the judgment debt by monthly instalments of £4. The debtor took no notice of this order, and on the 1st of November an order for his committal was made in his absence on a second judgment summons, by Phillimore, J., for non-payment of three instalments, viz., £12, then due under such order. The debtor, however, did not comply with the notice of committal, but on the 11th of November gave notice through his solicitor that application had been made to Darling, J., who had directed the judgment summons to be reinstated; when, however, the application came on, the debtor was not present or represented, and the only order made was to add £3 3s. for the applicants' costs to the judgment debt. The debtor paid the amount for which he stood committed, and subsequently the costs of the application. As he still refrained from paying the monthly instalments, by a third judgment summons on the 31st of January, 1904, after having been fully examined by Wright, J., as to his means, he was directed to pay £16 then due by the end of February, the monthly instalments to continue from the 1st of April following, but the order of Phillimore, J., was not varied in any other respect. The £16 was paid, but the debtor still did not pay the monthly instalments of £4, and on a fourth judgment summons before Wright, J., on the 8th of August, 1903, in the debtor's absence, he was committed for £15, suspended for a week. On the 14th of August, 1903, the debtor presented his own petition, and the receiving order was made, and adjudication on the same day. The public examination of the bankrupt took place on the 21st of October, 1903, his only creditors being the solicitors, the Messrs. Hilleary, who acted for him in (amongst other transactions) the winding up of a partnership. The liabilities were returned at £212 19s. 9d. and no assets were disclosed. Upon an application by the creditors that the order of adjudication be annulled, it was strongly urged on their behalf that, first, the debtor was not insolvent at the date of the presentation of his petition upon which such order was made; secondly, that the applicants were the only creditors of the debtor, and that the petition was presented for the purpose of defeating them; and, thirdly, that, inasmuch as both Phillimore and Wright, JJ., had examined the debtor and satisfied themselves of his ability to pay, the adjudication and the bankruptcy proceedings were an abuse of the process of the court, as they in effect overrode the two orders of the learned judges. Evidence was given at the public examination of the bankrupt of his means and mode of living, such as his being in receipt of £300 a year, derived from salary and commissions in his employment as salesman in a city firm, his residing in a substantially large house in Brentwood, and his employing counsel on several occasions on the judgment summonses. When the application came before the registrar, he held that the case came within *In re Painter*, 43 W. R. 144, [1895] 1 Q. B. 85, and not within *In re Betts*, 49 W. R. 447, [1901] 2 K. B. 39, and he dismissed the application with costs.

Section 35 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), under which the application by the creditors was made, is as follows: (1) "Where, in the opinion of the court, a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order, annul the adjudication." (2) "Where an adjudication is annulled under this section all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official receiver, trustee, or other person acting under their authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the judge may appoint, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court may declare by order." (3) "Notice of the order annulling an adjudication shall be forthwith gazetted and published in a local paper."

From this decision of the registrar the creditors appealed.

H. Reed, K.C., and *S. Lynch*, for the appellants.—This is an abuse of the process of the court: *Ex parte Painter, In re Painter*, 43 W. R. 144, [1895] 1 Q. B. 85; *In re Betts, Ex parte Official Receiver*, 49 W. R. 447, [1901] 2 K. B. 39. This last case presents circumstances like this. Where there is a committal order against the debtor, he ought not to be permitted to get a receiving order. [VAUGHAN WILLIAMS, L.J., referred to section 7, sub-section 3, of the Bankruptcy Act, 1883, which deals with the presentment of a petition in bankruptcy against the debtor as follows: "If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition."] Section 8 relates to the debtor, and under that section it is not the duty of the court to inquire concerning facts which under section 7 it ought to inquire into. [VAUGHAN WILLIAMS, L.J., referred to *In re Roberts*, 48 W. R. 132, [1900] 1 Q. B 122.] [By *Muir Mackenzie.—In re Shine, Ex parte Shine*, 40 W. R. 386, [1892] 1 Q. B. 522.]

Muir Mackenzie, for the respondent.—The learned registrar's decision perfectly right. In *In re Painter* the proceedings were under the Debtors Act, and the object of the debtor in that case was very different from the case here: *In re Roberts*, 48 W. R. 132, [1900] 1 Q. B. 122; *Shoolbred* v. *Roberts*, [1899] 2 Q. B. 560, 48 W. R. Dig. 19, [1900] 2 Q. B. 497,

49 W. R. Dig. 8. On the application of the debtor for a discharge, the court can, under section 8, sub-section 2, of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), impose conditions, subject to after-acquired earnings or property. This is an *à fortiori* case on the decision in *In re Painter*, all other cases are indistinguishable. *In re Betts* was a very different case; there the court found the debtor committing a series of frauds on his creditors. When in section 5 the Act says the court "shall," it does not cripple the court, as in this case the debt is over £200, and can be reached by the Debtors Act, 1869. The registrar was right, and his discretion was properly exercised.

S. Lynch replied.

VAUGHAN WILLIAMS, L.J.—I am of opinion that the learned registrar was perfectly right. There is no ground for saying that this receiving order made against the debtor on his own petition is an abuse of the process of the court. It was decided in *In re Roberts*, 48 W. R. 132, [1900] 1 Q. B. 122, that under section 44 of the Bankruptcy Act, 1883, certain goods which the bankrupt had acquired under a contract, between the commencement of his bankruptcy and his discharge, belonged to the trustee in bankruptcy, the evidence showing that they were not wanted for the bankrupt's support, even if they could be regarded as personal earnings. Therefore, having regard to that decision, what is before us here is by no means to the same effect as in that case, and it is quite plain that with regard to the payment by the debtor out of his personal earnings there has been nothing brought about which would prejudice the creditors in any degree. The very money which they seek to obtain will come to them by reason of this adjudication, and therefore under these circumstances the presenting of this petition is, in my opinion, in no sense an abuse of the jurisdiction of the court. It is quite true to say that this debtor would not be liable to pressure from time to time by a committal order being made against him. I am not prepared to say that the Legislature intended that a debtor who was subjected to such pressure might not relieve himself from that pressure by obtaining an adjudication in bankruptcy. The creditor would receive payment of his debt by the statutory means, which it was the intention of the Legislature to apply to such a case as this. The presenting of this petition is in no sense an abuse of the process of the court, and the appeal must be dismissed with costs.

STIRLING and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the appellants, *R. J. Gooch.*

Solicitor for the respondent, *Thos. Charles.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Feb. 5, 6, 10.

BAILY v. BRITISH EQUITABLE ASSURANCE CO. (a.)

Company—Life assurance—Deed of settlement—Participating policy-holders—Terms in prospectus—Bye-laws by company—Profits divisible among policy-holders—Power reserved to company to alter bye-laws—Part of profits to form a reserve fund—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62) *—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *ss.* 50, 51, 196, *and* 209.

A life and fire insurance company, constituted under a deed of settlement, and afterwards registered under the Companies Acts, 1862, *cannot—after issuing prospectuses to the public pointing out its advantages over other mutual societies, chief among which was the distribution of the entire profits in the mutual department without any deduction for a reserve fund, and on the strength of which prospectus a person took out a policy in the mutual department—afterwards, even though purporting to act in pursuance of section* 1 *of the Companies (Memorandum of Association) Act,* 1890, *by substituting a memorandum and articles of association for the deed of settlement, deprive the participating policy-holders of the profits which they previously enjoyed, by setting aside a certain amount, until a fixed sum should be reached, to form a reserve fund.*

A company was constituted by a deed of settlement of 1854 *to carry on, amongst other matters, that of life and fire assurance. It was afterwards registered under section* 209 *of the Companies Act,* 1862, *as an unlimited company. By their deed of settlement it was provided that the profits of the company should be ascertained as directed by the bye-laws, and it was further provided that any provisions of the deed and even bye-laws might be altered by a bye-law or bye-laws. In the mutual life insurance department, by virtue of a bye-law, the policy-holders were entitled to a division of any profits made in that department of the company's business. The plaintiff took out a policy in that department on his own life on the faith of certain statements contained in the company's prospectuses, that no profits should be set aside to form a reserve fund. Afterwards it was proposed, with the object of substituting a memorandum and articles for their deed of settlement, to register the company under the provisions of the Companies (Memorandum of Association) Act,* 1890. *The proposed articles set aside out of the profits a certain percentage until a fixed sum should be reached to form a reserve fund. The plaintiff's policy was taken subject to the indorsed conditions, which referred to the deed of settlement and the bye-laws and to any documents deposited with the company in relation to the assurance.*

Held, that the company could not, either by altering its bye-laws or by altering its articles, justify a breach of contract; that there was a contract for value between them and the plaintiff relating to the future profits of a particular branch of the company's business, and that the company could not therefore, by special resolution or otherwise, alter the contractual right of the plaintiff.

This was an appeal by the defendant company from a decision of Kekewich, J.

The action was brought by a participating policy-holder in the defendant company, on behalf of himself and all other the participating policy-holders, claiming a declaration that the company was not entitled to apply any profits arising from the mutual and participating branch of the business either in the

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

formation of a reserve fund, or to shareholders, or otherwise than by distributing the same amongst the holders of participating policies, and for an injunction to restrain the company from so applying the profits.

The defendant company was constituted under a deed of settlement dated the 12th of July, 1854, and had for its object the purpose of carrying on the business of a life and fire assurance and of an annuity, endowment, reversionary interest and loan association. The company was afterwards duly registered under the provisions of section 209 of the Companies Act, 1862 (25 & 26 Vict. c. 89), as an unlimited company. The deed of settlement (by clause 9) empowered the company to make bye-laws, and the profits of the company were to be ascertained and divided in the manner directed by the bye-laws; and (by clause 56) it was provided that any bye-law might be altered, repealed, or suspended by a bye-law, but not otherwise.

The bye-laws of 1854 made by the company contain, *inter alia*, the following provisions: (2) "That in the beginning of January and July in each year a calculation shall be made of interest upon the amount paid up in respect of each share in the company at the rate of 7 per cent. per annum up to the next preceding 31st of December and 30th of June respectively, and such interest shall at some time in the months of January and July to be fixed by the directors for that purpose, be payable to the holders of the shares out of the profits of the company only at the company's chief office for the time being, but every shareholder shall be entitled to receive interest only from the time of the actual payment of the amount so paid up, notwithstanding the payment by any shareholder of interest for the time any call was in arrear"; (3) "That in the month of January, 1858, and in every subsequent third year, a general valuation and calculation shall be made of the whole assets and liabilities of the company, and, after carrying forward such portions (if any) of the expenses of establishing the company as the directors shall consider equitable, the net profits of the company's business shall be ascertained by the actuary under the direction of the board of directors"; (4) "that in the month of January in the respective years last aforesaid a calculation shall be made by the actuary of the profits that have arisen in the departments of business in which the assured are to be entitled to participate in profits, and in such calculation a fair proportion of the interest hereinbefore directed to be paid and of the other expenses of the company shall be charged upon such last-mentioned departments, and the profits so ascertained to have arisen from the last-mentioned departments of business shall be set apart and divided amongst the policy-holders in such departments by the actuary under the superintendence of the directors, and the remainder of the profits of the company shall be divided among the shareholders according to the amount of shares held by each, and be paid to them along with the next half-yearly dividend."

Certain bye-laws of 1893 substituted a quinquennial ascertainment and division of profits between the different policy-holders, instead of the triennial ascertainment and division as prescribed by the bye-laws of 1858.

From 1862 until after the date of the plaintiff's policies, the defendant company from time to time issued prospectuses to the public inviting them to become policy-holders on certain terms which were contained in the prospectuses. Among other statements appearing in the prospectuses was the following:

"Mutual Insurance Department. — In ordinary mutual societies the public sustains the following disadvantages, which are here avoided: (1) Each assurer in such societies is personally liable for the entire engagements of the society; (2) the policy holder in such societies loses a large portion of his profits to form a reserve fund, which is in fact so much property taken from his family and put into the pockets of foreign parties; (3) the frequent alterations of the constitution of such societies involve considerable risk to the policy-holder. In the British Equitable Assurance Co. these defects are avoided: (1) Complete security is given to every policy-holder absolutely without responsibility; (2) the current expenses of working the company are assessed rateably on the premiums received in the mutual life assurance department and the general premiums, and the entire profits made by the company in the mutual department, after deducting the expenses, are divided among the policy-holders without any deduction for a reserve fund."

In January, 1886, the plaintiff, relying on the faith of these statements, which were printed on the back of the form of proposal which he signed, applied for two participating policies on his own life for £400 and £350 respectively, and paid regularly the premiums necessary for keeping these policies alive. The company, in granting him the policies, covenanted after the expiration of one calendar month after proof of his death to pay to his executors or administrators the respective sums of £400 and £350, and all such other sums (if any) as the company by their directors might have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being. The policies were ordinary common form policies.

About May, 1903, the company proposed, under the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), to substitute a memorandum and articles of association for the deed of settlement, under which the company was originally constituted, and in so doing to alter the existing system of profit-sharing by the plaintiff and other participating policy-holders, and to deprive them to some extent of the rights enjoyed by them. It was provided under the proposed articles to form a reserve fund by setting aside 5 per cent. of the profits of the company's business, including the profits arising from the departments of business in which the assured were entitled to participate in profits, until such fund amounted to £37,500; that a fixed annual dividend of 2s. 6d. per share should be paid to the shareholders out of the profits of the company, and that there should be carried to the credit of the shareholders' profit account a bonus equal to 5 per cent. of the divisible profits of the life assurance branch of the company's business; and that subject to the aforesaid provisions, unless and until otherwise determined by the company in general meeting, the divisible profits of the whole of the company's business should be carried to the credit of the life assurance branch and to such fund thereof as the directors should determine.

The plaintiff alleged that by this proposed scheme the participating policy-holders would be deprived of 10 per cent. until the proposed reserve fund amounted to £37,500, and after that of 5 per cent. of the profits, to which they would have been entitled by the former scheme; and also that it would enable the directors to divert the whole or any part of the profits to some other fund, and that it was entirely opposed to the prospectus which had induced him to take these policies. The defendant company's contention was, that the polices themselves formed the contract with the plaintiff, and that these policies contemplated that the practice of the company might

be altered from time to time, and on these grounds there was no breach of contract. The plaintiff brought the action to determine the legality of the proposed alterations as regarded the participating policy-holders.

Kekewich, J., after giving it as his opinion that the company were acting in perfect good faith, held that the prospectus which had induced the plaintiff to become a policy-holder must be imported into the contract with him contained in the policies, and that there existed a valid contract with the assured that he should have his proportion by way of bonus of the profits made out of the particular department in which he was assured. There was a contract with the participating policy-holders that there should be no reserve fund, but that all the profits of the mutual department, less certain necessary deductions for working expenses, should be divided among the policy-holders.

From this judgment the defendant company appealed.

Warrington, K.C., and *F. Whinney*, for the appellants.—The question turns solely on the contract between the company and the policy-holders. The bargain between the parties turned on the terms of the deed of settlement. On general principles of law, if an agreement is embodied in a formal document, that document is taken to express that they are at one on that contract. There is no reason for introducing a collateral contract, because, if so, the terms of the written document must be varied. [STIRLING, L.J., referred to *Erskine* v. *Adeane*, 21 W. R. 802, 8 Ch. App. 756, on p. 765 of the judgment.] A company such as in this case can only contract in a particular way, and it is not competent for them to vary their policy with individual policy-holders by some informal transaction; the question refers to a future transaction. The deed of settlement authorizes the directors to make policies, it has no effect in creating a contract, which is to be found in the policies themselves, and nowhere else. *Allen* v. *Gold Reefs of West Africa*, 48 W. R. 452, [1900] 1 Ch. 656. Here the company is registered under the Act of 1862, and as its provisions apply, an alteration as to a regulation could be made by a special resolution under section 50 of that Act, independently of the power given by clause 56 of the deed of settlement. *Punt* v. *Symons & Co. (Limited)*, *ante*, p. 41, [1903] 2 Ch. 506; *Pepe* v. *City and Suburban Permanent Building Society*, 41 W. R. 548, [1893] 2 Ch. 311. As long as the company are acting according to their practice, a shareholder cannot complain. The contract here is to be found in the policy, and the policy is capable of alteration by the bye-laws, and the company are entitled to make any alterations in it they like, which are carefully provided for by the terms of those policies.

P. O. Lawrence, K.C., and *Gatey*, for the respondent plaintiff.—The very table, Table A, under which the plaintiff insured provided that the entire profits are to be provided for triennially, and that contract can be enforced. The plaintiff was informed that if he insured in that policy and paid the premium he was to have the entire payment of the profits; the division of these profits was specially provided for by bye-law 4. The cases cited do not contravene any proposition the plaintiff puts forward. As long as a statutory right governs these rules of the company, there is no statutory right to alter them; the defendants cannot contract themselves out of a statutory right. The whole burden of the judgment of the learned judge in the court below was that a statutory right was expressed.

They referred to *Kearns* v. *Leaf*, *Aldebert* v. *Kearns*, 1 H. & M. 681, which shows that a policy-holder can interfere with what the company has been doing.

Warrington, K.C., in reply.—The true effect of section 196 in the Act of 1862 is to import the Act into the regulations of the company; there would have been no power in the deed of settlement. Section 50 of the Act of 1862, which enables a special regulation to be made, applies to this company, as its registration under the Act of 1862 was a compulsory registration, see section 209: *In re European Assurance Society, Ramsay's case*, 25 W. R. 279, 3 Ch. D. 388. The application is under a participating scheme: *In re English and Irish Church and University Assurance Society*, 11 W. R. 681, 1 H. & M. 85.

VAUGHAN WILLIAMS, L.J.—The prospectus is not referred to either in the contract or the words indorsed on the contract. If you alter the condition in the contract you would be altering the written contract.

P. O. Lawrence, K.C.—Yes, if altering means adding to.

VAUGHAN WILLIAMS, L.J.—No doubt, if you have a written contract, evidence is admissible to identify the subject-matter of the contract: *Norden Steamship Co.* v. *Dempsey*, 1 C. P. D. 654, p. 662.

Cur. adv. vult.

Feb. 10.—COZENS-HARDY, L.J., read the judgment of the court: This is an appeal from the judgment of Kekewich, J., who has in effect held that the profits attributable to the participating policy branch of the company's business, after certain undisputed deductions, ought to continue to be paid to the holders of participating policies, and ought not to be applied to the creation of a reserve fund or for any other purpose. The defendant company was originally constituted under a deed of settlement in 1854. By clause 9 the profits were to be ascertained and divided in manner directed by a bye-law or bye-laws. And by clause 56 any provisions of the deed of settlement and any bye-law might be altered, repealed, or suspended by a bye-law Bye-laws were duly passed by the company in 1854. [His lordship read the bye-laws 2, 3, and 4 of 1854, which are above stated, and continued:] These bye-laws, so far as material for the present purpose, were in force in 1886, when the plaintiff effected two policies in the mutual or participating branch of the defendant company. It is admitted that the plaintiff relied upon the statements contained in a prospectus issued by the company, in which the special advantages of the mutual or participating policies are set forth in emphatic language—*e.g.*, whereas in ordinary mutual societies the policy-holder loses a large portion of his profits to form a reserve fund, the entire profits in the defendants' mutual department are divided among the policy-holders, without any deduction for a reserve fund. The proposal, which was not before Kekewich, J., but which has been admitted in evidence before us, shows that it was for a sum "payable at death under Table A." This language is intelligible by reference to the prospectus, p. 16, which prints Table A with the following words at its head: "Annual premiums to assure a sum of money at death with profit in addition," and the following words at its foot, "The entire profits divided triennially." The premium payable in respect of a participating policy is of course higher than in respect of a non-participating policy. One of the questions in the proposal, applicable only to policies in the mutual department, was as follows: "XI. Are any profits which may be declared to be appropriated by way of

addition to the policy, or reduction from the future premiums, or making the policy payable during lifetime?" To which the plaintiff answered: "By way of addition." This proposal was accepted by the company. The actual policy as issued contained a covenant by the company to pay the full sum assured, "and all such other sums (if any) as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being." The endorsed conditions mention the deed of settlement and the bye-laws and the documents addressed to the company, which would include the proposal; but the words I have read are the only words in the policy itself expressly mentioning profits. It has been agreed that the only question upon which our judgment is desired is this—whether, having regard to the contractual relations between the company and the participating policy-holders, the company are at liberty to alter the provisions of bye-law 4 of 1854 in such manner as to alter the rights of those policy-holders to profits. This being so, it is not necessary to consider whether, apart from such agreement or admission, there would be any real difficulty in so far connecting the plaintiff's policy with the bye-laws and with the prospectus as to identify it with the participating policy described in the prospectus. It must be assumed, therefore, that bye-law No. 4 was originally applicable to this policy. Now, under this bye-law, it is for the directors, with the assistance of the actuary, to ascertain what (if any) are the profits of the participating branch, but the amount so ascertained "shall be set apart and divided amongst the policy-holders" in that department. The directors have no power under the bye-law to apply any portion of those ascertained profits to the formation of a reserve fund or to the relief of the shareholders.

It is, however, contended that as the company was registered under section 209 of the Companies Act, 1862, it thereby acquired power by special resolution to alter all or any of the provisions of the deed of settlement, not being in the nature of a memorandum of association, and all or any of the bye-laws, and that the plaintiff is seeking to restrain the company from altering bye-law No. 4 in exercise of this statutory power. And it is said that, apart from the statute, the deed of settlement itself contained a power to alter the bye-law, of which power the plaintiff had notice. We cannot assent to this argument. As between the members of a company and the company, no doubt this proposition is to some extent true. The rights of a shareholder in respect of his shares, except so far as they may be protected by the memorandum of association, are by statute made liable to be altered by special resolution: see *Allen* v. *Gold Reefs of West Africa*, 48 W. R. 452, [1900] 1 Ch. 656. But the case of a contract between an outsider and the company is entirely different, and even a shareholder must be regarded as an outsider in so far as he contracts with the company otherwise than in respect of his shares. It would be dangerous to hold that in a contract of loan or a contract of service or a contract of insurance validly entered into by a company there is any greater power of variation of the rights and liabilities of the parties than would exist if, instead of the company, the contracting party had been an individual. A company cannot, by altering its articles, justify a breach of contract.

But it is further contended that by the terms of the policy the company are only bound to pay such profits as the directors "according to their practice for the time being" may order to be added, and that the directors may regulate their practice by reference to a special resolution creating a reserve fund. This argument really involves the proposition that it is competent to the directors to change a participating policy into a non-participating policy. The word "practice" cannot have such a wide meaning. It cannot justify an alteration of rights or the diverson of any part of the profits from the participating policy-holders. In the present case there was a contract for value between the plaintiff and the company relating to the future profits of a particular branch of the company's business, and the company ought not to be allowed, by special resolution or otherwise, to break that contract. The appeal must be dismissed.

Appeal dismissed.

Solicitors, *Henry Gover & Sons.*

From K. B. Div.
(Lord Alverstone, L.C.J., Collins, M.R., and Romer, L.J.) Jan. 22.

In re Gough and Aspatria, Silloth, and District Joint Water Board. (*a.*)

Compensation—Waterworks—Lands compulsorily taken—Natural and special adaptability of land for purposes of undertaking—Right of arbitrator to take this into account—Aspatria, Silloth, and District Water Act, 1901 (1 *Ed.* 7, *c. lvii.*), *ss.* 23, 24, 29, 30.

In estimating the value of land and easements to be acquired by a water board for the purpose of constructing thereon a reservoir, the natural and peculiar adaptability for that purpose is a fit and proper matter for consideration by an arbitrator as an element in the value thereof in assessment of compensation.

Semble, *that the claimant in such a case need not give evidence that there were other customers who would be willing to purchase his land for such a purpose.*

The decision of the Court of Appeal (Bramwell, Brett, *and* Cotton, L.JJ.) *in* Riddell *v.* Newcastle and Gateshead Water Co., *reported in Browne and Allen's Law of Compensation* (2*nd ed.*), *p.* 672, *considered and approved.*

Appeal from a decision of Wright, J., upon an award stated by an umpire by way of special case.

In pursuance of the powers given them by the Aspatria, Silloth, and District Water Act, 1901, the appellant water board gave notice to the claimant to treat for certain lands and water in the notice referred to, of which she was the owner in fee, for the purpose of making a reservoir thereon. The parties failed to agree as to the amount of compensation and arbitrators and an umpire were appointed.

The umpire stated in his special case that owing to the natural configuration of the land taken by the board and intended by them to be used for building a reservoir, the land was peculiarly adaptable for the construction of a reservoir, and he stated for the opinion of the High Court the following among other questions:

"Whether, in estimating the value of the land and easements to be acquired by the water board for the Overwater and Chapel-house Reservoirs respectively, the natural and peculiar adaptability for the construction of a reservoir of the lands in question was or was not a fit and proper matter for consideration as an

(*a.*) Reported by Erskine Reid, Esq., Barrister-at-Law.

element in the value thereof in assessment in compensation."

If the court should be of opinion that in estimating the value of the land and easements the nature and peculiar adaptability for the construction of a reservoir of the lands in question was not admissible, then he reduced the amount of his award by the sum of £1,636.

Wright, J., held that the adaptability of the land for the particular purpose of the undertaking was proper matter for consideration as an element of value, and that it was not necessary to show that there were customers for the land other than the water board.

The water board appealed.

Balfour Browne, K.C., and *Roskill, K.C.*, for the water board.

Sir Ralph Littler, K.C., and *W. G. Clay*, for the respondent.

The arguments sufficiently appear from the judgments.

Lord ALVERSTONE, L.C.J.—The point which has been argued is one of very great importance, but it seems to me that it has been settled so far as this court is concerned, and if the law is to be laid down differently it must be in the House of Lords and not by us. The umpire has found that the natural configuration of the land is peculiarly adaptable for the construction of a reservoir, and he has awarded a sum of £1,636 beyond what I will call the ordinary normal market value of the land in respect of this special adaptability. For the water board it has been contended that that is not a proper element of compensation, first, on the ground that it is giving a value to the land because of the purpose to which it is to be put, and secondly, because the umpire has not gone on to say that some other purchaser might come forward who would pay this additional value. I think both points are decided against the water board in *Riddell v. Newcastle and Gateshead Waterworks Co.*, reported only in Browne and Allen's Law of Compensation (2nd ed.), p. 672, and also probably by *In re Ossalinsky (Countess) and Manchester Corporation*, which is reported in the same volume at p. 659. I should like to state how the point arose in the first of these cases, in which I appeared as counsel for the claimant.

In that case the amount of compensation to be paid to Mr. Riddell by the company had been referred to an arbitrator. Mr. Riddell was the tenant for life of the land the company required for their undertaking. The arbitrator determined the amount of the purchase-money to be paid by the company to the owner for the land, easements, and premises, and the compensation for the damage that he might sustain by the execution of the works, in the following manner: "As part of the compensation for the damage which Mr. Riddell would sustain by the execution of the works already mentioned Mr. Riddell claimed before me a large sum for water which the company could divert and impound by the said works, and in the before-mentioned sum of £17,000 I have not included any sum for such claim, it being contended by the company that I was precluded from so doing by reason of the seventh sub-section of the ninth section of the Waterworks Companies Act, 1877, but if the court shall be of opinion that this section is not a bar to the said claim I award the amount of £5,000, which sum I award in addition to the before-mentioned sum of £17,000." That section of the Waterworks Companies Act, 1877, provides that for the protection of Mr. Riddell the company should be bound to discharge every day not less than 200,000 gallons of water into a stream below the site of the reservoir, and sub-section 7 provided that such water should be taken as part compensation for all water which the company could collect, divert, and impound by the works authorized by the Acts.

In the present case it is not necessary to go into that point, as my brother Wright has held that the claimant here could not sell the water, and therefore that no claim for compensation is maintainable in respect of that. That point was not argued in the Queen's Bench in the *Riddell case*, and when the case got to the Court of Appeal the claimant was in difficulty with regard to his claim for compensation, for the arbitrator had awarded £17,000 as compensation in respect of the lands, tenant's rights, easements, and premises required to be purchased, and it was clear that he included in that sum all rights in respect of water which might be accumulated on the land. The arbitrator thus stated that the claim had been made in respect of the water which the company could collect or divert and impound by the works. That referred, without doubt, to damage which might happen to other lands of Mr. Riddell by the company intercepting the water which would have flowed to them. If that was the proper construction of the award, it could not be impeached. The counsel for the appellant had attempted to place a different construction on it, but their construction could not be maintained. It was impossible to suppose that an arbitrator, especially one who had so much experience in such matters as the late Mr. John Clutton, could have made the double mistake, first of omitting to consider any additional value which might attach to the land in consequence of its being a suitable site for a reservoir, and then in concealing his mistake by the language of his award. I asked that the case might be sent back, but the Court of Appeal refused. Brett and Cotton, L.JJ., gave judgment exactly to the same effect—namely, that it was a mistake to omit to consider any additional value to the land in consequence of its suitability as a site; but they did not say one word finding that there were other customers beside the purchasers, and I think that the Court of Appeal meant to decide that the elements of value in the land itself are matters of compensation as being part of the property to the owner or vendor. It may be of interest to those who have followed this branch of law that in consequence of that case I consulted Thesiger, L.J., who was a master of this subject, and he told me that the judgment of the Court of Appeal had only followed what had been the recognized practice of experienced surveyors for many years. I may also add that so deep was the impression made upon me by the case that I also consulted other gentlemen, who said that the rule laid down by the Court of Appeal was not a new rule to them. That is the reason why I have always regretted that *Riddell v. Newcastle and Gateshead Waterworks Co.* was not reported, because I have a strong opinion that it really recognized that rule. The *Countess of Ossalinksy's case* is also an instance of precisely similar effect. As I ventured to point out in the course of the argument, it does not involve any question of law at all; if no customer came forward, that shows that the element of value is not worth much. I am therefore of opinion that Wright, J., in no way added to what the arbitrator found; on the contrary, he decided the question in accordance with the principle laid down in the cases I have referred to, that "if there is a site which has peculiar natural advantages for the supply of water to a particular valley or a particular area of any other kind, or to all valleys or areas within a certain distance, if those valleys or areas are what might be

called natural customers for water by reason of their populousness or of their situation—if the site has peculiar natural advantages for supplying them in that sense, apart from value created or enhanced by any Act of Parliament or scheme for appropriating the water to a particular local authority—I think it ought to be taken that there is a natural value in the site for the purposes of water supply, and that it may be taken into consideration." I think that Wright, J., has there clearly expressed the law on the subject, and I also think that it is correctly stated in Balfour and Allen's Law of Compensation that this is no new principle.

The appeal, for the reasons I have stated, fails and must be dismissed.

Collins, M.R.—I am of the same opinion. It is really a question of fact. The appellants contend that taking the facts as stated by the umpire, it follows as a matter of law that that element of value consisting in the peculiar adaptability of the site in question for the particular purpose of a reservoir ought not to be included. The umpire has included that as an element of value, and it seems to me that in doing so he has accepted the *primâ facie* presumption that that element of value existed and ought to be taken into consideration in settling the compensation to be paid for the land. That *primâ facie* compensation is based upon a long series of authorities and it also appears to be good sense. Underlying all that is the assumption that there is a reasonable possibility of a market for the land The whole question of value is in relation to a possible market. If anyone wants to assert that as a matter of law a particular element of value which *bonâ fide* should be taken into account ought to be excluded he must on the facts show that there is no reasonable possibility of the land ever coming into the market. If he can show that, then I agree a point of law arises; but if the particular land has a particular adaptability for a special purpose it is not enough to say that that element cannot be taken into consideration because the umpire has not specially found that there was no possible market for the land apart from the particular scheme under which it was taken; a further step must be taken, it must appear that there is no possibility of a market.

Romer, L.J.—I agree, and I have nothing to add.

Appeal dismissed.

Solicitor for the water board, *T. R. Hargreaves*, for *Frank Richardson*, Aspatria.

Solicitors for the claimant, *Metcalfe, Birkett, & Rowlatt*, for *Mounsey, Bowman, & Graham.*

High Court of Justice.

Chan. Div. } April 26, 27.
Buckley, J. }

Keith v. Twentieth Century Club (Limited). (a.)

Deed—Construction—Use of garden—Grant to lessees, sub-lessees, and tenants, being occupiers of houses, and their friends—User by members of residential club.

A. granted by deed to B., his heirs, executors, administrators, and assigns, and his and their lessees and sub-lessees or tenants, being occupiers of certain houses, and their families and friends, the right to enter and use an adjacent ornamental garden. A limited company, which was the owner of some and the lessee of another of these houses, established in them a proprietary residential club for ladies. Under the rules of the club bedrooms might be allotted to the members at a weekly rent, payable in advance, but subject to many restrictions as to user.

Held, that, under the circumstances, the resident members, though occupiers of the houses, were occupiers as licensees of the company, and not as lessees, sub-lessees, or tenants, and that they were not, therefore, entitled as of right to enter into and use the garden.

Held, further, that the members of the club were not "friends" whose entry on to and user of the garden the company could authorize.

Argument of points of law.

This was an action brought by certain occupying tenants and owners of houses situate in Stanley-gardens and Kensington Park-gardens, Notting Hill, the backs of which abut on an ornamental pleasure-ground or garden, to restrain the defendant company, which carries on a club in certain other houses adjoining the garden, from authorizing the members of the club to use the garden.

By an indenture of the 25th of June, 1852, Felix Ladbroke, the then owner in fee simple of the site on which the houses in Stanley-gardens were afterwards built, of the houses in Kensington Park-gardens, and of the garden, conveyed to Charles Henry Blake in fee simple the site of the houses in Stanley-gardens, bounded on one side by the garden in question, which was therein referred to as then laid out for the use of the houses in Kensington Park-gardens, and he thereby also granted to the said C. H. Blake, his heirs, executors, administrators, and assigns, and his and their lessees and sub-lessees or tenants, being occupiers for the time being of the houses then in course of erection or at any time thereafter to be erected immediately adjoining the garden in question, and for his and their families and friends, in his and their company or without, free use and right of ingress, egress, and regress at all times thereafter into, out of, and upon the garden in question, he and they nevertheless conforming to such rules as to the user of the same as should be ordered by the said Felix Ladbroke, his heirs or assigns, and the committee (if any) of the resident inhabitants of the houses adjoining the garden to whom the management and control of the garden should be committed for the preservation and the keeping up of the same, and also paying an annual subscription for the maintenance of the garden.

The plaintiffs are occupiers, some being owners in fee simple and others tenants for terms of years, of houses in Stanley-gardens and Kensington Park-gardens.

Such of the plaintiffs as are occupiers of houses in Stanley-gardens derive their title through Charles

(a.) Reported by H. L. Ormiston, Esq., Barrister-at-Law.

Henry Blake, and, consequently, are entitled under the deed of the 25th of June, 1852, to use the gardens.

The remaining plaintiffs, occupiers of houses in Kensington Park-gardens, are entitled to use the garden in a similar manner as assignees of leases granted by Felix Ladbroke.

The defendant company, which is the owner in fee simple of four houses and the lessee of one house in Stanley-gardens, and as such is likewise entitled to the benefit of the deed of the 25th of June, 1852, was incorporated as a limited company in 1902, one of its objects, as stated in its memorandum, being "to provide furnished residential rooms and board at economical prices, for educated women workers engaged in professional, educational, literary, secretarial, or other similar work."

In pursuance of its objects the defendant company converted the five houses of which it was in occupation into a residential club for ladies, known as the "Twentieth Century Club."

The club is constituted and carried on by and in accordance with a printed document issued by the defendant company containing its "constitution" and "bye-laws."

The document states that the club was founded to provide a comfortable home, combined with the facilities of a club, for ladies engaged in work in London.

The club is the property of the defendants, and is managed by them, and members incur no liability beyond the annual subscription of 10s. 6d. a year. Sleeping rooms are provided at a charge of 10s. 6d. a week, payable in advance weekly. Country and non-resident members, by paying the annual subscription, can avail themselves of the facilities of the club, and have the use of a bedroom, if there be one vacant. Various restrictions are imposed on the user of the bedrooms; for example, members are not allowed to use oil lamps or stoves in the bedrooms for heating, lighting, or cooking, neither are lighted candles allowed therein. Domestic pets are not to be introduced; musical instruments and sewing machines are not to be used; and smoking is not allowed in the building. Any member wishing to withdraw from the club, or to vacate her apartment, can do so by giving one week's notice.

By the bye-laws, No. 15: "The directors do not undertake to reserve any particular bedroom for a member if vacated during holidays, &c., unless paid for."

By No. 17: "The directors reserve to themselves the right, notwithstanding anything stated or implied in the foregoing bye-laws, to remove from the club register the name of any member whose room may be required for other use. In every such case a proportionate amount of the last annual subscription will be returned."

The defendant company, which paid an annual subscription in respect of each house to the committee of management of the garden, permitted the resident members of the club during their resident membership to enter into and use the garden, and claimed that they were entitled to permit non-resident members of the club to use it.

Under these circumstances the plaintiffs brought the present action, to which the owner in fee of the garden was not a party.

By an order made, by consent, by Byrne, J., points of law were ordered to be set down to be argued before the court. In substance they were (1) Whether the resident members of the club were entitled as of right during their resident membership to enter into and use the garden; (2) whether the defendant company was entitled to authorize or allow such entry and user by (*a*) resident and (*b*) non-resident members of the club.

Buckmaster, K.C., and *G. W. Brabant*, for the plaintiffs.—The members of the club are not entitled in their own right to use the garden, for they are neither lessees, sub-lessees, nor tenants. To constitute a person a tenant he must have an estate in the land carved out of that of his landlord. Taking all the rules of the club into consideration, the inference is that the members are not tenants, but licensees: *Watkins* v. *Overseers of Milton-next-Gravesend*, 16 W. R. 1059, L. R. 3 Q. B. 350. Neither can the defendants authorize them to enter the garden; they are clearly not part of their family. A company cannot have friends in the sense in which that word is used in this grant, and, in any event, the members of the club would be more correctly described as the customers of the company.

Astbury, K.C., and *Ashworth James*, for the defendants.—There is no restriction in the grant as to the tenement which is to give a right to the use of the garden, or as to the owner, or as to the use to which the garden may be put. The defendants pay a subscription in respect of each house, and somebody, therefore, must be contemplated as intended to enjoy the right for which they pay. The resident members of the club are tenants within the wording of the grant. The rules show that they pay in advance for their rooms for a week, and have exclusive occupation of them. They thereby become weekly tenants, and, as such, are entitled to the benefit of the grant. There may be several tenants in respect of the same house: *Harris* v. *Drewe*, 2 B. & Ad. 164, and *Kimber* v. *Admams*, 48 W. R. 322, [1900] 1 Ch. 412, 415. A lodger may be a tenant if the premises are let to him: *Newman* v. *Anderton*, 2 B. & P. N. S. 224, and *Cook* v. *Humber*, 10 W. R. 427, 11 C. B. N. S. 30, 43. "Tenant" in legal parlance, is used in a wide sense: *Stamper* v. *Overseers of Sunderland*, 16 W. R. 1063, 3 C P. 388, 394, and *Thompson* v. *Ward*, 6 C. P. 327, 351. The company is entitled to license the members of the club to use the garden: *Baxendale* v. *North Lambeth Liberal and Radical Club* (*Limited*), 50 W. R. 650, [1902] 2 Ch. 427.

Buckmaster, K.C., replied.

BUCKLEY, J., after stating the facts, continued: The first question is whether these ladies are lessees, sub-lessees, or tenants of the company. In my opinion they are not. All those words imply the existence of some interest or estate in land—the estate or interest of a lessee, of a sub-lessee, or of a tenant. Under certain circumstances a person making a payment may be entitled to enter on and use land, of which, nevertheless, he is not a tenant. For example, if a man pays a sum of money for a stall at the opera, he pays for the right of occupying a particular seat to see a particular performance. Similar cases are payment for the right to enter a picture gallery, or to go into a strawberry garden and eat as much fruit as can be picked. In no such case does the person who makes the payment become a tenant, he is but a licensee. He has no estate, right, or interest in the land as land; he has a right to be there by license. To constitute a man a lessee, he must have some right in land, carved out of the estate of his landlord. In the present case the ladies are no more than licensees, the payment of 10s. 6d. in advance merely entitling them to use of a sleeping apartment for seven days, the company meantime retaining all their rights to the room.

Next, as to the words "being occupiers of the houses," it is true that an occupier of part of a house is an occupier of the house. It is plain, however, that the

words "being occupiers" are words, not of grant, but of restriction of that which precedes. A lessee who is not an occupier cannot use the garden. To give a person such a right you must predicate that he is both a lessee and an occupier. Nothing, therefore, turns no the fact that the ladies are occupiers of the houses.

Then the class of persons entitled to use the garden includes "his and their families and friends in his and their company or without." Nothing arises on the word "family." The ladies are not of the family of the company. The question is whether they can be said to be its "friends." The first distinction to be drawn is that the freeholder, or any other person entitled to use the garden, as, for instance, the company cannot invite anyone to enter the garden merely from friendly motives. For example, a Sunday-school teacher could not invite her scholars, or a manufacturer his employes. The test must be whether the person invited is your friend. Without attempting to define the limits of friendship, I am prepared to say that these ladies are not friends of the company, but its customers. The defendant company is carrying on a business, and the persons who become members and make payments are accepted, not because they are friends, but by reason of the commercial relationship which exists between them and the company. In such a case it is very difficult to draw the line between persons who can and persons who cannot be spoken of as "friends." In each case it must depend on the nature of the relationship between the parties. For example, a visitor at the house of a lessee, or even a casual acquaintance whom he met in the street and invited to enter his garden, might be a "friend" for the purpose of this grant. As to whether a "paying guest" could be so denominated might be a nice question. I think, however, that the inmates of a boarding-house, a private hotel, a hospital, or a school would not be "friends." In the present case, I decide that the relationship between the company and the members of the club is not that of friendship. I therefore answer the questions stated in the negative.

Solicitors, *Seaton Taylor; Caprons, Hitchins, Brabant, & Hitchins.*

Chan. Div.
Swinfen Eady, J. } March 22, 23, 29.

In re SHILSON, COODE, & CO. (*a.*)

Solicitor—Costs—Taxation—Commission for the collection of rents.

The taxing-master allowed a lump sum by way of commission to remunerate solicitors for the collection of certain rents.

Held, that the commission should be treated as struck out of the bill as an item improperly included, the solicitors remaining entitled to their proper remuneration for the work done.

Summons to review taxation.

The solicitors to a trust estate collected the rents and delivered their bill of costs to the trustees, and charged (*inter alia*) a commission of 5 per cent. on the amount of the rents collected.

The applicant was a beneficiary, and took out this summons to review the taxation.

Eve, K.C., and *Ashworth James*, for the applicant.

Vernon Smith, K.C., and *J. G. Wood*, for the solicitors.

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

SWINFEN EADY, J., in giving judgment, said: The master has proceeded on the footing that, in the exercise of his discretion and in the absence of any agreement, he is entitled to allow the solicitors a lump sum by way of commission to remunerate them for their trouble in collecting the rents. The applicant seeks to review the taxation, not being satisfied with the taxing-master's decision on that point.

In my opinion the solicitors are in a dilemma. If this commission is a charge for professional work done by them as solicitors, they ought to deliver a bill of items in respect of it. In the absence of any agreement with their clients the master has no discretion to allow a lump sum for work of that character. The reasoning of Farwell, J., in *In re Johnston*, [1904] 1 Ch. 132, supports this view. On the other hand, if the work was not professional work the commission ought not to have been included in the bill.

The proper order to make upon this application is to vary the certificate by directing the master to treat the commission as struck out of the bill as an item improperly included. The effect of that will be to leave the matter at large between the parties. The solicitors will still be entitled to their proper remuneration for the work done; they will not be barred in respect of that claim; but on the other hand, they will not necessarily be entitled to receive this particular sum by way of remuneration. It may be that some application may hereafter be made for them to deliver a bill of items in respect of the work; or it may be that, if the work is treated as non-professional work (that is to say, as non-taxable work, but work for which the solicitors are nevertheless entitled to receive a fair remuneration), the trustees may agree the amount with the solicitors; and if the applicant is dissatisfied with that amount it may be it will be open to him to impeach the agreement at his own risk; but on the present application the charge must be treated as struck out. This may affect the costs of the taxation under the one-sixth rule. My view is that for the purpose of arriving at that sixth the item is to be treated as struck out of the bill—that is, as if the bill had originally been brought in at a reduced amount—and the one-sixth must be calculated on that footing. The certificate must be varied accordingly.

Solicitors, *Church, Rendell, & Co.*, for *Pitts-Tucker & Sons*, Barnstaple; *Coode, Kingdon, & Cotton.*

K. B. Div.
(Lord Alverstone, L.C.J.) } March 19.

BAKER AND WIFE v. WICKS AND OTHERS. (*a.*)

Poor Law—Rating—Recovery of rates—Illegal distress—Liability of overseers—Poor Relief Act, 1819 (59 *Geo.* 3, *c.* 12), *s.* 7—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 5, *sub-section* 1; *s.* 19, *sub-section* 5; *s.* 33.

Where a justices' warrant of distress for rates is handed by one of the overseers to the assistant overseer, who, by the terms of his appointment, is authorized to perform all the duties of an overseer, and the assistant overseer, in the execution of the warrant, is guilty of an illegal and excessive distress, the overseers are not liable for the assistant overseer's conduct.

Further consideration before Lord Alverstone, L.C.J., in an action that had been tried before him without a jury at the Lewes Assizes.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The action was for illegal and excessive distress, and was brought against three defendants, E. Wicks and W. E. Wright, the overseers of the poor for the parish of Ringmer, in the county of Sussex, and J. S. Webster, an auctioneer.

The plaintiff, Daniel Baker, was a farmer residing with his wife at Ringmer, and entertained a conscientious objection to the application of any part of the rates to the support of voluntary or non-provided schools under the Education Act, 1902, and with the object of recording his protest against such application he refused to pay the amount due from him in respect of rates in June, 1903; a summons was issued and an order for payment duly made by the justices for the county of Sussex.

On the 7th of July the justices issued a distress warrant in the statutory form given in Schedule C 1 and C 2 to the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), addressed "To the overseers of the poor of the parish of Ringmer, in the county of Sussex, and to the constables of the East Sussex Constabulary, and to all other peace officers in the said county," commanding them to make distress of the goods of the plaintiff Daniel Baker to satisfy the demand for £7 19s. 7½d. in respect of unpaid rates, and the costs.

The justices handed the warrant to a police constable, who, acting under instructions, declined to execute it, and handed it to the defendant Wicks, who in turn handed it to a man named Washer, who was an assistant overseer for the parish of Ringmer, and who by the terms of his appointment was empowered to perform all the duties of an overseer. Washer was instructed to execute the warrant and to be careful not to overstep his duty.

On the 16th of July Baker paid to Washer the amount of the demanded rate, less fifteen shillings, the computed proportion of the rate appropriated to educational purposes, and this he refused to pay. The plaintiffs heard nothing further until the 3rd of September, when Washer came with the defendant Webster to the plaintiffs' farm, where they seized under the warrant of distress £100 worth of furniture and goods to satisfy the claim of fifteen shillings remaining unpaid, notwithstanding the fact, which they were both told, that with the exception of about £5 worth the furniture was the property of Mrs. Baker.

The plaintiffs thereupon brought this action against the three defendants. Washer was not made a defendant in the action, but was brought in as a third party by Webster.

Boxall, K.C. (*E. E. Humphreys* with him), for the plaintiffs.—There was an illegal and excessive distraint, and all three defendants are liable; the fact that Wicks and Wright did not authorize Washer to commit the illegal acts is no defence. Overseers are, with regard to an assistant overseer, in the same position as a sheriff to his subordinate officer, and as a sheriff who has delegated his authority to a subordinate officer is responsible for any illegal act committed by such subordinate officer when acting under that authority (see *Gregory* v. *Cotterell*, 4 W. R. 48, 5 E. & B. 571), so overseers are responsible for the misconduct of an assistant overseer to whom they have delegated the performance of their duty under a distress warrant. Overseers cannot delegate their authority in such a way as to relieve themselves of responsibility.

Avory, K.C. (*Lawless* with him), for the defendants Wicks and Wright.—The defendants Wicks and Wright are not liable for the illegal acts committed by the assistant overseers. Sheriffs and overseers do not stand on the same footing, for the sheriff's officer derives his authority solely from the sheriff and the latter is no doubt liable for an illegal act committed by his officer in the discharge of his authority, but the assistant overseer has an independent authority apart from that of the overseers. Lord Denman in *Reg.* v. *Watts*, 7 A. & E. 461, at p. 469, says the assistant overseer is not the servant of the churchwardens and overseers of the parish, but of the vestry, from whom he directly receives his authority." Then, again, in *Points* v. *Attwood*, 6 C. B. 38, Coltman, J., at p. 49, says, speaking of an assistant overseer: "The acts done by him are not, therefore, to be considered as done by him as the agent of the other overseers, but as done by virtue of his own authority derived from the appointment of the vestry."

He also referred to *Smith* v. *Keal*, 31 W. R. 76, 9 Q. B. D. 340, and *Morris* v. *Salberg*, 37 W. R. 469, 22 Q B. D. 614.

Barnard Lailey, for the defendant Webster.

Clarke Hall, for the third party, Washer.

Boxall, K.C., in reply.—The cases of *Reg.* v. *Watts* and *Points* v. *Attwood* are not authorities against the plaintiffs, for the passages relied on in them are merely *obiter dicta*.

Lord ALVERSTONE, L.C.J.—I cannot help regretting that the plaintiff, Mr. Baker, was not better advised as to the absurdity of attempting to raise in this kind of way this so-called conscientious objection to the rate for educational purposes. He might have raised it with equal dignity by paying the amount he objected to under protest. It is also much to be regretted that the police should have refused to execute the warrant. If they had carried out their duty no difficulty would have arisen. The matter now has to be dealt with as a question of law. The action is brought against the two overseers, Wicks and Wright, and Webster, an auctioneer, who brought in Washer, the overseer's assistant, as a third party. Washer had been appointed to exercise all the duties of an overseer of the poor, and an effective distress warrant had been addressed to the overseers of the poor in respect of the goods of the plaintiffs for 15s. for rates which had not been paid by Baker. If the overseers were in the position of sheriffs the plaintiffs would be entitled to obtain judgment against the defendant Wicks.

As to the defendant Wright, it has been shown that he had nothing to do with the matter. With regard to Wicks, he appeared to have given Washer, in whose hands the matter was placed, by no means unwise advice when Washer consulted him, but it is quite plain he made no attempt to take the matter out of Washer's hands. It is provided by statute that overseers may legally employ a duly qualified broker to levy execution, and the goods may be sold by the auctioneer. If I could come to the conclusion that the auctioneer only took an inventory of the goods under the direction of Washer, not only would he not be liable for illegal distress, but there would be some ground for saying he would be entitled to ask for some indemnity. The facts, however, prevent me from adopting the view that Webster did nothing more than take an inventory. According to the telegrams and letters under which Webster was engaged, it is said the costs were unlimited and fees as liberal as he liked. It is said that he was selected because, being a distance away, his business would not be affected, but the mere fact of taking an inventory would not hurt anyone's business. The evidence shows that he did a great deal more than take an inventory of the value of the goods under Washer's direction. He was, in fact, a principal in levying the distraint, and it was extremely improper conduct on his part.

The greater part of the goods were claimed by the wife, and not only was the seizure of the goods a highly improper and unjustifiable act, but it was a wrongful act and an excessive distress. It has been contended that Wicks must be held responsible for the unlawful act. With regard to the overseers, the question is whether they are responsible for the conduct of assistant overseers, and whether the same principle ought to be applied to them which is applied in the case of sheriffs, who are responsible for everything that is done during an execution. A sheriff has no right to delegate his authority, and is responsible for the acts of his subordinates. Overseers, however, are not in the position of sheriffs, and the principle does not therefore apply to the case of an assistant overseer, who under the statute is appointed to perform all the duties of an overseer. An assistant overseer is the servant of the vestry, and the overseers cannot be made liable for the acts of an assistant overseer. The act was done by the assistant overseer by virtue of his own authority, and where there is a statutory recognition of the office in question, the law in regard to the responsibility of a sheriff does not apply. The cases cited of *Reg.* v. *Watts* and *Points* v. *Attwood* are not direct decisions that the assistant is not the servant of the overseers, but the *dicta* to that effect are stated in the clearest and strongest terms, and lay down an intelligible principle upon which I feel bound to act.

In my opinion there was no act on the part of Wicks or Wright which makes them responsible for taking the goods of Mrs. Baker, and judgment therefore must go for Wicks and Wright. I find that Webster did levy the distress and took part in an illegal act. That being so, there is no remedy over against Washer, so that the third party notice fails against him as against the overseers. With regard to damages, the value of goods lost and damage done is £14 or £15, and I give judgment for the plaintiffs against Webster for £50, with costs, and judgment for the defendants Wicks and Wright, with costs. I make no order against Washer, but allow no costs in his favour on the third party notice. I think that the overseers are entitled to any costs occasioned to them by the third party notice, and they must be paid by Webster.

Judgment accordingly.

Solicitor for plaintiffs, *S. Lithgow*, for *D. A. Davies*, Hove.

Solicitors for Wicks and Wright, *Beale & Payne*, for *E. Bedford*, Newhaven.

Solicitors for Webster, *Needham, Tyer, & Barrow*, for *E. G. & F. J. Jackson*, Belper.

Solicitors for Washer, *E. M. Marx & Thompson*, Brighton.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) Jan. 15.

KNUCKEY v. REDRUTH RURAL DISTRICT COUNCIL. (*a.*)

Mine—Owner—Duty to fence—Public well in shaft of disused mine—Metalliferous Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 77), *ss.* 13 41—*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 64.

By section 64 *of the Public Health Act,* 1875, *it is provided that all existing wells "shall vest in and be under the control of" the local authority.*

By section 13 *of the Metalliferous Mines Regulation Act,* 1872, *it is provided that "Where any mine . . . is abandoned or the working thereof discontinued . . . the owners thereof, and every other person interested in the minerals of the mine, shall cause the top of the shaft . . . to be kept securely fenced for the prevention of accidents."*

By section 41 *of the same statute "the term 'mine' includes . . . all the shafts . . . in and adjacent to a mine . . . and belonging to the mine"; and "the term 'owner' . . . means any person or body corporate, who is the immediate proprietor, or lessee, or occupier of any mine . . . but does not include a person or body corporate who . . . is merely the owner of the soil and not interested in the minerals of the mines."*

The shaft of an abandoned mine having become flooded with water was used as a public well, and as such became vested in the defendants, the local authority. Owing to the top of the shaft being unfenced a horse belonging to the plaintiff fell down the well and was injured. In an action to recover from the defendants damages arising, owing to their negligence in not fencing the well as required by section 13 *of the Metalliferous Mines Regulation Act,* 1872,

Held, that the defendants were not the "owners" of the mine or of the shaft within the meaning of section 41 *of that Act, and were, therefore, not liable in an action for damage sustained owing to the top of the shaft not having been fenced as required by section* 13.

Appeal by plaintiff from the Redruth County Court.

The action was brought to recover from the defendants damages for the loss of a horse which had fallen down a well, which the plaintiff alleged the defendants had failed in their statutory duty to fence. The well was formed by the shaft of an abandoned mine, and was a public well. The plaintiff contended that the well was vested under section 64 of the Public Health Act, 1875, in the defendants, who were the sanitary authority of the district in which the well was situated, and that they were bound under section 13 of the Metalliferous Mines Regulation Act, 1872, to fence the top of the shaft in which the well was for the prevention of accidents, and that, the plaintiff's horse having fallen down the shaft in consequence of it not having been fenced, the defendants were liable in damages for the loss sustained by him owing to their neglect of their statutory duty.

The learned county court judge found as a fact that the well had become vested in the defendants, and that it was an old pit shaft, but he held that they were not the "owners" or "persons interested in the minerals of the mine" so as to compel them to fence the well in accordance with the provisions of Metalliferous Mines Regulation Act, 1872, and he therefore gave judgment for the defendants.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

From this judgment the plaintiff now appealed.

Section 64 of the Public Health Act, 1875, provides that all existing public wells "shall vest in and be under the control of the local authority."

The Metalliferous Mines Regulation Act, 1872, provides as follows:

Section 13. "Where any mine to which this Act applies is abandoned, or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred, the owner thereof, and every other person interested in the minerals of the mine, shall cause the top of the shaft and any s de entrance from the surface to be and to be kept securely fenced for the prevention of accidents."

Section 41. "In this Act, unless the context otherwise requires, the term 'mine' includes . . . all the shafts . . . in and adjacent to a mine . . . and belonging to the mine: the term 'owner' when used in relation to any mine means any person or body corporate, who is the immediate proprietor, or lessee, or occupier of any mine, or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mines."

Bethune (*R. C. Glen* with him) for the plaintiff.—The learned county court judge has found as a fact that this well is a public well, and it therefore is vested, under section 64 of the Public Health Act, 1875, in the defendants and is under their control. They are therefore the owners of the well: *Coverdale* v. *Charlton*, 27 W. R. 257, 4 Q. B. D. 104; *Taylor* v. *Corporation of Oldham*, 25 W. R. 178, 4 Ch. D 395. Being the owners of the well, they are the "owners" of part of the mine within the meaning of section 41 of the Metalliferous Mines Regulation Act, 1872, and are bound by section 13 of the same Act to fence and keep fenced the top of the shaft which forms the well. They have failed to comply with this statutory duty, and they are, therefore, liable in damages for the injuries sustained by the plaintiff's horse.

He cited *Evans* v. *Mostyn*, 26 W. R. Dig. 143, 2 C. P. D. 547; *Dublin United Tramways Co.* v. *FitzGerald*, 51 W. R. 321, [1903] A. C. 99; and *Foster* v. *Owen*, 41 W. R. 240, 62 L. J. M. C. 7.

Schiller, for the defendants.—The defendants are not the owners of a mine and liable to keep the top of a shaft thereof fenced. They are not "interested in the minerals of the mine," and therefore by section 41 are not included within the term "owner" as defined by that section. [He was stopped.]

Bethune replied.

Lord ALVERSTONE, L.C.J.—In this case the learned county court judge has found that the well was a public well and became vested in the defendants by virtue of section 64 of the Public Health Act, 1875. I have no doubt there was evidence on which he could so find.

It seems to me that that is by no means conclusive of the case, and in fact goes a very little way to decide it. I agree that the vesting of the well under section 64 will, according to ordinary principles applicable to such vestings in public bodies, vest in the public authority some right of property in the well, and in so much of the land as is necessary to enable them to perform their statutory duties, and I have very little doubt that they would have the right to take steps to protect it from danger and make the well properly efficient if they thought right to do so. That is not the question we have to decide. It is not alleged against the defendants that they were the owners of the well and kept it in a dangerous condition. What we have to consider is, whether the defendants have been guilty of a breach of a statutory obligation imposed by section 13 of the Metalliferous Mines Regulation Act, 1872.

Now, section 13 says that where any mine to which this Act applies is abandoned the owner thereof and every person interested in the minerals of the mine shall cause the top of the shaft to be securely fenced.

If the words stood there by themselves without the interpretation clause in section 41, I think it could scarcely be disputed that the duty to fence is not only upon the owner of the mine, but upon every person interested in the minerals in the mine.

Then comes section 41, which extends the meaning of "mine" so as to make it include all the shafts, both below ground and above ground, in or adjacent to the mine. Therefore I agree that the person who owns the mine also owns the shafts, and it is the owner of the shafts in connection with that mine who is under the obligation imposed by section 13; but section 41, it seems to me, points to the owner of the mine and the minerals—the persons interested in the mine as distinguished from the mere owner of the soil for other purposes, and the exclusion from the word "owner" of certain persons is made abundantly plain. It says that the term "owner" when used in relation to any mine shall include bodies corporate, immediate proprietor or lessee or occupier of any mine, but expressly excludes a person who is merely the owner of the soil and not interested in the minerals of the mine. That being so, it seems to me, whether you take section 13 by itself, or together with section 41, it is not the mere legal owners of the soil which surrounds the shaft, but the person who is either the owner of the mine or interested in the minerals who is liable under section 13 to fence the shaft. That being so, what is the position of the defendants? They are not interested in the minerals of this mine, therefore I think they are not "owners" of the mine or the shaft so as to render them liable under section 13 to fence the well.

For these reasons I think the appeal must be dismissed.

WILLS, J.—I am entirely of the same opinion. I think the keynote of section 13 is that the liability to fence is cast either upon the owner of the mine or upon a person having an interest akin to ownership in the minerals of the mine. I think that is made apparent by the consideration of the definition of "owner" in section 41, which for certain purposes excludes from the term "owner" persons who are merely owners of the soil and who are not interested in the minerals of the mines. There is no pretence for saying that the defendants in this case are interested in the minerals of the mine, and they are, therefore, not liable under section 13 to fence the shaft.

KENNEDY, J.— I am of the same opinion. It seems to me that when you consider this question it is impossible to say that the public authority in whom, under section 64 of the Public Health Act, 1875, the well becomes vested, and to whom control of the well passes, are the owners of the mine within section 13 of the Metalliferous Mines Regulation Act.

Appeal dismissed with costs.

Solicitors for the plaintiff, *Robbins, Billings, & Co.*, for *Paige & Grylls*, Redruth.

Solicitors for the defendants, *Coode, Kingdon, & Cotton*, for *Walters*, Camborne.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) Dec 11.

COMMISSIONERS OF POLICE v. ROBERTS. (a.)

Licensing law—Keeping open during prohibited hours—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.

In order to constitute the offence of keeping open licensed premises under section 9 of the Licensing Act, 1874, *it is necessary that the premises should be capable of being entered from outside, or that liquor could be supplied to persons outside.*

Case stated.

Information against the respondent Roberts for unlawfully keeping open his premises after licensing hours.

The following facts were proved or admitted at the hearing:

The respondent, the licensee of the "Three Rabbits" public-house, Romford-park, Manor Park, was granted an occasional licence pursuant to section 9 of the Licensing Act, 1874, exempting him from the provisions of that Act relating to the closing of premises. The ordinary time for the closing of premises under the provisions of the Licensing Act, 1874, was from 11 p.m. on the 16th of April to 6 a.m. on the 17th of April.

The exemption of the occasional licence extended the time during which the respondent was entitled to keep open his premises from 11 p.m. on the 16th of April to 12.30 a.m. on the 17th of April.

At 12.30 a.m. on the 17th of April a police sergeant was on duty outside the premises. The outer doors of the house were then closed. The police sergeant drew the attention of the respondent's manager to the time. Singing was going on inside the premises, when the respondent came out and said to the sergeant: "I am very sorry they have stopped so late." The sergeant answered: "I shall report the matter." The respondent replied: "Do as you like; you have your duty to do. I thought that the licence was till 1 a.m instead of 12.30." Between 12.40 and 12.45 a.m. thirty-eight persons came out of the private door of the premises. The respondent was not called to give evidence, nor was any evidence adduced on his behalf. The doors of the premises were closed at 12.30 a.m. There was no evidence that any persons were served with intoxicating liquors after 12.30 a.m. It was contended upon the above facts that there was no evidence upon which the respondent could be convicted, and *Jeffrey* v. *Weaver*, 47 W. R. 638, [1899] 2 Q. B. 449, was cited in support of this contention.

Upon the facts, and in view of the statement of the respondent that he thought that the extension of his licence was till 1 a.m., the justices were of opinion that the closing of the doors at 12.30 a.m. was not with the intention of ceasing to supply intoxicating liquors to the persons already in the house; they found as a fact that the house was kept open for the sale of intoxicating liquors in the sense that it was intended by the respondent that intoxicating liquors should be sold to the persons already therein; but in view of the fact that the doors were physically closed and that no person in fact entered after 12.30 a.m., they deemed themselves bound by *Jeffrey* v. *Weaver*, and dismissed the information.

The question for the opinion of the court was whether upon the above facts and findings the justices came to a correct determination in point of law.

Danckwerts, K.C. (*A. Gill* with him).—The justices were mistaken in their view of the case. The authorities show that the mere physical closing of the doors is not the proper test, but whether there was an intention to supply intoxicating liquors.

He cited *Tassell* v. *Ovenden*, 25 W. R. 692, 2 Q. B. D. 383; *Finch* v. *Blundell*, 26 J. P. 71; *Tennant* v. *Cumberland*, 7 W. R. 161, 1 E. & E. 401; *Jeffrey* v. *Weaver*.

R. D. Muir, for the respondent, was not called upon.

Lord ALVERSTONE, L.C.J.—I think it is too late, having regard to the authorities, to put the construction contended for by Mr. Danckwerts on the words "opening or keeping open for sale." Section 9 specifies three offences which may be committed during prohibited hours: (1) selling or exposing for sale in the premises; (2) opening or keeping open the premises for sale; (3) allowing intoxicating liquors to be consumed in the premises although purchased before closing time.

I express no opinion whatsoever as to what would have happened if the respondent had been charged under the first or third of these heads. A series of decisions, of which *Jeffrey* v. *Weaver* is only one, have settled that in order to constitute an offence under the second branch of section 9 there must be a keeping open of the premises in the sense that people can get in from outside. It was not intended by the Legislature that a prosecution should take place under that branch of the section merely because it may be thought the publican would have supplied liquor if he had been asked for it.

LAWRANCE, J.—I am of the same opinion. The justices have not found that any offence was committed, and we cannot arrive at a different conclusion.

KENNEDY, J.—I am of the same opinion. Having regard to the offences created by the section, I think it would be wrong to construe the words "keeping open for sale" in any other than their natural sense. And all the authorities to which we have been referred support that conclusion. There may be a difficulty in proving an offence under the other branches of section 9, but that is not an adequate reason for construing this clause in a non-natural way.

Appeal dismissed.

Solicitors for appellant, *Wontner & Sons.*

Solicitor for respondent, *F. A. S Stern.*

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). March 25.

NEW BALKIS EERSTELING (LIMITED) v. RANDT GOLD MINING CO. (LIMITED). (a.)

Company—Shares—Call for amount remaining unpaid—Forfeiture—Re-sale by company—Certificate stating that purchaser is discharged from prior calls—Subsequent call—Liability for future calls—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *Table A, art.* 22.

A limited company, as authorized by its articles of association, declared forfeited a number of partly paid-up shares for non-payment of calls and resold them to the appellants upon terms embodied in the certificate which followed the terms of article 22 *of Table A, Schedule I., of the Companies Act,* 1862. *This provided that the purchasers of the shares should be held discharged from all calls then due. A new call was subsequently made upon the appellants in respect of these shares to the extent of the amount still outstanding and unpaid.*

Held, that the appellants were liable, since, as the certificate stated, they were holders of shares not paid up in full.

Decision of the Court of Appeal (51 *W. R.* 391, [1903] 1 *K. B.* 461) *affirmed.*

Appeal from an order of the Court of Appeal (Earl of Halsbury, L.C., Lord Alverstone, L.C.J., and Jeune, P.) (51 W. R. 391, [1903] 1 K. B. 461), which affirmed the decision of Bucknill, J.

The respondent company was incorporated as a limited company by shares, with a nominal capital of £80,000 in 80,000 shares of £1 each, which were subsequently subdivided into 320,000 shares of 5s. each.

The articles of association of the respondent company gave power to the directors to make calls, and in default of payment to declare the shares forfeited, and provided that any shares so forfeited should be deemed to be the property of the company, and the directors might sell, re-allot, or otherwise dispose of the same in such manner as they thought fit.

The articles were not expressed to exclude or modify the regulations in Table A. No. 22 of these regulations runs thus: "A statutory declaration in writing that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated as against all persons entitled to such share, and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share, discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale."

A number of the shares in the respondent company had been forfeited, among them were 40,000 shares held by the African Gold Properties (Limited), which the appellants purchased from the respondent company for £150. The terms of the sale were contained in the certificates which were issued by the respondent company to the appellants.

The certificate relating to the 40,000 shares was as follows: "This is to certify that the New Balkis Eersteling (Limited), of Winchester House, Old Broad-street, London, E.C., is the registered holder of 40,000 shares of 5s. each . . . in the above-named company, upon which the sum of 3s. 4d. per share has been paid. The remaining 1s. 8d. per share has been called up, and is payable by the African Gold Properties (Limited), who were the holders of the said shares prior to the same being forfeited, and the said New Balkis Eersteling (Limited) is to be deemed to be the holder of the said shares, discharged from all calls due prior to the date hereof." It was agreed before the Court of Appeal that the form of certificate was in fact copied from the wording of article 22 of Table A set out above. The African Gold Properties had paid sums amounting to between 3¾d. and 4d. per share on the 40,000, and there was not more than 3s. 8d. paid on those shares, and there was accordingly upwards of 1s. 3d. remaining unpaid on the shares.

In December, 1900, a call of 1s. 3d. per share was made on all the shares held by the appellants, who refused to pay, and the present action was commenced.

Bucknill, J., gave judgment for the respondent company, which was affirmed by the Court of Appeal.

Haldane, K.C., and C. C. Scott (*A. T. Lawrence, K.C.,* with them), for the appellants.—This was a sale of shares, and the decisions of *Ooregum Gold Mining Co.* v. *Roper*, 41 W. R. 90, [1892] A. C. 125, and *Welton* v. *Saffery*, 45 W. R. 508, [1897] A. C. 299, do not apply. The shares, being forfeited, became the property of the respondents, who sold them freed from all liability for calls, and we are protected by the language of the certificate. The company had exhausted their power of making calls, and therefore could not make a fresh call.

Sir R. T. Reid, K.C., and *Clauson*, for the respondents, were not heard.

Lord MACNAGHTEN.—This case has been presented to your lordships on the part of the appellants with great ability, but, speaking for myself, I rather doubt whether there is any room for argument.

The facts are quite clear. There was a company called the African Gold Properties (Limited), who were holders of shares in the Randt Co. They had 40,000 shares, upon which calls to the amount of 3s. 4d. per share were made and paid. Then there was a call to the amount of 1s. 8d. which was not paid, and the shares were forfeited. They were disposed of to the present appellants, and a certificate of proprietorship was granted to them, which is to be found in the appendix.

It seems to me that the whole question depends upon the true construction of that certificate, bearing in mind, of course, that the certificate derived its efficacy from the general principles applicable to such a case as this, and the provisions of the enactment, especially in Table A of the Companies Act of 1862. The general principle in such a case is, I think, that every member of a company limited by shares is liable in respect of all moneys payable upon his shares to pay every call that is duly made upon him. It is contended by the appellants that the company had no power to make this call.

Now, the certificate is in these terms: "This is to certify that the New Balkis Eersteling (Limited) is the holder of forty thousand shares of five shillings each" (then it sets out their numbers) "upon which the sum of three shillings and fourpence per share has been paid." That, of course, means that 1s. 8d. per share has not been paid. Now, the provisions of Table A require that in the case of forfeiture "a certificate of proprietorship shall be delivered to a purchaser," and according to the provisions of the Act

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

the certificate is to specify the shares held by him and the amount paid up on them, and the amount of liability upon those shares. Therefore, so far, the certificate in this case is entirely in accordance with the requirements of Table A; it leaves the appellants liable, on the face of the certificate, for the 1s. 8d. which is unpaid. The contest really has arisen upon the latter part of the certificate, which is in these terms: "The remaining one shilling and eightpence per share has been called up, and is payable by the African Gold Properties (Limited), who were the holders of the said share prior to the same being forfeited." That is a statement of fact which is literally and accurately true. Then it goes on to say: "And the said New Balkis Eersteling (Limited) is to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof." That follows the language of article 22 in Table A, which says that "A certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such shares discharged from all calls due prior to such purchase."

It seems to me that that was a very reasonable provision to make, because, if he had not been discharged from those calls, questions might have arisen as to whether he was or was not liable to pay interest upon those shares in respect of the call which had been made. The intention seems to me to be that he is to get a certificate of proprietorship like everybody else, specifying what had been paid on his shares, and leaving him liable, in respect of the balance, to any call which the company may properly make. As regards this call, there is no objection taken to it for want of formality or regularity, or anything of that kind. It seems to me that it is a call that has been duly made, and which the appellant is liable to pay; and therefore I move your lordships that this appeal be dismissed with costs.

Lord DAVEY.—I confess that in the course of Mr. Haldane's argument I had some doubt whether the order which is appealed from should be supported or not, but reflection has satisfied me that the decision of Bucknill, J., affirmed by the Court of Appeal, is correct. It appears to me that the certificate in question follows the terms of article 22 of Table A in the Companies Act. I will remark that if it is in accordance with article 22 no question of *ultra vires* can arise, because it would be ridiculous to say that that which is prescribed by an Act of Parliament, agreeing with other articles of a company formed under that Act, could be *ultra vires*. The question really, as it appears to me, turns upon the construction of a few words in article 22—namely, what is meant by saying that the purchaser of a forfeited share from the company is to be deemed to be the holder of such share, discharged from all calls due prior to such purchase? Does that mean that he is to be discharged from the liability to pay the amount of calls already due, or does it really mean that that demand which has been made is no longer to affect the title to his share? The words rather favour the first construction, because they are "discharged from all calls due." Now what is due is the amount of the previous call—not the demand itself; the demand itself is not due, but the amount of the previous call is. But if I look at the whole article and the context in which it is found, and also at the nature of the transaction, I think the meaning must be that the holder of the share as such is to be discharged from any liability under the previous demand. The reason why I say so is this: In the first place, the purport of article 22, and the effect of it, and, as you see if you read the whole of it, the intention, is to give the holder of the purchased share a good title—that is to say, a clean title to the share which he purchases, unaffected by the proceedings which had previously taken place, arising out of the non-payment of the previous demand. He is to have a clean title, unaffected by the fact of the previous call having been made, or, in other words, I think the effect is that, so far as the purchaser and any holder from him of that share are concerned, they are to be in the same position as if that prior call had never been made.

But that is a mere question of quieting and perfecting the purchaser's title, and it does not appear to me to affect the question of what it is that he purchases. Now what is it that he purchases? Upon this certificate there can be no doubt what it is that he purchases—namely, he purchases a 5s. share on which 3s. 4d. only has been paid up; and therefore the holder of that share under the Act of Parliament and the previous clauses (clauses 4 and 6, I think, are the clauses) in Table A will be liable to pay the extra 1s. 8d. Whether the company could make such a contract to relieve him from the payments of that 1s. 8d. is, I think, hardly doubtful. They could not do so unless they are expressly authorized. Now there is nothing in article 22, as I read it, which authorizes the company to relieve him from the payment of that 1s. 8d. Therefore the result is this—that the purchaser purchases the share *talis qualis*—that is to say, a share upon which 3s. 4d. only has been paid up. He is relieved from any liability under the previous demand or call which has been made by the company and from any consequences of not complying with that call, but the holder of it is subject to any call which the company may properly make. He holds his share in the same position, in all respects, as if those previous calls had never been made by the company. And with this consequence, that the company *quoad* these particular shares (I am speaking only of the forfeited shares which are the subject of the purchase) is at liberty to make another call, calling up the money over again. Therefore I think that the order appealed from should be affirmed.

Lord JAMES OF HEREFORD.—When I first read the papers in this case I confess I shared the doubt to which my noble and learned friend Lord Davey has referred as having been entertained by him; but as the case proceeded it seemed to me that the result which has now been stated by my noble and learned friend was perfectly accurate.

The question is really contained in the last words which my noble friend has just uttered. It was contended at the bar, as I understand, that the company had no power to make a second call on the shares which had been forfeited. It seems to me that it is in that statement that the fallacy lies. I can see no reason why, when the shares have been forfeited and no call has been received on them, the power of the company should be taken away, and that it should be prevented from obtaining the amount that may be necessary to put it in funds for carrying on the business of the company by making a second call. The non-payment of a call cannot be equivalent to the receipt of it in any shape or form. That being so, there is nothing injurious to the public interest, or contrary to equities existing between the parties, that this call should be made and enforced against the present appellants.

Lord ROBERTSON.—I entirely agree.

Lord LINDLEY.—I am of the same opinion. I am not surprised at this certificate being construed in different ways by different people; but in order to understand it one must understand the subject-

matter to which it relates. It is said that a forfeited share is like a table or a chair or any other property which the company has at its disposal. It is nothing of the sort. A forfeited share which is either sold or re-issued or parted with, with a view of future use, is a share in the company—which involves a great deal.

But the short answer to the appellants' case appears to me to be this: Nobody who knows anything at all about companies and shares and the forms of documents which are in use in business would dream of taking this certificate as a certificate for a fully paid-up share. It is nothing of the sort; it tells you it is nothing of the sort; it tells you how much is paid; it tells you what is not paid; and then it goes on to say that the person who takes this share is to be discharged from liability for all calls—which means that there is to be no liability on this share; he is not to be liable for the 10 per cent.; that call, so far as he is concerned, does not affect him; but it tells him, in language which I do not say is so plain that it cannot be misunderstood, because evidently it has been misunderstood, that he has become the holder of a share not paid up in full. Now what is the liability of the man who takes that? It is to pay calls as and when they are made.

Then it is said "You cannot make two calls." If you look at article 4 you will see that the appellants are asking the House to put a construction upon it which has never been put on it yet, so far as I know, and which would not work in practice at all. What would be the result if, under a certificate of this kind or proceeding of this sort, the company were endeavouring to raise more than 5s. per share I do not know; but that point has not arisen. I can conceive that there might be difficulties then; but, as I understand it, they have given credit to these gentlemen for the money they have actually got from the previous call, and therefore this point does not arise. They are not attempting by this machinery to raise more money per share than what they were by the Act authorized to raise.

I have no doubt myself that the decision is quite right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Dale, Newman, & Hood.*

Solicitors for the respondents, *Sanderson, Adkin, Lee, & Eddis.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — June 15.

SELLAR *v.* CHARLES BRIGHT & CO. (LIMITED). (*a.*)

Practice — Charging order — Debentures — "Stock or shares"—Ord. 46, *r.* 1—*Judgments Act,* 1838 (1 *&* 2 *Vict. c.* 110), *s.* 14.

The court has no power, under section 14 *of* 1 *&* 2 *Vict. c.* 110, *to make an order charging debentures in a company with the payment of a judgment debt.*

Appeal from an order of Phillimore, J., in chambers.

The plaintiff recovered judgment in the High Court against the defendants for £2,537 10s. 2d., and, the judgment remaining unsatisfied, he obtained from Phillimore, J., in chambers, an order under 1 & 2 Vict. c. 110, s. 14, charging the defendants' interest in certain shares and debentures in a limited company standing in the name of one Charles Hudson Bennett on behalf of the defendants with the payment of above-mentioned amount due on the judgment. The defendants appealed from that part of the order which gave a charge on the debentures. By 1 & 2 Vict. c. 110, s. 14, "if any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not) standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered and interest thereon. . . ."

C. A. Bennett, for the defendants.—There is no power to make a charging order on debentures in a company. By ord. 46, r. 1, "an order charging stock or shares may be made by any Divisional Court or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1." Section 14 of 1 & 2 Vict. c. 110, which is the material section, gives power to charge "any stock or shares of or in any public company in England (whether incorporated or not)." The words "stock or shares" do not include debentures in a company. In the first place, the word "stock" does not include debenture stock. In section 23 of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), the distinction between debenture stock and "shares or stock" is recognized. *A fortiori* debentures are not included in those words. [He also referred to Palmer's Company Precedents, vol. 3, 9th ed., p. 5.] Nor do "shares" include debentures. Debentures are an acknowledgment of a debt with or without the creation of a charge. A debenture-holder is a creditor of the company; in no sense is he a shareholder in the company. A shareholder has a voice in the control and management of the company; a debenture-holder has not. In *In re Bodman,* 40 W. R. 60, [1891] 3 Ch. 135, Chitty, J., said that there was a material difference between debenture stock and proprietary stock in a company. The holder of debenture stock is a creditor of the company with a security on the assets of the company. The holder of proprietary stock is a member of the company and has the right of participating in the dividends or net profits of the company, whereas the holder of debenture stock is not a member of the company, and receives only a fixed rate of interest whatever the net profits may have been. It was accordingly held in that case that a bequest of all a testator's shares in a public company did not carry debenture stock. The charging order is therefore wrong so far as it purports to charge the debentures.

Alan Macpherson, for the plaintiff.—The word "stock" is wide enough to include debentures, and as wide a meaning as possible ought to be given to that word. The object of the Legislature is to enable a judgment creditor to obtain a security over property which cannot be taken in execution in the ordinary way, and this object will be carried out by giving a wide meaning to the words "stock or shares."

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

COLLINS, M.R. — It seems to me to be quite clear, for the reasons given by the learned counsel for the appellants, that the order, so far as it purported to create a charge on the debentures, is wrong and cannot stand. That part of the order, therefore, charging the debentures must be discharged.

STIRLING and MATHEW, L.JJ., agreed.

Appeal allowed.

Solicitor for the plaintiff, *W. J. Hunter.*

Solicitors for the defendants, *Bennett & Chance.*

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) April 22.

WILLIAMS *v.* NORTH'S NAVIGATION COLLIERIES (1889) (LIMITED). (*a.*)

Master and servant—Wages—Deductions—Set-off—Sum payable under magistrates' order—Truck Act, 1831 (1 *&* 2 *Will.* 4, *c.* 37), *s.* 3.

A workman having absented himself from work in breach of his contract of employment, his employers took proceedings against him under the Employers and Workmen Act, 1875, *and obtained an order against him for payment of a sum of money by instalments payable on days on which his wages became due. On the day on which the first instalment became payable, the employers when paying him his wages deducted therefrom the amount of the instalment.*

Held, that such deduction was not an offence against section 3 *of the Truck Act,* 1831.

Appeal by the defendants from an order of Bucknill, J., at chambers.

The plaintiffs were six workmen who were in the employment of the defendant colliery company.

On the 22nd of December, 1903, the plaintiffs, in breach of their contract of employment, absented themselves from work without leave and without having given notice. The defendants thereupon proceeded against them in a court of summary jurisdiction under section 4 of the Employers and Workmen Act, 1875, claiming damages from them for this breach of their contract of employment. On the 16th of January, 1904, the court of summary jurisdiction made an order on each of the plaintiffs to pay to the defendants 30s. as damages for the breach of contract, the money to be payable in three fortnightly instalments of 10s. each, the first instalment being made payable on Saturday, the 30th of January, and the other two instalments on Saturday, the 13th of February, and Saturday, the 27th of February. These respective dates were the fortnightly colliery pay days. In paying the plaintiffs their wages on the 30th of January the defendants deducted therefrom the sum of 10s. in each case.

On the 1st of February the plaintiffs commenced this action to recover the sums of 10s. so deducted from their wages, for a declaration that such deductions were illegal under the Truck Act, 1831, and for an injunction to restrain the defendants from making any further deductions from the wages which might thereafter become due.

The plaintiffs applied at chambers for an injunction to restrain the defendants from making any similar deductions until the trial of the action. Bucknill, J., granted an *interim* injunction.

The defendants appealed, and it was agreed to treat the application as the trial of the action, the plaintiffs withdrawing their claims to any other relief than a declaration that the deductions were illegal as being contrary to the Truck Act.

J. E. Bankes, K.C., and *Montague Lush, K.C.* (*A. J. Ashton* with them), for the defendants.—The Truck Act, 1831, does not prohibit the making of these deductions. The sole object of that Act is to prohibit the payment of wages otherwise than in coin. Section 3, on which the plaintiffs rely, deals with the mode of payment, not with the calculation of the amount of wages due: *Chawner* v. *Cummings*, 8 Q. B. 311; *Archer* v. *James*, 10 W. R. 489, 2 B. & S. 61. Any question as to the right of making a deduction is a question as to the mode of calculating the amount of wages. The defendants have paid all the wages that are due to them They have a clear defence of set-off to the plaintiffs' claims. But in any case mere non-payment of wages is not an offence against the Truck Act, 1831. It was held in *Willis* v. *Thorpe*, 23 W. R. 730, L. R. 10 Q. B 383, that a deduction from wages of a fine for staying away from work without permission was not an offence against section 3 of the Hosiery Manufacture (Wages) Act, 1874. In *Redgrave* v. *Kelly*, 37 W. R. 543, and *Beetham* v. *Crewdson*, 55 J. P. 55, it was held that a deduction of a fine from wages was not a violation of the the Truck Acts, 1831 and 1887. The Truck Act, 1896, prohibits deductions from wages in respect, either of fines, or damaged goods, or the use of materials, except under certain specified conditions. The provisions of this Act do not touch the case of a deduction in respect of an admitted set-off.

They also referred to *Smith* v. *Walton*, 3 C. P. D. 109, 26 W. R. Dig. 140; *Hewlett* v. *Allen & Sons*, 41 W. R. 197, [1892] 2 Q. B. 662, 42 W. R. 670, [1894] A. C. 383; and *Owner* v. *Hooper*, 19 Times L. R. 601.

Rufus Isaacs, K.C., S. T. Evans, K.C., and *Bailhache* (*John Sankey* with them), for the plaintiffs.—The Truck Act, 1831, prohibits an employer from deducting from the wages of a workman a sum due to himself from the workman, without the consent of the workman. The employer cannot, for the purpose of compliance with the statute, be both payer and payee; to hold otherwise would be to make the statute idle: see per Bowen, L.J., in *Hewlett* v. *Allen & Sons*. That case shows that the non-payment of wages earned and payable is a breach of section 3. This is not inconsistent with *Redgrave* v. *Kelly*, which merely decided that a case of non-payment is not covered by section 9. The statutory obligation is to pay the entire amount of the wages earned by or payable to the workman, and to pay it in coin. It may be that a deduction authorized by the workman is not thereby prohibited, for the amount represented by such deduction, though part of the wages earned by him, may be said to be not payable to him. It was held, under the Acts of 1831 and 1887 that such deductions might legally be made: *Lamb* v. *Great Northern Railway Co.*, 39 W. R. 475, [1891] 2 Q. B. 281. But no deduction could be made which was not authorized by the workman: *Smith* v. *Walton*; *Ex parte Cooper, In re Morris*, 26 Ch. D. 693, 33 W. R. Dig. 23. The Act of 1896 now prescribes certain conditions with respect to deductions which may be made with the consent of the workman. But a deduction to which the workman has not assented is still invalid and illegal. The non-payment in full of these wages at the time of payment was a breach of statutory duty, and none the less so because the employers might have a good right of set-off in proceedings subsequently taken against them by the workmen to recover their wages.

Cur. adv. vult.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

April 22.—COLLINS, M.R.—This is an appeal from an order made by Bucknill, J., at chambers, whereby he granted an interim injunction in an action brought by a number of workmen against their employers for non-payment in full of certain wages alleged to be due to them. The plaintiffs by the indorsement on their writ sought to recover the amount of certain deductions which were made on the payment of those wages, and they claimed a declaration that such deductions were illegal, and an injunction to restrain the defendants from making any further deductions of the same kind. The case first came before us as an interlocutory matter, when only two members of the court were sitting. We then came to the conclusion that the matter could not be conveniently dealt with in that way. There is one way, it is true, in which we might have dealt with it—viz., by discharging the injunction and leaving the real question in the case to be determined at the hearing. Both parties, however, were desirous that this court should deal with the merits of the case as a whole, and it was accordingly arranged to treat the case as a final appeal and to let it come on when the full court was sitting. To bring about that result the plaintiffs have been obliged to throw over the greater part of their suggested cause of action and to confine themselves to the question on which both parties desire to have a decision—viz, whether a set-off against wages insisted on by an employer at the time of the payment of wages is a violation of the Truck Act. We felt that there would be a difficulty in making the declaration which the plaintiffs asked for, even though we should be of opinion that such a set-off was a violation of the statute, because the declaration would not be ancillary to the putting in suit of any legal right. But with a view to meet the pressure which was put on us by both sides we agreed to hear the case and determine it on its merits.

The case arises in this way. The employers had a ground of complaint against some of their workmen in respect of a violation of certain rules, which violation gave them, the employers, a remedy sounding in damages. This remedy they put in suit, as they were entitled to do, under the Employers and Workmen Act, 1875, before a court of summary jurisdiction. The magistrates imposed on each of the workmen a fine payable by instalments, and by their order they appointed as the dates for payment, days which coincided with the usual days for the payment of the men's wages. When the wages came to be paid, the employers set off the sum of 10s., which by the exigency of the judgment of the magistrates was payable to them by each of the workmen on that day, against the sum which was payable by them as wages to each of the workmen. It is alleged that this is a violation of the Truck Act, 1831. And it is alleged that this is so, notwithstanding this fact, that by the terms of the Truck Act and under its authority the sum so set off could have been recovered by the employers from the workmen under a right of set-off in proceedings instituted by the workmen to recover wages due to them. Although the Legislature has intervened to allow this right of set-off, still it is alleged that an offence is committed if an employer having this legal right of set-off avails himself of it at the time when he pays his men their wages, though he could, by authority of the statute, avail himself of it next day in proceedings by the workmen to recover their wages. Now, nothing is to be treated as an offence against the Truck Act unless it is made so clearly. The question therefore is, Has the Truck Act constituted it an offence for an employer to withhold from a workman payment of his wages to the extent to which he, the employer, has a legal right of set-off against the workman—*e.g.*, to the extent of the amount of a judgment obtained by him against the workman?

The object of the Truck Act, 1831, as has been pointed out in many cases, is to be ascertained from its title and its preamble. It is thus intituled: "An Act to prohibit the payment of wages in goods or otherwise than in the current coin of the realm." The preamble is: "Whereas it is necessary to prohibit the payment of wages in goods or otherwise than in the current coin of the realm." The statute proceeds to provide for what it thus describes as its main end and object. Section 1 provides that in all contracts for the hiring of any artificer wages shall be made payable in the current coin of the realm and not otherwise. That clearly gives effect to the main object—viz., the prohibition mentioned in the preamble. Then section 2 provides that contracts must not contain any stipulations as to the manner in which wages shall be expended. That is another provision giving effect to the same main end. Then comes section 3, the section with which we have to deal in this case. It provides as follows: "The entire amount of the wages earned by or payable to any artificer, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer of or in respect of any such wages, by the delivery to him of goods or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void." The plaintiffs seek to get out of this section something which is not to be found in it—viz., an absolute obligation on the employer, whether he has a right of set-off or not, to pay the workman the whole amount of the nominal sum which but for any such right of set-off would be payable as wages. It is said that a deduction in respect of a set-off is contrary to this provision of the Act. It seems to me that these words merely constitute a provision which is calculated to help in carrying out the central purpose of the Act—viz., that wages are not to be paid otherwise than in money. They deal with the mode of payment, not with the amount to be paid. The section speaks of the wages "earned by or payable to" the workman. The words "payable to" ought not to be rejected. The first thing is to ascertain the sum to be paid. Then comes the mandate of the statute, which says that the sum must be paid in coin and not otherwise. But the matter does not stand there. The Act proceeds, by section 4, to provide that wages not paid in coin may be sued for and recovered by the workman; it enacts that the right arising under and given by the Act may be enforced in a civil court. Then comes section 5, which deals with the question of set off. It says that in any proceeding for the recovery of money due to a workman as wages the employer shall not be allowed to make any set off by reason or in respect of any goods, wares, or merchandize had or received by the workman as or on account of his wages. That is another provision ancillary to the main purpose of the Act and emphasizing the intention of the Legislature not to interfere with the law except so far as is necessary for carrying out the central scheme of the Act—viz., the payment of wages in money and not in goods. In my opinion we have here a statutory sanction of all sets-off which are not struck at by the Act. Then, section 6 says that an employer shall not be entitled to maintain any action in respect of goods supplied to a workman as or on account of wages. The only other section I need refer to is section 9, which provides that any employer who shall enter into any contract or make any payment by the Act declared

illegal shall be liable to penalties. It seems to me that the Legislature, in considering what they should constitute as an offence under the Act to be visited with penalties, selected this as the offence, the entering into any such illegal contract or the making of any such illegal payment. They deliberately refrained from constituting the non-payment of wages or the making of a set-off an offence under the Act. They made it an offence to pay wages otherwise than in current coin. The Truck Act of 1831 has been followed by other Acts dealing with new points which have arisen. But I think that this particular matter has not been enlarged on by any subsequent Act. The question has been the subject-matter of decisions from time to time. The leading case is *Chawner* v. *Cummings*. There Lord Denman said: "In order to form a correct judgment upon the nature of this agreement and of these deductions, it is necessary to attend to the provisions of the Act with some particularity. It was directed, as is well known, against what has been called generally the truck system, or, as the title of the Act is, against the payment of wages in certain trades in goods or otherwise than in the current coin of the realm. The prohibition extended to bank notes, because section 8 expressly legalizes payment by them under certain circumstances. The same purpose is declared in the preamble, and in the same terms, and is pursued in the earlier sections of the Act. Section 1 declares all contracts illegal where the wages are made payable in any other manner than in the current coin. Section 2 avoids all contracts where there is any provision as to the place or manner in which the wages, or any part, are to be expended. Section 3 makes all payments, except as aforesaid, illegal and void; and section 4 contains the proviso already referred to, that the artificer may recover his wages as if such prohibited payments had not been made; and section 5, also before noticed, takes away the right of set-off in such cases. Now, it is to be observed that payment otherwise than in money is alone prohibited. Deductions or charges are nowhere mentioned or alluded to before section 23, hereafter to be considered. Then are these deductions in the nature of payment at all? It seems to us to be the mode or calculating the amount of wages, and nothing more." The principle laid down in that case has been followed in subsequent cases, and has never been questioned. A legal set-off is merely a mode of calculating the amount of wages due, and the payment of the amount so found due is no violation of the Act. The fact of the passing of the Hosiery Manufacture (Wages) Act, 1874, shows that the Truck Act, 1831, did not make it an offence to adjust the amount of wages payable by introducing a legal set-off. In the case of *Hewlett* v. *Allen & Sons* Bowen, L.J., made observations which have been pressed as opposing the view which I am now taking. It is contended that those observations support the proposition that there is an obligation on the employer to pay the whole amount of the wages, whether there is a set-off or not. But when they are read in their context, I think they do not support the contention that it is a breach of statutory obligation to make a deduction in respect of an admitted set-off. The House of Lords, while affirming the decision of the Court of Appeal, distinctly negatived the notion that any offence had been committed at all in that case, and they did not give any countenance to the *dicta* which are the basis of the plaintiffs' contention in this case. I therefore think that the judgment of Bowen, L.J., is not an authority in favour of the plaintiffs. In my opinion it cannot be said that any violation of the statute or any offence has been committed by giving effect to a legal right of set-off such as that which has been sanctioned in this case by the court of summary jurisdiction. Therefore, apart from the formal difficulty as to the making in this case of the declaration which the plaintiffs asked for, I do not think that any such declaration ought to be made.

ROMER, L.J., read the following judgment: So far as concerns the relief actually sought in this action the plaintiffs do not dispute that the defendants are entitled to the set-off claimed by them. And in my opinion this is not a case which would justify an injunction being granted as sought by the plaintiffs. Nor is the court bound to make any declaration as claimed by the plaintiffs. But both parties have asked us to express our views on a question that has been argued, and I proceed therefore to give my opinion so far as it appears to me within my province to do so in the present action. I can give that opinion and my reasons for it very briefly. In my opinion the Act of 1831 did not constitute as a punishable offence the mere non-payment of part of a workman's wages, where the master, who is (apart from any special provisions of the Act) entitled to a set off in respect of an ordinary debt due to him from the man equal to the amount of wages retained, claims a set-off and a right of retainer in respect of that debt, the debt not being one in respect of goods, wares, or merchandize, a set-off of which is prohibited by section 5 of the Act. Nor, indeed, can I see that the Act makes a punishable offence any mere non-payment of a man's wages when they fall due, merely because the master had not the means of paying or neglected to pay the same exactly when they became payable. Of course I am only dealing with the Act of 1831, which governs the present case, and am not considering special legislation dealing with a special trade, like the Hosiery Manufacture (Wages) Act, 1874, the provisions of which are significant when compared with the provision of the Act of 1831. I come to the conclusion I have indicated with regard to the Act of 1831 by a consideration of its clauses taken as a whole, and in particular of sections 1, 2, 3, 5, and 9, which, in my opinion, ought to be considered together. It appears to me that section 9 was intended to specify what should be deemed punishable offences under the Act, and that apart from those offences, if a workman did not obtain payment of his wages, the only remedy contemplated by the Act as available to the man and to enable him to obtain payment is by civil action or proceedings. And even if this were not so, yet so far as concerns a case where a master does not pay part of the wages, because he has a set off not invalidated under section 5, it appears to me, having regard to the provisions of that section, it is not right to hold that the Act, which contemplated an action, suit, or other proceeding being taken by the man for his wages, and only prohibited a special set-off being set up against him by the master, could have contemplated that it would be a statutory offence for the master to claim at the time when the wages became payable a set-off, which is not prohibited, and which he could effectually set up as against any subsequent civil proceedings by the man to enforce payment. It appears to me that under this Act if the master sets up, as he may without committing any punishable offence, when the wages become payable, a right to set-off such a debt as we are considering in the present case, then the man can do nothing except commence a civil action or other civil proceedings in which the set-off will be a good defence. It follows that in the present case no declaration can be made in favour of the views of the plaintiffs and that the appeal should be allowed. After what the Master of the Rolls has said I do not think it

necessary or useful to refer to the various cases cited before us.

MATHEW, L.J., read the following judgment: The question which we have to determine under the arrangement come to between counsel, to which the Master of the Rolls has referred, is whether the workmen have an absolute right under the Act of 1831 to be paid their wages in cash, or whether the employers may deduct the amount of an admitted set-off and hand the workman the balance. It was contended for the employers that the Truck Act did not apply. The statute, it was said, did not deal with non-payment. The object of the Legislature was not to enforce payment, but to prohibit and to punish payment not in money but in goods. It was argued for the workman that the Act went much further and was intended to make a failure to pay in current coin an offence for which proceedings of a criminal character might be instituted. It was argued that to dispose of the case the true construction of section 3 of the Act of 1831 had to be ascertained, and the counsel on each side relied with equal confidence, though not with equal success, upon its provisions. I am of opinion that the view of the meaning of the section indicated in previous decisions is the correct one—viz., that the statute does not apply to cases of non-payment. The workman who does not receive all that he has earned has the right to enforce payment in the ordinary way, and is not intended to have the right to prosecute his employers for breach of contract. Any other construction would lead to the unreasonable result that the employers of the workmen specified in the Act would be subject to a serious and vexatious liability not imposed on other employers. The same considerations apply to the question of set-off. There would seem to be no reason why the Legislature should impose on one class of employers a disability to which other employers are not exposed. This action was brought by the workmen to recover the balance alleged to be due to them, and they applied for an injunction to restrain the employers from making any further deduction. The answer of the defendants was that they had a set-off in respect of the wages which were unpaid. This would seem to be an adequate reason for refusing the injunction. But it was argued for the workmen that, although it could not be disputed that there was a set-off, still it was not available at the time when wages became due. The duty of the employers, it was urged, was to hand over the whole amount and to take steps to enforce their set-off at some future time. In other words, that the statute postponed the employers' right to pay themselves by deducting the amount admitted to be due from the workman. I am unable to adopt this reasoning, and I find nothing in the Act of 1831 or the later statutes to justify this contention. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiffs, *Smith, Rundell, & Dods*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

Solicitors for the defendants, *Bell, Brodrick, & Gray*, for *C. & W. Kenshole*, Aberdare.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Feb. 10, 11.

In re DALLAS. (*a.*)

Mortgage—Equitable charge—Future property—Expectancy under will—Priority—Notice—Renunciation of sole executor—Executor mortgagor—Administrator—Property in court in lunacy.

Notice cannot be given so as to affect the priorities of incumbrances to a person who is himself the mortgagor both in the case of the incumbrance first created and of the subsequent incumbrances. The priorities of incumbrancers of future property are regulated by the order in which notices of their charges are in fact given to the legal holder of the property, after it has come into existence, and as between incumbrancers who have so given notice on the same day, in the order of the creation of their charges; the fact that the earlier incumbrancer has not been guilty of any negligence in the giving of his notice at a later date than the notice given by the later incumbrancer, is immaterial.

Whether, where the property charged is an expectancy under a will, an effective notice can be given to a sole executor who afterwards renounces probate, quære.

Decision of Buckley, J. (ante, *p.* 313), *affirmed.*

This was an appeal from a decision of Buckley, J. (reported *ante*, p. 313).

The question arose on a reference by the master to the judge as to the method of ascertaining the priorities of the several incumbrancers of a fund in respect of which a petition had been presented for its payment out of court.

By his will dated the 7th of July, 1893, Robert Dallas gave a legacy of £10,000 to his son Frederick, and appointed three executors, Frederick Dallas, W. Beedell, and E. F. Jenkins. E. F. Jenkins died on the 18th of January, 1898, leaving C. E. E. Jenkins his sole executor. W. Beedell died on the 21st of January, 1899. The testator's will was prepared by the firm of Brooks, Jenkins, & Co., of which E. F. Jenkins was then a member, and which subsequently consisted of S. H. Scott and A. E. Heatley.

On the 28th of June, 1898, lunacy proceedings in respect of the testator were taken, a receiver of his property was appointed, and his personal estate was paid into court in lunacy.

The testator died on the 24th of December, 1902.

In the interval between the date of the will and the death of the testator F. Dallas charged his expectant legacy for amounts in the aggregate largely exceeding the sum of £10,000.

On the 9th of January, 1903, F. Dallas renounced probate.

On the 4th of March, 1903, administration with the will annexed was granted to Mrs. Beedell, a daughter of the testator.

By an order in lunacy drawn up the 17th of March, 1903, and completed on the 27th of March, 1903, the funds in court were directed to be paid out to Mrs. Beedell.

On the 3rd or 4th of May, 1903, these funds reached her hands.

On the 24th of May, 1903, F. Dallas was adjudicated a bankrupt.

On the 28th of May, 1903, Mrs. Beedell paid the sum of £9,985, representing the legacy of £10,000, less costs, into court under the provisions of the Trustee Act, 1893.

By an order of the 4th of July, 1903, made on the

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

above-mentioned petition, certain inquiries and an account were directed. The reference to the judge, which was made in pursuance of a direction in the order to that effect, was as to the principle to be adopted in determining the priorities of the incumbrancers having regard to the notices given.

The particulars of the incumbrances on the fund in question, and the steps the incumbrancers had taken to protect themselves by giving notice were were as follow: A charge dated the 30th of March, 1896, consolidating mortgages of the 13th of January, 1894, and a charge of the 18th of May, 1894, created in favour of Edgar Francis Jenkins; a charge dated the 8th of January, 1897, in favour of the British Mutual Life Assurance Society; charges dated the 18th of May, 1897, and the 3rd of November, 1898, in favour of Frederick Stuart; a charge dated the 28th of April, 1898, in favour of John Edward Evans; charges dated the 15th of June, 1898, the 12th of May, 1899, the 13th of November, 1899, and the 14th of December, 1900, in favour of Stanley Herbert Scott and Arthur Edward Heatley; a charge dated the 23rd of May, 1900, in favour of the Staffordshire Financial Co. (Limited).

On the 9th of January, 1903—*i.e.*, before the grant of the letters of administration, Emily Beedell had received from Charles Edward Elliott Jenkins (the sole executor of Edward Francis Jenkins), the British Empire Mutual Life Assurance Society, Stanley Herbert Scott, Arthur Edward Heatley, and the Staffordshire Financial Co. (Limited) notices of their claims with the dates of their respective securities, referred to in the judgment of Vaughan Williams, L.J., as the "Brooks-Jenkins incumbrances."

On the 5th of March, 1903—*i.e.*, after the letters of administration had been granted, Emily Beedell received notices from the same parties.

On the 12th of March, 1903, Frederick Stuart, on his first hearing of the grant of administration, gave notice to Brooks, Jenkins, & Co., who were the solicitors acting for Emily Beedell, of his charges.

On the 17th of March, 1903, and on subsequent dates, Emily Beedell received notices of the incumbrances held by various other persons.

Buckley, J., held that the charges must rank according to priority of notice given to the administratrix after the grant of letters of administration.

F. Stuart appealed.

H. Terrell, K.C., and *Stokes*, for the appellant.—The doctrine of notice has no application to the present case. That doctrine is based on this, that priorities are affected by the giving of notice because an incumbrancer who has failed to give notice has omitted a step which he ought to have taken for his own protection, and he must bear the consequences of his negligence. In the present case the appellant gave notice to the administratrix as soon as he heard of the grant of letters of administration. It is not suggested that he could have given notice earlier, and his rights ought not to be affected by the omission to do that which he could not possibly have done. *Johnstone* v. *Cox*, 30 W. R. 114, 19 Ch. D. 17, is the only case in this court which is against the appellant's contention. In that case, at the moment when the *chose in action* came into existence, there was a person —*i.e.*, Cox, to whom notice could be given to complete the title to the charge previously created upon it. In the present case, when the fund came into existence there was no one to whom notice could be given except the executor who afterwards renounced. The executor was himself the mortgagor, and therefore he had notice. An assignment operates at the moment when the fund thereby assigned comes into existence.

The following authorities were cited in the course of the argument: *Ward* v. *Duncombe*, 42 W. R. 59, [1893] A. C. 369; *Tailby* v. *Official Receiver*, 37 W.R. 513, 13 A. C. 523; *Dearle* v. *Hall*, 3 Russ. 1; *Foster* v. *Cockerell*, 3 Cl. & F. 456; *Buller* v. *Plunkett*, 9 W. R. 190, 1 J. & H. 441; *Webster* v. *Webster*, 10 W. R. 503, 31 Beav. 393; *Somerset* v. *Cox*, 12 W. R. 590, 33 Beav. 634; *Earl of Suffolk* v. *Cox*, 15 W. R. 732; *Calisher* v. *Forbes*, 20 W. R. 160, 7 Ch. App. 109; *Collyer* v. *Isaacs*, 30 W. R. 70, 19 Ch. D. 342; *In re Wasdale*, 47 W. R. 169, [1899] 1 Ch. 163; *Brown* v. *Savage*, 7 W. R. 571, 4 Drew. 635; *Lloyd's Bank* v. *Pearson*, [1901] 1 Ch. 865, 49 W. R. Dig. 126; and *Willes* v. *Greenhill*, 10 W. R. 33, 4 De G. F. & J. 147.

Buckmaster, K.C., and *Macklin*, for the Brooks-Jenkins incumbrancers,

Ryland, for the Staffordshire Financial Co. (Limited), and

Vaughan Williams and *H. Marshall*, for other incumbrancers, were not called on to argue.

VAUGHAN WILLIAMS, L.J.—I think that the decision of Buckley, J., was right and ought to be affirmed. Really with regard to very nearly all the questions which have been argued before us to-day on behalf of the appellants we are concluded by authority. I will first shortly state sufficient to show how the question arises which we have to determine in the present case. [His lordship stated the facts, and continued:] There could be no effective notice given by an incumbrancer so as to enable him to obtain priority until the fund came into existence, and there was some person who had control of the fund and to whom notice could be given. Therefore we begin with the proposition that there could be no effective notice given during the life of the testator. The next period with which we have to deal is the period between the death of the testator and the renunciation of probate by F. Dallas. With regard to that period we have not to decide whether there could be a good notice so as to affect the priorities given to an executor who subsequently renounces before his renunciation, because it is plain on the authorities that if the person to whom notice is given is himself the assignor, both in the case of an incumbrance first created and also in the case of a later assignment, that notice cannot be effective. The reason is that, whatever view may be taken of the principle upon which notice is allowed to affect priorities, it is common to all theories of the principle upon which these notices are effective to alter priorities, that the notice is given upon the hypothesis that the trustee or other person who legally dominates the fund will give information to the person giving the notice if there is any prior incumbrance in question. But if you have a case where there is only one trustee, and that trustee has himself made the first assignment, it is plainly idle to give him notice of a second assignment—that is, an assignment which he proposes secondly to make, because his obvious interest is to conceal the first assignment from the would-be incumbrancer, for if the latter knew of the first incumbrancer he would probably refuse to advance money on the security of the second assignment. This part of the case may be disposed of at once by referring to *Browne* v. *Savage*. That was a case in which the actual question which had to be decided was whether notice to one of several trustees, that one being the assignor, was a sufficient notice of an assignment. It was held that it was not a sufficient notice upon the ground that it was the interest of such assignor to conceal from the person giving the notice the very fact the discovery of which

if it existed was the object of the notice. I thought at first that the ground of the decision was that the assignor would be likely to conceal the second incumbrance from his fellow-trustees, but on looking closer into the case I see, more particularly from p. 640 of 4 Drew., that the concealment referred to by Kindersley, V.C., was not concealment from his co-trustees, but the concealment of the fact of the earlier incumbrance from the person who was invited to make the advance on the second mortgage. That this is so is made plain by the observations of Cozens-Hardy, L.J., in *Lloyd* v. *Pearson*. That also was a case where there were several trustees who had control of a fund; but it is the principle which is dealt with by Cozens-Hardy, L.J., and I propose to refer to what he says on p. 873 of [1901] 1 Ch.: "It would be whittling away the rule, and indeed would be making it a mere trap, if it were to be held that the knowledge which an assignor-trustee has of his own incumbrance is sufficient to give the assignee priority against a subsequent incumbrancer who gives due notice to all the trustees. This, I take it, was the view of Kindersley, V.C." The result of these authorities, to my mind, is this, that inasmuch as notice to or knowledge of a sole assignor-trustee is not an effective notice to operate upon priorities, we may dismiss at once from this case all considerations of the knowledge of Frederick Dallas, the named executor who subsequently renounced probate. Even if there had been an express notice to him, it would not have been an operative notice for this purpose.

When one passes from this and looks to see when the next notice was given, it seems to me that no notice was given by any incumbrancer until after the grant of letters of administration to Mrs. Beedell. That was on the 4th of March, 1903, and notice was given to her by the Brooks-Jenkins incumbrancers on the 5th of March, 1903, and any notice which was given by Stuart was given several days subsequently to that. In that state of things, therefore, the question which which we have to answer is, Ought those of the Brooks-Jenkins incumbrances which in point of date of creation were subsequent to Stuart's incumbrance to take priority of his incumbrance? All that any of the incumbrancers have got is an equitable title, and their equities would *primâ facie* be enforced in order of date. But the Brooks-Jenkins incumbrancers have been the first to give notice of their incumbrances. The ground on which counsel for the appellants sought to argue that that notice ought not to give any priority was this: They said that the whole principle upon which giving notice is allowed to affect priorities was that those who had not given notice have been guilty of some neglect of duty, and that if that be so, it cannot be said here that Stuart had been guilty of any neglect of duty whatever, because he could not have given notice during the lifetime of the testator. That, so far as Frederick Dallas—the assignor and named executor—is concerned, he could not have given any effective notice to him; and that, therefore, the first time at which he could have given an effective notice was upon the grant of the letters of administration, and he could not tell when that was to take place, and could not prevent the Brooks-Jenkins incumbrancers from giving the first notice, as it was through their solicitors that application was made for the grant of the letters of administration which were granted to Mrs. Beedell. I agree so far with counsel for the appellant that there is no reason to impute any negligence to Stuart. But the answer is, that that is not the true principle to be applied. The true principle has been determined once and for all by the case of *Ward* v. *Duncombe*. It seems to me that that case decides that the principle which has been suggested by counsel for the appellant in their argument as the ground on which notice when given has been allowed to have the effect which it is allowed to have upon priorities is not the true principle. That case has been a good deal discussed in the course of the argument here, and I do not propose to go into it at any length. But if one turns to the observations of Lord Macnaghten, at p. 390 of [1893] A. C., one finds the following: "It may perhaps be doubted whether the views of Sir Thomas Plumer in *Dearle* v. *Hall* were quite correctly appreciated in *Foster* v. *Cockerell*—that was a case in the House of Lords which gives the go-by to all considerations founded upon the conduct of the parties. But however that may be, *Foster* v. *Cockerell* unquestionably lays down that the rule known as the rule in *Dearle* v. *Hall* is independent of any consideration of the conduct of the competing assignees where the assignee second in date has no notice of the earlier assignment. Priority in such a case depends simply and solely on priority of notice." I cannot imagine any words which could more clearly lay dowh the principle upon which these notices are supposed to operate. They operate independently of any consideration of conduct of the competing assignees. Priority of incumbrance depends solely and simply upon the priority of notice. It is true that subsequently Lord Macnaghten goes on to say (at p. 394 of [1893] A. C.): "I have made these observations, not for the purpose of impugning the authority of the rule in *Dearle* v. *Hall*. The rule is settled law. But it seems to me that when your lordships are asked to extend the rule to a case not already covered by authority, it is proper to inquire into the principles upon which the rule is said to be founded. For the reasons which I have already given I do not think that those principles are so clear or so convincing that the rule ought to be extended to a new case." Having said that, I think that I ought not to occupy any time by referring to the arguments or to the opinion of the law lords in the case of *Foster* v. *Cockerell* to show that Lord Macnaghten's view of what was decided in that case is perfectly accurate further than to say this: That when one looks at those arguments it is obvious that the contention of the counsel for the appellants in that case was almost identical with the contention of counsel for the appellant in this case, and that contention was really answered by the court holding that the rule known as the rule in *Dearle* v. *Hall* was a rule to the effect and based on the principle stated by Lord Macnaghten in his judgment in *Ward* v. *Duncombe*. Having said that, I have now disposed of the principal argument in this case. But there is a word or two more to be said, because counsel for the appellant were relying rather on what Lord Macnaghten said with regard to not extending the rule in *Dearle* v. *Hall*. They suggested that in the present case there was no fund and no trustee at all until after the death of the testator, and that after the fund came into existence there was no person to whom an efficient notice could be given, and they said, therefore, that it would be an extension of the rule in *Dearle* v. *Hall* if we were to allow it to apply to such a case as this. That contention is really completely answered by what are commonly known as, and what are still called for short, "the army agents' cases." It is quite plain that in those cases there was a limit during which there was no trustee to whom a notice could be effectively given, and yet the result of those cases was that a notice given when there came into existence such a person was held to be a good notice effective to alter priorities. I think that there is no other point which we have to deal with in order to dispose of this

case, and I have only to say that, in my opinion, the judgment of Buckley, J., ought to be affirmed and the appeal dismissed.

STIRLING, L.J.—I am of the same opinion, and I have very little to add. The question to be determined here is whether the rule laid down in *Dearle* v. *Hall* is applicable to the present case. The rule is stated by Lord Macnaghten in *Ward* v. *Duncombe*, [1893] A. C., at p. 384, thus: "An assignee of an equitable interest in personal estate without notice of an existing prior assignment may gain priority simply by the act of giving notice to the person who has legal dominion over the fund before notice is given by the earlier assignee." It has been contended before us that that rule ought not to be applied to a case where the earlier assignee has not been guilty of any negligence in giving notice. But what was said by Lord Macnaghten in *Ward* v. *Duncombe*, [1893] A. C., at pp. 390 and 391, cited by my lord, appears to me entirely to negative that argument. It is quite true that Lord Macnaghten there points out that there is great difficulty in stating exactly the principle upon which the rule in *Dearle* v. *Hall* was established, and at least he warns those who have to apply that rule against extending it to cases not covered by that authority. The question, then, which we have to consider in the present case is whether this case is covered by that authority. If it is, we have to apply the rule. It may be said, possibly, that there is no case reported which is in its facts entirely like the present, but in my opinion in principle it is covered by the army agents' cases, and particularly by the principle stated by Bacon, V.C., in *Johnstone* v. *Cox*, the decision in which was affirmed by the Court of Appeal. At that time, in accordance with the law that then applied to the sale of commissions in the army, the Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), an officer when he retired from the service was entitled to certain money usually called "purchase-money for his commission." It was paid by the Government to army agents. It was placed on deposit and could not be paid to the officer until his retirement was gazetted. In that case the incumbrancer who was first in date gave notice of his charge to the army agents after the money had been paid to them but before notice of the officer's retirement appeared in the *Gazette*. The second and third incumbrancers gave notice the day after the retirement was gazetted, and then the first incumbrancer in point of date gave another notice five days after the notice in the *Gazette*. It was held that the order of priority of the incumbrancers was, first the second, then the third, and then the first; so that the second and third incumbrancers, by giving notice after the fund had become available for payment and was in the hands of the agents as agents for the officer, before the first, gained priority over the first incumbrancer. What happened here was that Frederick Dallas executed several assignments of his expectancy. At the death of the testator he was himself sole executor of the will, and no notice could in fact be given while that state of things existed. He renounced his executorship, and letters of administration with the will annexed were granted to his sister. Then notice were given to her by some of the incumbrancers on the 5th of March, 1903, and on the 12th of March notice was given by Stuart, another incumbrancer. Now, the question is whether the principle of *Johnstone* v. *Cox* does not apply to the facts of this case, and it seems to me that it does. In *Johnstone* v. *Cox* the principle was applicable in this way—that although at the time when the incumbrance was created there was no person who had legal control of the fund, yet the priorities could be altered the moment when a person came into existence who had legal control of the fund and to whom effective notice could be given. Here there was no person who had control over the fund until the grant of the letters of administration, and the fact that at the time of the death of the testator there was no one who had legal dominion over the fund does not make any difference. It was said that the distinction between the case and the army agents' cases was that in those cases directly the fund came into existence there was a person to whom notice could be given, while in this case there was not, but in my opinion that is a matter of detail and does not alter the principle. Then as regards the point that Frederick Dallas was himself the executor, and the position was the same as when notice of an incumbrance has been given to a trustee who has died or retired, and ought not to be prejudiced by the fact that there is an appointment of a fresh trustee who is not aware of the notice already given and receives a fresh notice, I agree with what has been said by my lord on this point. I only say that we are not now deciding whether notice to an executor who does not act and renounces is of any value whatever. I should, personally, be very slow to adopt that proposition.

COZENS-HARDY, L.J.—I am of the same opinion. I agree with what has been held by Buckley, J., and I am so entirely satisfied with the reasons assigned by him for his decision, and also with what has been said by my brethren, that I shall not occupy more than a few minutes in giving my judgment. It is not open to us since *Ward* v. *Duncombe* to hold otherwise than that the rule in *Dearle* v. *Hall* is independent of the conduct of the incumbrancers. It is also clearly settled that the rule applies, although there was no trust fund and no trustee in existence at the time of the several assignments. The army agents' cases are only intelligible on that view. *Johnstone* v. *Cox* was a clear decision on the point. The matter was not elaborately dealt with both by Bacon, V.C., and by the Court of Appeal in that case, but it had been dealt with before in *Calisher* v. *Forbes*, and the principle was recognized by Lord Selborne in *Addison* v. *Cox*, 21 W. R. 180, L. R. 8 Ch. 76, in 1872, so that it is not open to us to reconsider it. Therefore there is only one point left. It was said that Frederick Dallas as assignor had knowledge—as, of course, he had—of his own incumbrances, and that the knowledge which he possessed of his own incumbrances, he being an executor named in the will, must be regarded as equivalent to a notice entitling the assignees to priority in order of date. I do not agree. It seems to me that the knowledge of the assignor is an entirely different thing from the knowledge obtained by notice given by the assignee to the person who has control of the fund. Under these circumstances it is not necessary, therefore, to decide whether notice to an executor who renounces and disclaims has or has not any force or validity. But, speaking for myself, I should require a great deal of argument to induce me to accede to the proposition submitted to us in the present case on that point.

Appeal dismissed.

Solicitors, *George S. Warmington & Co.; Brooks, Jenkins, & Co.; Smith & Co.*, for *Duignans & Elliot*, Walsall; *Arthur J. Speechly; Marshall & Marshall.*

High Court of Justice.

Chan. Div.
Warrington, J. } May 9.

In re THE LEAD CO.'S WORKMEN'S FUNDS SOCIETY.

LOWES *v.* GOVERNOR AND COMPANY FOR SMELTING DOWN LEAD WITH PIT AND SEA COAL. (*a.*)

Friendly society — Unregistered society — Continuance impracticable—Dissolution—Jurisdiction to wind up.

Where there is a fund which belongs to a number or society of persons who have individually certain interests therein regulated either by a trust deed or by a body of rules, and especially where the fund is vested in a trustee upon trust for those persons, if the rules cannot be carried into effect modo et forma *and the society continued without giving certain members more than they are entitled to as between themselves and the other members, the Court has jurisdiction to interpose and wind up the society for the purpose of administering its funds and distributing them equitably among its members.*

A fund was formed for the purpose of providing the workmen and others employed by a company with allowances during sickness or infirmity and pensions during old age. Rules concerning the membership of the society of those entitled to the fund were made, and from time to time altered, under which entrance fees were paid, the sums for allowances and for subscriptions were fixed, and provision was made that when members attained sixty-five years they should cease to contribute to the funds or to have any allowance for sickness, but they should become entitled to have a weekly allowance or pension for the remainder of their lives. Under these rules the society existed for nearly a century. The society was governed by a committee chiefly composed of the officials of the company. The company having ceased to employ workmen, and having practically ceased business, and no new members having for some years joined the society, it became impracticable to carry out the rules, and it was found that if the society continued the funds would become exhausted for the benefit of some members only. At a meeting of the members a majority, both of pensioners and non-pensioners, voted for a dissolution.

Held, that, under such circumstances, although the society was not a partnership, yet the court had jurisdiction to wind it up, and, not being able to do more justice by continuing it, would wind it up for the purpose of distributing its funds equitably among its members according to their respective interests therein under the rules.

Action.

This was an action, brought on without pleadings, asking for a certain declaration with regard to the rights of members of the above society who had attained the age of twenty-one years, and to have the society dissolved and its affairs wound up by the court. Two questions arose, one of construction of the rules of the society, and one of the jurisdiction of the court to have the society wound up. The case is reported only upon the latter question.

The society was established in connection with the defendant company, which was established by royal charter in the early part of the eighteenth century principally for the purpose of working lead ore in Durham, Cumberland, and Westmorland. In the early part of the nineteenth century a fund was started for the benefit of the workmen employed by the company. The persons entitled to that fund formed the above society, which from the year 1828 was governed by certain rules, but which was never registered under the Friendly Societies Acts. Alterations of the rules were from time to time made down to the year 1891. No deed of any kind was entered into by or on behalf of the company with reference to the society, but the funds of the society stood in the name or in the books of the company. The rules stated that the objects of the society were to promote and establish union, friendship, and mutual assistance among its members, and to provide for them, by means and out of the society's funds, aid towards a comfortable subsistence in times of sickness and old age, and other benefits and advantages; and that the purposes to which the funds of the society should be applicable should be a provision of such benefits and advantages as aforesaid in accordance with the rules of the society. Provision was made for certain entrance fees and for contributions from each member until attaining the age of sixty-five years. The society was to be managed by a general committee assisted by a finance committee and by local committees. Membership was confined to regular workmen, agents, clerks, and others in the employ of the company.

The company was to be the custodian of the invested funds of the society so long as it continued to be willing to act in that capacity.

Rule 22, after providing that the benefits given by the society to its members should include an allowance of 7s. a week to every member who had not attained sixty-five years and was confined to his bed by sickness or infirmity, with a smaller allowance in the event of partial incapacity, continued: "Every member upon attaining the age of sixty years shall cease to contribute to the society, and he can then no longer claim any allowance for accident or sickness, but shall become indefeasibly entitled to a weekly allowance of 6s. for the remainder of his life, whether in sickness or in health, and without being under any restriction as to work; and such weekly allowance shall not be liable to forfeiture under any of these rules."

Owing to a fall in prices the company discontinued working their mines, and had ceased their business, and were selling off their property. The local officials of the company had been discharged, and workmen were no longer employed, and no new members of the society had been admitted since 1899. The result was that the rules as to the management of the funds of the society could no longer practically be carried into effect, as the officials who constituted the committee whose duty it was to frame and carry out the rules in many instances no longer existed as such.

Evidence was given by the actuary to the society, which his lordship accepted, that if the society were allowed to go on and no immediate division of the funds were made they would soon become exhausted, and there would be a large deficiency in the payment of the existing pensions and sick allowances.

The invested funds of the company consisted at the time of the trial of some £32,000 in Consols standing in the name of the company. There were 439 members of the society, of whom eighty-eight were sixty-five years old.

The matter came before Byrne, J., in March last, and in accordance with his desire a meeting of the members was convened at which fifty-four pensioners and 250 non-pensioners voted for a dissolution of the society by the court, and twenty-nine pensioners and thirty-one non-pensioners voted against a dissolution in any form either by the court or under the Friendly Societies Act.

The present action was brought by two plaintiffs who were members of the society, under the age of

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

sixty-five years, on behalf of themselves and all other members under that age against the company as custodian of the trust funds, and against four members of the society who had attained sixty-five years and were pensioners, two of whom had voted for and two against the dissolution of the society. The plaintiffs, after claims upon the construction of the rules as to the rights of the members over sixty-five years to have their weekly allowances paid without regard to the members under that age, claimed to have the society dissolved and its affairs wound up under the direction of the court, and to have the rights of all parties beneficially interested in the trust funds ascertained and declared.

Norton, K.C., and *MacSwinney*, for the plaintiffs.—This is a partnership, and the court has jurisdiction to wind it up: *Lloyd* v. *Loaring*, 6 Ves. 773; *Pearce* v. *Piper*, 17 Ves. 1; *Beaumont* v. *Meredith*, 3 Ves. & B. 180; *Silver* v. *Barnes*, 6 Bing. N. C. 180, 186; *Cunnack* v. *Edwards*, 45 W. R. 99, [1896] 2 Ch. 679; *In re Alfreton District Friendly and Provident Society*, 11 W. R. 301; *Independent Protestant Society*, [1895] 1 Ir. 1; *Jones* v. *Lord Charlemont*, 16 Sim. 271; *Clements* v. *Bowes*, 17 Sim. 167; *Ward* v. *Sittingbourne and Sheerness Railway Co.*, L. R. 9 Ch. 488; *Duke of Bedford* v. *Ellis*, [1901] A. C. 8; Lindley on Partnership (6th ed.), p. 465. The partnership being formed before 1862 is not illegal: *Shaw* v. *Simmons*, 32 W. R. 292, 12 Q. B. D. 117.

They also cited *McKenny* v. *Mayor and Corporation of Barnsley*, 10 Times L. R. 553; *Kemp* v. *Wright*, [1895] 1 Ch. 121; and *Botten* v. *City and Suburban Permanent Building Society*, 44 W. R. 12, [1895] 2 Ch. 441.

Cave, K.C., and *Adler*, for the defendants who voted for the dissolution, supported the above arguments and cited *In re Sinclair*, 45 W. R. 596, [1897] 1 Ch. 921. The society being trustees of the fund, the court has jurisdiction to dissolve it by way of execution of the trust.

Rowden, K.C., and *P. F. S. Stokes*, for the defendants who voted against the resolution.—The association is not a partnership (see Lindley on Partnership (5th ed.), book 1, chap. 1, s. 5), and there is no precedent for winding it up.

Carson, K.C., and *A. J. Spencer*, for the company.

WARRINGTON, J.—Mr. Adler, the actuary, says that if the society is allowed to go on as at present the funds will soon be exhausted, and there will be a deficiency in the payment of the existing pensions and sick allowances, with the result that a number of those who are now in the position of having some interest in the fund and the expectation of getting some tangible benefit out of it will be deprived of any such benefit. The fact also that the company has given up its business seems to me to go a long way to deprive the society of the substratum upon which it was founded—namely, to be a society for the benefit of persons who were or had been employed by the company. Now, what is proposed to be done—if that is material for the present purpose, which I rather doubt, but I may as well allude to it—is that judgment should be pronounced for winding up the affairs of the society, that the contributions should cease, and that the existing assets should be divided among the members of the society equitably, according to the interests which under the rules they have. With regard to that it is said that the court has no power to make such order. Mr. Norton, on behalf of the plaintiffs, in the first instance, put the case upon the ground of partnership. He said that this was a partnership, and could be wound up like any other business, and he cited in support of that contention *Lloyd* v. *Loaring*, *Beaumont* v. *Meredith*, and *Silver* v. *Barnes*. In each of these cases a society having some similarity to the one in the case before me was referred to as a partnership, but it was referred to as such for a different purpose, and not, I think, with a view of founding upon it any decree for dissolution, or any relief such as is usually given in partnership cases. It has been pointed out in Lindley on Partnership, in the passage which Mr. Rowden referred to, that the use of the word "partnership" in connection with these societies was really a misuse of the term, and I quite agree with that, if I may say so respectfully. I think that they are not partnerships either within the definition of the Partnership Act of 1890, or within the general acceptation of the word "partnership." But does the jurisdiction of the court to deal with the funds vested in a number of persons for their joint benefit depend upon its being shown that that number of persons constitute what is properly and technically a partnership? That is where I differ from the argument that has been presented to me by Mr. Rowden. Under what particular jurisdiction it should be put, it is perhaps rather difficult to say, but it seems to me that where you have, as you may have in the present case, funds which belong to a number of persons who have individually certain interests therein regulated by a trust deed, or, as in the present case, by a body of rules, and especially where, as in the present case, you find those funds vested in a trustee for the members of that society, then I think that the court has jurisdiction to interpose. If it finds that the interests of those to whom the funds belong cannot be carried into effect *modo et forma*, as they have at other times determined amongst themselves they shall be divided, then I think that the court has power to interpose and say that justice cannot be done by allowing these rules to go on as they have gone on hitherto; because if that is allowed, certain members of the society will get benefits to which as between themselves and the other members they were never entitled to get; and the only way in which justice can be administered on equitable principles is to endeavour to do the best one can to give to each member of the society that interest in the funds to which he is justly entitled; and that can only be done by winding the society up. It seems to me, therefore, that on that ground I must make an order for the winding up of the society and its affairs, and for the distribution of the fund among the persons beneficially interested therein. With regard to authority, no case has been cited to me on either side, and I can find no case which tends to show that I have no jurisdiction such as I am minded to assume. On the other hand, no case has been cited directly showing that I have such jurisdiction; but the case of *Pearce* v. *Piper* has been cited, where it is, I think, clear, when the case is carefully examined, that the Lord Chancellor, perhaps without deciding it, assumed, and acted upon the assumption, that he had jurisdiction to deal with the fund in a case very much like the present one. In that case there was a society called "The Amicable Society of Master Bakers." It had been established in the year 1798 under certain articles of agreement which I need not read in detail, but they were very like the rules in the present case. It is sufficient for me to say that it was a society established for the purpose of raising a fund to provide certain annuities for superannuated workmen, and to provide sick pay. The society had got into difficulties very much as the present society has, and the Master of the Rolls, before whom the matter came, at the suggestion of the plaintiffs, dealt with it in this way. The plaintiffs in that case, unlike the plaintiffs in the present case,

did not claim a dissolution, but they claimed to have the society continued, and to have directions given which would ensure their funds, and so enable them to go on; and the Master of the Rolls, in compliance with the prayer of the plaintiffs, made a decree for an account against the trustees, and directed an inquiry to ascertain what was due to the plaintiffs for arrears of their annuities, and to have the produce of the fund applied in payment of the annuities, and if the subscriptions and the rents and the produce of the fund were not sufficient to provide the annuities in full, then to have the subscriptions increased. That was appealed from to the Lord Chancellor. There had been a resolution apparently of a majority of the members to dissolve the society, and the prayer of the petition of appeal insisted "that the bill should be dismissed, that the resolution to dissolve the society was proper, and that a court of equity ought not to lend its aid and give effect and duration to an undertaking founded in mistake, and the consequence of which must inevitably involve in ruin many of the parties." It will therefore be observed that the appellants desired that the undertaking should be ended, and the respondents, supporting the decree of the Master of the Rolls, desired to have it continued. It is difficult to follow the case throughout because it extended over many days, and there are detached bits of judgment, some on one day and some on another, but at the end, on p. 19, (17 Ves.) we find the Lord Chancellor saying: "This society will be sensible that it is much more easy for them than for the court to arrange this"—that is, to arrange their affairs generally. He continues: "If they cannot agree on some plan, I must refer it to the master to make similar inquiries to those directed by Lord Thurlow, taking the assistance of a calculator, and to inform me, if this society cannot longer exist, what will be an equitable distribution of the fund subscribed. But that course is not to be taken unless the court is unable to do more justice by securing to those who have and may become entitled to annuities the enjoyment of them." I think it is clear that the Lord Chancellor considered that if, as he says, the society could not longer exist the proper course was, after having obtained the advice and the assistance of the master and of a calculator, to make an equitable distribution of the funds which had been subscribed. It will be observed that he inserts one condition—namely, that that course is not to be taken unless the court is unable to do more justice. The Lord Chancellor, therefore, in that case, does not provide me with an authority sufficient to enable me to pronounce the judgment which I am asked to pronounce. Having had the evidence read to me, I come to the conclusion upon the facts that the court is unable to do more justice by securing the annuities than by making a distribution of the fund. I think, therefore, that I must pronounce, under the third clause of the summons, a judgment declaring that the affairs of the society ought to be wound up by and under the direction of the court, and that the rights of all parties beneficially interested in the funds of the society ought to be ascertained, and that such funds should be distributed amongst the members of the society accordingly, and I direct a scheme for the purpose to be drawn up in chambers.

Winding up order made.

Solicitors, *Ridsdale & Sons*, for *W. J. & H. C. Watson*, Barnard Castle; *Clarke, Rawlins, & Co.*

K. B. Div. (Channell, J.) March 9.

ATTORNEY-GENERAL *v.* SANDOVER. (*a.*)

Copyhold—Fine on admittance—Colourable purchase—Amount of reasonable fine.

A. having agreed to purchase a copyhold property in the Manor of Richmond, in order to avoid payment of the fine on admittance subsequently purchased a smaller copyhold property. The agreement for purchase provided that the vendor should retain the rents and remain liable for the repairs. A. was admitted in respect of this property, and paid the fine on admission. Subsequently he was also admitted in respect of the larger property, paying (by the custom of the manor) a nominal fine only.

Held, that the Crown, as lord of the manor, was entitled to the fine on the larger property, as the sale of the smaller property was a colourable sale, and the Crown was entitled to be placed in the same position as if the admission had never taken place.

Held, also, that the rule that an arbitrary fine ought not to exceed two years' improved value does not apply when the admission exempts from fines in cases of future purchases.

Information on behalf of the King, as lord of the manor of Richmond, claiming that a fine was due to the King as the lord of the manor of Richmond.

By the custom of the manor of Richmond: "He that is a stranger and comes to be tenant of any copyhold lands belonging to the said manor is finable for the same at the will of the lord of the said manor as the first tenant, but never after he is once admitted to be tenant doth he pay any arbitrary fine for any other lands that he shall buy within the said manor. The fine certain paid by the copyhold tenants at the taking up of their estates or upon admittances to purchase among themselves is no more but two years' quit rent due for the lands or tenements to be taken up or bought."

The information stated that shortly before July, 1902, the defendant Sandover, who was not a tenant of the manor, agreed to purchase a messuage known as Ormond Lodge from John Thomas Billett for the sum of £1,750. The sum payable to the King by the defendant had been assessed at the sum of £400.

In order to avoid payment of the fine on the purchase the defendant Sandover arranged with the defendant Long, who is a tenant of the manor, for the purchase by Sandover from Long of a copyhold cottage known as 11, Prospect-place, Richmond.

The agreement in writing, which was dated the 22nd of July, 1902, provided that Sandover should purchase the cottage at the price of £100, and should reconvey the same to Long for the sum of £75, and bear and pay all costs in connection with the transfer. The rents were to be retained by Long, who was to pay the outgoings. If Sandover wished to retain the cottage he was to pay the further sum of £80.

The steward of the manor had no notice of this agreement of the 22nd of July, 1902.

Sandover completed the purchase of the cottage from Billett, and on the 13th of August, 1902, 11, Prospect-place was surrendered by Long, and on the same day Sandover was admitted a tenant and paid a fine of £32.

Subsequently, on the 29th of September, 1902, Billett surrendered Ormond Lodge to Sandover, who was admitted on paying a fine of 6d. only, being two years' quit rent.

The information prayed that it might be declared

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

that the alleged purchase from Long by Sandover of 11, Prospect-place was colourable and void as against the Crown, and that the defendant Sandover was not a tenant of the manor before his admittance to Ormond Lodge, and that he be ordered to pay the sum of £400 less the said sums of £32 and 6d.

Sir R. Finlay, A.G., and *Vaughan Hawkins*, for the Crown.—If there had been a *bonâ fide* sale he would have been entitled to avoid payment of the fine in this way, but this was a colourable sale, as shown by the agreement, which provides that the vendor shall retain the rents and also remain liable for repairs. That being so, the lord is entitled to be placed in the same position as if the admittance had not been made: *Rex* v. *Boughey*, 1 B. & C. 565. As regards the amount of the fine, no doubt two years' improved value is the general rule, but that does not apply where payment of the fine gives the purchaser exemption on a future purchase: Watkins on Copyholds (4th ed.), p. 572.

Danckwerts, K.C., and *Holman Gregory*, for the defendant Sandover.—The transaction was a genuine one, and even if Sandover only became a trustee for Long, he would still have been bound to admit him: *Rex* v. *Hendon*, (1888) 2 T. R. 484. The fine here is bad, because it is at the will of the lord: *Douglas* v. *Earl Dysart*, (1861) 10 C. B. N. S. 688, 10 W. R. Dig. 21.

Cave, K.C., and *Gilbert Smith*, for the defendant Long.

Finlay, A.G., in reply.—*Douglas* v. *Earl Dysart* turned upon the peculiar form in which the question was left to the court.

CHANNELL, J.—I think in this case I must find for the Crown. In my opinion the transaction was colourable; not that I think there was anything fraudulent about it, because any purchaser has a right, if he can, to evade this custom—that is, so to conduct his purchase as not to subject himself to the larger fine. It was, I think, perfectly legitimate for Sandover to purchase the cottage from Long with an understanding that, if desired, Long should purchase it back again. The transaction would then have passed the property in the cottage to Sandover, and the rents and profits of it and the liability to repair it would have been his; and it would have been immaterial that he wanted to become the owner for the purpose of getting on the roll as a tenant and of getting thereby the advantage of being able to get on the roll in respect of another property for a less fine than he would have to pay if he was not a tenant. But it must be a real transaction, and if he pretends to purchase the property when there is no intention that the property should pass, then the transaction is not real, but colourable. And if not, notwithstanding that it is colourable, he is in fact admitted, then, inasmuch as the admittance was procured for the express purpose of escaping payment of the larger fine, the lord is entitled to treat him as not having acquired any rights under the admittance. That is in accordance with the law as laid down in *Rex* v. *Boughey*, and seems to me in accordance with general principles. Whether, if the tenant of a copyhold were to surrender his tenement in favour of a person who had not acquired any beneficial interest, and whom it was desired to put on the roll merely as a trustee for the surrenderor, I need not here decide. In all probability, if the surrender was not made for the purpose of depriving the lord of a fine, the lord would be bound to admit him; but if it were shown that the object was to affect the lord's right to a fine, I think it is clear the lord would be entitled to refuse admittance. The reason why I think that this transaction was colourable is not that there was an agreement by the vendor to repurchase, but that the supposed purchaser was not to have the rents and profits of the property he purchased and was not to be liable for the outgoings. That seems to me to show clearly that it was a purchase only in name, and that being so the property never passed. Now, that being so, I think that the lord is entitled to be put in the same position as he would have been in if he had never admitted the tenant—that is, he is entitled to a reasonable fine on the admittance to Ormond Lodge. I do not agree that because in the custom the amount of the fine is stated to be at the will of the lord the custom must therefore be bad. Arbitrary fines have always been construed by the court as being limited to a reasonable amount, and as a general rule that amount must not exceed two years' improved value. But there is authority for saying that there is an exception to that general rule in a case in which, as here, the admittance purchases a special right to be admitted to any other property thereafter purchased at an almost nominal fine. In such a case it is only reasonable that on account of this special advantage something should be added to the two years' value which constitute the maximum fine in manors where this custom does not prevail. As to how much should be added, it seems to me that regard should be had both to the value of the property to which admittance is sought and also to the question whether there is any reason to think that the property has been bought for the purpose of getting admittance to other property at a future date. If, for instance, I had to decide what would be a reasonable fine on admission to the small cottage in Prospect-place I should be inclined to hold that seven years was the proper fine, as Dolben, J., held in a case cited by Watkins (*King* v. *Dollington*, 1 Show. 83). I think, on the whole, that to double the maximum fine where the property is of substantial value would not be fair, and I therefore fix the fine at three years' value—viz., £300.

Judgment for the Crown.

Solicitor for the Crown, *Solicitor to Woods and Forests.*

Solicitors for the defendant Sandover, *Trinder, Capron, & Co.*

Solicitors for the defendant Long, *Skewes-Cox, Nash, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) Dec. 17, 21.

RAVEN v. JUSTICES OF SOUTHAMPTON. (a.)

Licensing law—Refusal to renew—Appeal to quarter sessions—Evidence at quarter sessions.

On appeal to quarter sessions against the refusal to renew a licence the only evidence produced in support of the refusal was a map showing that there were a large number of other licensed houses within a short distance of the licensed premises in question.

Held (Kennedy, J., *dissenting*), *that this was not evidence on which the quarter sessions could refuse to renew the licence of the house.*

Case stated.

The facts of the case and the arguments sufficiently appear from the judgments.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Avory, K.C. (*Temple Cooke* and *Emanuel* with him), for the appellants.

C. T. Giles (*Bassett* with him), for the respondents.

The following cases were cited: *Rex* v. *Howard*, 51 W. R. 21, [1902] 2 K. B. 363; *Evans* v. *Conway Justices*, 48 W. R. 577, [1900] 2 Q. B. 224; *Sharpe* v. *Wakefield*, 39 W. R. 561, [1891] A. C. 173.

Cur. adv. vult.

Dec. 21.—KENNEDY, J.—I need not say that in differing from my lord and my brother Lawrance I feel the greatest possible doubt as to the correctness of my judgment, but I feel that, having formed an opinion, I ought to give fully my reasons for the view which I do take. In this case the court of quarter sessions have affirmed the refusal of the respondents to grant the renewal of the licence to the "George and Henry" public-house in Orchard-lane, Southampton.

George Raven is the tenant, Crawley & Co. are the owners of this house. The ground of objection to this house was that it was not required in the locality and neighbourhood.

On the hearing of the appeal the respondents, according to the proper and universal practice in such matters, began. They called William Henry Killick, the assistant borough surveyor, and John Neish, a detective in the borough police. Killick proved that if the "George and Henry" was taken as the centre of a circle of 100 yards radius there were within that circle two fully-licensed houses and seventeen beer-houses; and if that circle were enlarged so as to have a radius of 300 yards there would be included within it no less than fully twenty-five fully-licensed houses and forty-seven beer-houses. The same witness stated that no objection had been served in regard of any of these other houses; that the neighbourhood was thickly peopled; and that the character of the people had remained the same while its numbers had increased in the last ten years, during the whole of which period the appellant Raven had held a licence. The witness produced an ordnance map to illustrate his figures and distances, and to show the site both of the "George and Henry," and of the other licensed houses within the area to which his evidence related by means of circles and marks drawn upon the map. The witness Neish corroborated Killick, and further testified the neighbourhood was a troublesome one to the police. The appellants thereupon called witnesses, but neither their names nor the nature of their evidence appear in the case. The court, after hearing the arguments of counsel, affirmed the decision of the licensing justices and refused the renewal of the licence subject to the opinion of this court upon the point intended to be raised by the statement of this special case.

That point in substance is that the court had not any evidence that this house was not required in the locality and neighbourhood. If there was such evidence of course we cannot overrule their decision. In my judgment it is impossible to say that the state of the locality and the neighbourhood, and the evidence given in regard to the throng of inns and beerhouses, and the evidence as to the position of this house in regard both to all those public-houses and to the neighbourhood did not afford any evidence which entitled the court of quarter sessions, acting judicially, as, of course, they are bound to act, to affirm the decision of the licensing justices in refusing to renew the licence of this house. As I understand the effect of the judgment of the House of Lords in *Sharpe* v. *Wakefield*, both justices at the licensing sessions and also the court of quarter sessions on appeal, exercising their discretion, of course judicially, are entitled to refuse to renew a licence if they are of opinion that the public-house to which it relates is not required for the wants of the neighbourhood. To my mind there can be no question that the sworn evidence in this case, with the justifiable inference to be drawn from the position of the public-house in relation both to the neighbourhood and to the other public-houses, might be held by the tribunal before which the evidence was adduced to establish the necessary point, unless—and this is the gist of the appellant's contention—it is not merely relevant, but absolutely essential to the proof that it be further shown by evidence that there are some better grounds for refusing the renewal of the licence to the house objected to than could be shown to exist in regard to the licence of any house within the neighbourhood under consideration, as, for example, in regard to convenience of site, or business, or character, or the extent of business done. Now, speaking for myself, I know of no authority, either in the licensing statutes or in the reported cases, which can be cited in support of this argument. On the contrary, as I have already said, the law accepts as justification for the refusal to renew a licence the fact that, in the opinion of magistrates or the court of quarter sessions, the renewal of the licence is not required by the locality.

It may, I think, properly also be borne in mind in considering the appellant's arguments, firstly, that to attempt really and satisfactorily to compare the relative claims to continuance of some sixty or seventy houses as against the one house objected to would plainly involve a long, most difficult, and probably in most cases an impracticable inquiry; and, secondly, that direct evidence as to the wants of the locality being over-supplied has been given in this case. In my opinion the burden of counterbalancing this evidence should be on the applicants for the renewal of the licence to show that the particular licence is less superfluous than all, or even than some, of the other public-houses. The applicants in this case did not succeed in proving any of these matters on their own behalf. It has been urged that there is hardship in not renewing a licence without evidence of its uselessness or inconvenience as compared with the other houses in the vicinity. I agree that unless all the houses are compared in evidence what might be deemed a hardship may arise. But our duty is to administer the law, and in my view the thing to be decided is whether or not this public-house, owing to the advantages of its situation or to its accommodation or trade, ought to keep its licence in view of the wants of the area in which there are a number of public-houses. No doubt other considerations may be taken into account by the justices, such as the length of time during which a licence has been yearly renewed, or to evidence, if it is given, of the relative superiority of the public-house in question as compared with other public-houses in the same locality. But in dealing with the appellants' contention here, which is that certain evidence is not merely relevant, but indispensable, before a renewal can be refused it appears to me to be essential to comprehend the nature of that which is, after all, the real and essential issue.

The only other matter that I think calls for notice was a subject of discussion at the hearing before us which is contained in paragraph 5 of the special case: "It was contended on behalf of the respondents that the map and facts there proved were facts on which we could find, and were evidence to support a finding, that the said licence was not required as aforesaid; and although such evidence did not differentiate the said "George and Henry" from the other licensed houses in the neighbourhood,

yet if it were necessary so to differentiate it weight should be given to the fact that the said notice of objection had been so served as aforesaid by the respondents, who had local knowledge and could therefore differentiate, and had in fact differentiated, between the said licensed houses."

As I read that paragraph it means this, that the appellants here contended that you must do that which I have endeavoured to express—namely, before dealing with this licence, even though you know where it is, and know its position in relation to the locality, you must give evidence to make the case of renewal less desirable in this case as compared with all these other public-houses.

And as I understand—and I dwell upon this because I think my lord and my brother Lawrance take a different view—I think that the justices held they had sufficient evidence and did not agree with the contention of the appellants that it was necessary to differentiate the "George and Henry" in this way, but that if it was necessary so to differentiate it they thought they were entitled to look at and consider the fact of the notice of objection having been served by direction of the local justices. The judgment of the Court of Appeal in *Evans* v. *Conway Justices*, to which I have already referred, and by which it was decided that the court of quarter sessions are not entitled to refuse a licence without some evidence to ground the objection, decided also that the tribunal ought to proceed as a court of law with regard to the reception of evidence and the requirements of legal proof. It may therefore be said to partake of the nature of an administrative tribunal, though proceedings before it are not an ordinary litigation. With regard to the question of differentiation I feel considerable doubt as to how far, if at all, quarter sessions may in such a case consider as to the differentiation of the "George and Henry" from other public-houses in the same locality. It is not, however, necessary to decide this point in view of the opinion I have already expressed, that there was evidence before the justices which entitled them in my view to come to their decision. I will therefore only say that I am inclined to think that while the origin of the objection to the renewal of this licence could not in itself be treated as affording some evidence that the "George and Henry" was, as between itself and the other public-houses, the one that could best be dispensed with in reference to the wants of the neighbourhood, the court would not be entitled wholly to exclude from their consideration the fact that the objection to this renewal did not come from a private or irresponsible objector.

LAWRANCE, J.—I will state very shortly the grounds on which I have arrived at a conclusion different from that of my brother Kennedy.

I think the magistrates had not before them any evidence which justified them in acting as they did in this case. It seems to me impossible to read paragraph 3 of this case without seeing that the evidence which was called added nothing to the knowledge of the justices with regard to the number of public-houses in the locality. That is to say, the witnesses came there to prove the map and nothing else. The map shows that there is in this district two public-houses fully licensed within 100 yards of this house and twelve within 200 yards, and it seems to me the magistrates acted on that without having before them any direct evidence as to the "George and Henry" public-house licence. Now I am of opinion that the magistrates are bound to act judicially in the matter. I do not think they can be said to have acted judicially in dealing with the case in this way—namely, by taking the map and then deciding to take away the licence of this public-house, against which, so far as I know, there is not a word to be said. If there had been, there would have been evidence forthcoming from the witnesses who were called; but they took that public-house alone, and without any more evidence than that there were too many public-houses within a short distance of it, they deprive it of its licence. Now, the question is, is that acting judicially? It is impossible, of course, to lay down any rule as to what may be done, but it certainly does appear to me that what was done in the *Farnham case* (*Rex* v. *Howard*) ought, in the interest of justice, to be done in cases of this kind. What the magistrates did there was this: they formed a committee of their own members, who did inquire into all the respective merits of the different public-houses in that district. They made a report to the justices, and the justices acted on that, and they were held by the court to have acted rightly in doing so. The words of the Master of the Rolls seem to me most important in that view: "They were of opinion that the only satisfactory way of dealing with the question was to cause objections to be served on all the owners of licensed houses, so that the case of each might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to such renewals on the ground that the houses were not required, and also on special grounds set out in the notice." That is a reasonable and proper way of acting. Nothing of that kind was done here. All that was done was to act upon the map, taking the map alone, acting upon the fact that there were an enormous quantity of public-houses in the the neighbourhood, and it was necessary to begin with one of them, and as to that one no evidence was given. For that reason I come to the conclusion that the appeal should be allowed. I should be sorry to tie the hands of justices who are interested in decreasing the number of public-houses in an overcrowded district, but I think they must have before them some evidence on which they can act, and it is fair to the owners of public-houses they should have some.

Lord ALVERSTONE, L.C.J.—I agree with the judgment of my brother Lawrance, but as the matter is of great importance I think it better to state my reasons. I do not differ in substance from the view of the law expressed by my brother Kennedy. Where we part company is in the application of the law to this particular case, and I think it right to state one or two matters that I assume for the purpose of this judgment. I recognize that the justices may of their own motion give notice that a licence will be objected to on the ground that a particular licence is not required. That was discussed in the *Farnham case*, where we held, and the Court of Appeal affirmed our view, that that course might be taken; but it must be remembered in this particular case the justices only are respondents to this appeal. I further desire to point out that it by no means follows that it is necessary to differentiate between different houses because the justices are going to refuse, or think they ought to refuse, a particular licence on the ground it is not required. There may be circumstances in connection with the character of the house, or with its present accommodation, which would justify the magistrates in thinking that that house, having regard to all its circumstances, is not required in the neighbourhood, and they may act accordingly. We have to consider whether or not the court of quarter sessions in this case acted as a court upon evidence that they could lawfully receive, having regard to the objection that was raised by the justices, "That the licence is not required

in the locality or neighbourhood." I presume the quarter sessions have stated the whole case. If they have not done so I may be doing an injustice to them; but that is their own fault, because they have stated the case on which our opinion is asked, and I must assume that they have given us all the evidence on which they acted. It has been suggested that there was other evidence. All I can say is that the quarter sessions ought not to have stated a case for us and asked our opinion unless that case was stated having regard to the whole of the evidence, and that is why I wish to read the evidence. [His lordship read the evidence from the case, set out in the judgment of Kennedy, J., and continued:] Now, I take it as the basis of my judgment that it is on that evidence, and that evidence only, that the quarter sessions affirmed the decision of the justices not to renew the licence. I do not think it unfair to say, as my brother Lawrance has said, that all that evidence amounted to is the map and nothing else. It showed no peculiarities of the particular house, and it did not even show the surrounding circumstances of the locality of the particular house, its accommodation, or anything to do with it. It was nothing but the map, and I think it is not unimportant to point out that the map itself shows that immediately opposite the "George and Henry," and in the same street, stands another fully-licensed house. I mention that, not for the purpose of showing that it was necessary for the justices to differentiate that house from the "George and Henry," but in order to point out that if they acted on the map only, as I think they did, it is not only easy to see how in the absence of any evidence about the plaintiff's house they could avoid differentiating. I wish to enforce what has been laid down by the Master of the Rolls in the *Farnham case*. I accept it as binding upon me, and as indicating what ought to be done in these cases. In that case, which was much more difficult than this, there were a great many houses involved, and the Master of the Rolls says this: "It is clear from their report that they—that is, the justices—were of opinion that the only satisfactory way of dealing with the question was to cause objections to be served on all owners of licensed houses so that the case of each of them might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to the renewals on the ground that they were not required, and also on special grounds set out in the notice. These objections were signed by the clerk, stating that he was acting under the instruction of the justices present at the annual licensing meeting." All I point out is that in a case much more complicated than this the Master of the Rolls, at any rate, considers the fair method would be to serve objection on all the licensed houses. I mention that only for the purpose of showing that in the absence of circumstances relating to any particular houses, differentiation (or rather comparison) may be the only means of dealing fairly with this question; but I wish again to point out that I do not consider such comparison and differentiation is necessary when there is evidence as to the character of the house in respect of which the licence is refused. Now, that being so, I come to the conclusion—and this is where my brother Kennedy and I differ—that the court of quarter sessions had no evidence before it except the map, and if they did not rely on the differentiation as contended for by the respondents they had no evidence on which they could act. I think it is a very serious matter to lay down that justices at quarter sessions may act on that which is not evidence in a court of law. There was, therefore, in my opinion, no evidence before the justices on which they could properly decide that this house was not required for that neighbourhood, and the appeal ought to be allowed.

Appeal allowed.

Solicitors for the appellants, *Speechly, Mumford, & Co.*, for *Lamport, Bassitt, & Hiscock*, Southampton.

Solicitors for the respondents, *Barlow & Barlow*, for *Bassett*, Southampton.

House of Lords.

From C. A. (England). } Feb. 15.

EASTBOURNE CORPORATION v. ATTORNEY-GENERAL. (a.)

Inland Revenue—Stamp duty—Conveyance on sale—Person authorized by statute to purchase property—Purchase of realty and chattels—Finance Act, 1895 (58 *&* 59 *Vict. c.* 16), *s.* 12.

By section 12 *of the Finance Act,* 1895, *where "any property" is purchased under statutory authority, a duly stamped instrument of conveyance of the property must be produced to the Commissioners of Inland Revenue.*

Held, that the ad valorem *duty was payable on personal as well as real property purchased under the special statutory powers.*

Decision of the Court of Appeal (50 *W. R.* 161, [1902] 1 *K. B.* 403) *affirmed.*

Appeal from an order of the Court of Appeal (Collins, M.R., and Stirling and Mathew, L.JJ.) (50 W. R. 161, [1902] 1 K. B. 403), affirming a decision of the King's Bench Division (Kennedy and Phillimore, JJ.) (50 W. R. 59, [1901] 2 K. B. 773).

This was a special case, stated by consent, pursuant to ord. 68, r. 2, and ord. 34, r. 1, which is set out at length in the report in the Divisional Court.

The question turned on the construction of section 12 of the Finance Act, 1895, which is as follows: "12. Where, after the passing of this Act, by virtue of any Act, whether passed before or after this Act, either (*a*) any property is vested by way of sale in any person, or (*b*) any person is authorized to purchase property, such person shall within three months after the passing of the Act or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament, or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property, and in default of such production the duty, with interest thereon at the rate of 5 per cent. per annum from the passing of the Act, date of vesting, or completion of the purchase, as the case may be, shall be a debt to her Majesty from such person."

In April, 1899, the appellants and the Eastbourne Electric Light Co. (Limited) (the undertakers supplying electricity under the Eastbourne Electric Supply Order, 1890), entered into a contract of purchase and sale, and the contract was sanctioned by the Eastbourne Electric Supply Order, 1899. The total purchase-money was £88,749 2s. 9d., of which £37,929 was admitted by the Crown to have been paid in respect of personal chattels.

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

The Crown claimed *ad valorem* duty upon the whole of the consideration, and the courts below decided in its favour.

Danckwerts, K.C., and *Ritchie Macoun*, for the appellants.—Some limitation must be placed upon the word "property" in the section. Personal chattels pass by delivery, and no conveyance is necessary. Otherwise, a new burden created, which was not the object of the Act.

Sir E. Carson, S.G., and *Rowlatt*, for the Crown, were not heard.

Earl of HALSBURY, L.C.—We have had a very long and ingenious argument on this question, which seems to me to be a very plain one. I certainly do not mean to go through all the different and ingenious hypotheses which have been put forward in order to show that the plain words of the Act of Parliament may be cut down and reduced to an absurdity. I think, so far as there is any argument at all, the whole question turns upon the word "conveyance," and although, with some hesitation and a considerable amount of circumlocution, the learned counsel has addressed to us what I must admit to be a learned and ingenious argument, it simply comes to this: that the statute is intended in its operation to apply only to land, or what would be equivalent to land, in its natural sense. But, as I have before said, the whole of that argument seems to depend upon the use of the word "conveyance," which he says only means, according to the technical view of that question, a conveyance of land, or realty in some form whether it be land or not. My answer to that is that it is not true. The word "conveyance" means what it says: it conveys any property. I find in Wharton's Law Lexicon that it is defined as "an instrument that transfers property from one person to another." That is all; and although it may be perfectly true to say that where you are dealing with personal property it may pass, and does pass, completely by mere delivery, it is a very illogical consequence of that proposition to suggest that it may not pass in any other way, and that you may not convey it by an ordinary conveyance. I think you may.

I think that really disposes of the whole argument. When I look at the statute itself and see what it does, I am content to apply it to the particular facts with which your lordships have to deal. It seems to me that it would be impossible to say, having regard to the particular facts with which your lordships have to deal, that the case is not included in the language of the statute. We have heard a great deal about confusion, about ambiguity, and about alternative constructions; but when I apply the language of the statute to the transaction which is engaging our attention, it appears to me to be as clear as possible that in the ordinary natural meaning of the words therein employed the statute does apply to this transaction.

I decline to go into hypotheses about other cases in which it might be supposed that this language would be too wide and would include something else. It is enough for me to say that, as applicable to this particular transaction, the words seem to me to be absolutely clear, without confusion and without any alternative construction at all, and to apply literally and strictly to the transaction in question.

For these reasons I move your lordships that the judgment appealed from be affirmed and the appeal dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion.

Lord SHAND.—I also am of the same opinion. It appears to me that the very purpose of the Act of 1895 was to enlarge the subject of taxation so that personal property bought by sale should be liable to duty just as heritable property was previously liable. The Act, I think, succeeded in its purpose, and I agree in the opinion of their lordships in the court below and with my noble and learned friend on the woolsack and Lord Macnaghten that the judgment must be affirmed and the appeal dismissed.

Lord LINDLEY.—I am of the same opinion. I think the case becomes absolutely clear if you read the section shortly, leaving out the words which are not applicable to the present case. The section runs thus: "Where, after the passing of this Act, by virtue of any Act, whether passed before or after this Act, any person is authorized to purchase property, any such person shall (within three months after the completion of the purchase) produce to the Commissioners of Inland Revenue an instrument of conveyance of the property" (that is, of the property which the purchaser is authorized by an Act of Parliament to purchase) "duly stamped with an *ad valorem* duty payable upon a conveyance on sale of the property." Now, what is that? What is the property of which an instrument of conveyance is to be produced, and what is the property the *ad valorem* value of which is to govern the stamp? It is obviously the property which the purchaser is authorized by an Act of Parliament to purchase. I think it is plain beyond all question that this Act was not intended to affect ordinary purchases made in the ordinary course of business. It was confined, and intended to be confined, to purchases authorized by some special Act of Parliament, expressly authorized, the property being, if not accurately defined, at all events described in such Act of Parliament. That gets rid of the whole difficulty. There is no ambiguity about it all. Every word in this section has its natural meaning and requires no forced construction whatever. The whole fallacy of the argument on the part of the appellants appears to me to be this: that because personal chattels pass, or can pass, by delivery without any instrument at all, you cannot have an instrument of conveyance for them. That is not the case. In this case the Act of Parliament is addressed to cases where an instrument is required, and being required it must be stamped. The little difficulty, if there is any difficulty about it, arises entirely from not seeing that it does not apply to ordinary purchases in the ordinary course of business, but to special purchases specially authorized.

Appeal dismissed.

Solicitors for appellants, *Sharpe, Parker, & Co.*, for *H. W. Fovargue*, Town Clerk, Eastbourne.

Solicitor for Crown, *Sir Francis Gore, Solicitor of Inland Revenue.*

Court of Appeal.

Original Motion. (Collins, M.R., and Stirling, L.J.) June 7.

DAVID v. REES AND OTHERS. (a.)

Practice—Costs—Set-off—"Parties"—Independent proceedings—Ord. 65, r. 14; r. 27, sub-rule 21.

Ord. 65, rr. 14 and 27 (21), do not allow a set-off of costs in separate actions.

Motion by the plaintiff for a stay of execution as to costs.

The plaintiff advanced sums of money to certain persons, including Thomas Rees and Ernest Henry Rees, for the use of the Aberaman Football Club, upon their joint and several promise to repay the same. The club was an unincorporated body, Thomas Rees being its treasurer and Ernest Henry Rees its secretary, and the other persons were members of the committee of the club. A sum of £78 8s. 9d. being due in respect of the advances, the plaintiff brought an action in the High Court against Thomas Rees and Ernest Henry Rees and the others to recover the above amount. Thomas Rees and one other defendant did not appear to the writ, and judgment was signed against them for the amount claimed and £5 12s. costs. The other defendants, including Ernest H. Rees, appeared, and upon an application for judgment under order 14, the judge at chambers gave unconditional leave to defend and remitted the action for trial to the county court. At the trial in the county court judgment was given for the plaintiff for £72 8s. 9d. and costs, which were taxed at £33 2s. 2d.

The club received certain moneys, the proceeds of gate money, amounting to £84 12s. 5d., which were placed in a bank in the names of Thomas Rees, Ernest Rees, and Thomas William Griffiths, who held the moneys on behalf of the club. The above judgments remaining unsatisfied, the plaintiff instituted garnishee proceedings in the High Court, alleging that there was a debt of £48 due from the Aberaman Football Club to Thomas Rees as treasurer of the club, and that Thomas Rees was entitled to an indemnity against the club's funds in respect of the judgment debt due from him to the plaintiff. The garnishee proceedings were entitled as between "Morgan Richard David, judgment creditor, and Thomas Rees, judgment debtor; the Aberaman Football Club, Thomas Rees, Ernest Henry Rees, and Thomas William Griffiths, the persons in whose names the funds of the club stand, garnishees," and he claimed to be paid the amount of the judgment debt due from Thomas Rees out of the said sum of £84 12s. 5d. There being no denial of the debt of £48 from the club to Thomas Rees, the master and the judge at chambers made an order that the garnishees should pay to the judgment creditor £48, the debt due from the garnishees to the judgment debtor. Ernest Henry Rees appealed from this order, and the Court of Appeal allowed the appeal with costs there and below to be paid by the plaintiff to Ernest Henry Rees, and discharged the garnishee order as against Thomas Rees, Ernest Henry Rees, and Thomas William Griffiths so far as the same purported to attach funds in their hands. Ernest H. Rees' costs of the garnishee proceedings were taxed at £34 4s.

The plaintiff thereupon applied by way of original motion to the Court of Appeal that the execution in respect of the taxed costs of the garnishee proceedings should be stayed upon the ground that the county court judgment which the plaintiff had recovered against Ernest H. Rees for £72 8s. 9d. debt and £33 2s. 2d. costs remained unsatisfied, and he claimed that the costs of the garnishee proceedings should be set off against his unsatisfied judgment.

W. D. Benson, for the plaintiff.—Ord. 65, r. 14, and ord. 65, r. 27, sub-rule 21, allows a set-off of those costs. The action against Thomas Rees and Ernest Rees was the same action, started by the same writ, though as against Ernest Rees the action was remitted to the county court, and under section 65 of the County Courts Act, 1888, it became as regards him a county court action. There was, however, only one action, and the two sets of costs were incurred in that one action. The decisions of the Divisional Court in *Edwards* v. *Hope*, 33 W. R. 672, 14 Q. B. D. 922, and of Chitty, J., in *Hassell* v. *Stanley*, 44 W. R. 405, [1896] 1 Ch. 607, that ord. 65, r. 14, does not apply to costs in independent actions are not applicable. Secondly, if those decisions are applicable, they ought not to be followed. The Court of Appeal in *Edwards* v. *Hope* expressly left the question open; and there is no reason for limiting the rule to costs in the same action. It would be unjust to make the plaintiff pay costs to Ernest Rees, who already owes him a large sum for debt and costs. The decision of the Court of Appeal in *Barker* v. *Hemming*, 28 W. R. 764. 5 Q. B. D. 609, went upon the old ord. 6, r. 19, which corresponds with ord. 65, r. 27 (21), and as that rule deals with the power of the taxing officer on the taxation of costs, the court in that case might well say that it was limited to costs in the same action. That reasoning, however applicable it may be to ord. 65, r. 27 (21), does not apply to ord. 65, r. 14. There was, therefore, jurisdiction to allow the set-off.

Harold Simmons, for Ernest Rees.—The action against Ernest Rees, which was remitted to the county court, and the garnishee proceedings on the judgment recovered against Thomas Rees in the High Court were independent proceedings. Thomas William Griffiths, who was a party to the garnishee proceedings, was not a party to the action. By section 65 of the County Courts Act, 1888, an action when remitted to a county court becomes for all purposes a county court action. The decisions in *Edwards* v. *Hope* and *Hassell* v. *Stanley*, to the effect that ord. 65, r. 14, does not apply to a set-off of costs in independent proceedings, ought to be followed. Further, the decision in *Barker* v. *Hemming* that ord. 6, r. 19 (now ord. 65 r. 27, sub-rule 21), only applies to a set-off of costs as between parties in the same action is in point and applies to ord. 65, r. 14, as well as to ord. 65, r. 27 (21). But even if it can be said that the action remained one action, the garnishee proceedings were proceedings distinct from the action, and were therefore independent proceedings within the reasoning of *Barker* v. *Hemming*. He also contended that under the jurisdiction existing before the Judicature Acts there was no right to set off these costs.

COLLINS, M.R.—I am of opinion that this application fails. The plaintiff recovered judgment in the High Court against Thomas Rees upon his personal liability to pay a sum of £78 8s. 9d. which had been advanced to a number of persons, including Thomas Rees, for the purposes of a football club. Thomas Rees did not pay the judgment debt, and there did not seem to be much prospect of the plaintiff getting the fruits of his judgment. It appeared, however, that a sum of money came into the possession of the club, and the club were at the same time liable to Thomas

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Rees in respect of a debt due to him from the club. The sum of money belonging to the club was deposited in a bank in the names of three persons—Thomas Rees, Ernest Henry Rees, and Thomas William Griffiths. The plaintiff thereupon issued garnishee proceedings against the club and against these three persons. The master made the garnishee order absolute against all the garnishees, and the learned judge at chambers affirmed his order. Ernest Rees appealed from that order, and we held that Ernest Rees, as a trustee of this fund, was under no personal liability to the defendant, and discharged the garnishee order against the three persons in whose names the fund was standing, and ordered the plaintiff to pay to Ernest Rees the costs of the appeal and of the proceedings at chambers. These costs were taxed, and the plaintiff now applies to be allowed to set off the costs due to him under his county court judgment against Ernest Rees against the costs of the garnishee proceedings. It seems to me, when I look at the rules, that there is no power to allow the set-off. By ord. 65, r. 14, "a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." The set-off is there allowed between "parties." Then by ord. 65, r. 27 (21): "In any case in which . . . by the order or direction of a court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off. . . ." That rule also deals with "parties." Both those rules have been the subject of decisions, one in the Divisional Court and one in the Court of Appeal. *Edwards* v. *Hope* was a decision upon ord. 65, r. 14. The head-note in that case is as follows: "The court, upon an application to set-off cross-judgments in distinct actions, are entitled, notwithstanding ord. 65, r. 14, to order that the set-off shall be subject to the lien for costs of the solicitor of the opposite party, for assuming that rule 14 applies to a set-off in distinct actions it leaves the court a discretion to allow the set-off, either subject to or notwithstanding the solicitor's lien, and if it has no application the court have the same discretion by the practice previous to Reg. Hil. Term, 1853, r. 63, which since the repeal of that rule by the new rules is revived." In that case the Divisional Court held that rule 14 only applies to damages or costs in the same cause. The Court of Appeal left that point open, and Bowen, L.J., after dealing with the old practice, said that "if we interpret the rule as applying only to a set-off in the same action, it has no application to the present case, and rule 63 of Hilary Term, 1853, having been abrogated, the old equitable jurisdiction of the court is revived. If, on the other hand, rule 14 is taken to apply to a set-off in different actions, the court, by the express terms of the rule, has a discretion as to the terms on which the set-off is to be allowed. Either way, therefore, the court below was at liberty to exercise its discretion, and we ought not to interfere unless we can see that this discretion was wrongly exercised, which we certainly cannot." In *Hassell* v. *Stanley*, which is another case dealing with ord. 65, rr. 14 and 27 (21), the head-note is as follows: "Costs incurred in the High Court cannot be set off against costs obtained in the county court, although the proceedings are between the same parties. Ord. 65, r. 14, does not apply to costs in independent proceedings." In that case Chitty, J., said: "As the question I have just refrained from deciding is now directly raised again, I am not going to avoid giving my decision on the point by sheltering myself under my judicial discretion; and I therefore say that, in my opinion, the principle adopted by the Divisional Court in *Edwards* v. *Hope*, 14 Q. B. D. 922, and by Kay, J., in *Blakey* v. *Latham*, 37 W. R. 569, 41 Ch. D. 518, applies to this case, and I therefore decline to make any order for a set-off of the costs of this motion against the costs obtained by the defendants in the county court." There is one other case to which it is necessary to refer — *Barker* v. *Hemming*, decided in 1880. The head-note in that case states that "under ord. 6, r. 19, of the Rules of the Supreme Court (Costs)—by which, whenever in cases specified a party entitled to receive costs is liable to pay costs to the other party, the taxing officer may adjust the costs by way of deduction or set-off—such set-off or deduction is limited to costs due to either party in respect of the same action, and cannot be enforced in respect of the costs of any separate proceeding between the same parties." Ord. 6, r. 19, which was under discussion in that case, was in the same terms as the present ord. 65, r. 27 (21). James, L.J., there said: "The plain meaning of ord. 6, r. 19, is that costs are to be set-off as between parties—not as between persons, but as between parties—in the same action, and in their character of parties to it. It cannot be supposed that the rule would apply to costs incurred by them in a distinct action in a different branch of the court, and it can just as little apply to the costs incurred in this interpleader, which is a proceeding distinct from the action." The ground of that decision was that the word "parties" was used in the rule, thereby making the rule inapplicable to the set-off claimed. The word "parties" is common to both sets of rules, which are addressed solely to a set-off as between parties. The set-off claimed in the present case does not, therefore, come within either of the rules.

It is then suggested that there is another principle independent of the rules—namely, the old principle recognized both at common law and in equity, allowing a set-off though the actions are different. But that principle is limited to the case of parties suing or being sued in the same right. In Lush's Practice (3rd ed.). vol. 1, p. 328, it is said that "a set-off will not be allowed even between the same parties where the judgments are in different rights; as where one of the parties is trustee only in one, and in the other is interested in his own right"; and for that proposition the case of *Bristowe* v. *Needham*, 8 Sc. N. R. 366, is cited. In the present case it is claimed to set off costs payable to a person in his capacity as a trustee against costs payable by him in his personal capacity. This is outside the principle, and also outside the above-mentioned rules. The set-off, therefore, cannot be allowed, and the application fails.

STIRLING, L.J.—I am of the same opinion. The plaintiff is a creditor of a football club, which is an unincorporated body, and Thomas Rees and Ernest Rees, among others, promised to pay the debt. The club did not pay the debt, and the plaintiff sued Thomas Rees and Ernest Rees in the High Court. Judgment by default was recovered against Thomas Rees, and the action as against Ernest Rees was remitted to the county court, and resulted in judgment for the plaintiff against Ernest Rees for the amount of the debt, with costs. Therefore a sum of money for costs became due from Ernest Rees to the plaintiff. The debt remaining unsatisfied, the plaintiff, ascertaining that there was a debt due from the club to Thomas Rees, took garnishee proceedings in the High Court against the club and the three trustees in whose names a sum of money belonging to the club was standing in a bank. Ernest Rees was one of those trustees. Those garnishee proceedings were entitled

in the action against Thomas Rees. The plaintiff succeeded in those garnishee proceedings in chambers, and Ernest Rees appealed to this court against them. We held that the garnishee proceedings were wrongly instituted against the three trustees, and discharged the order as to them, and directed the plaintiff to pay to Ernest Rees the costs of those proceedings. An application is now made to us to allow those costs to be set off against the costs which Ernest Rees owes to the plaintiff in respect of the county court judgment.

The question is whether that can be allowed. The application is based first of all upon ord. 65, r. 14. It was, however, suggested that another rule—ord. 65, r. 27 (21)—might apply, and that the application might also be justified under the common law or equitable jurisdiction of the court. To begin with ord. 65, r. 27 (21), that rule is not applicable, because there is an express decision of this court in *Barker* v. *Hemming*, upon a former rule which was identical in terms with sub-rule 21, and the ground of that decision was that the set-off of costs must be between the parties in the same action and in their character of parties to it. Here the costs due to the plaintiff are costs recovered under the county court judgment, and the costs which Ernest Rees recovered against the plaintiff are costs of garnishee proceedings improperly instituted against him in the High Court. For that reason sub-rule 21 does not apply. Then rule 14 was mainly relied upon. That rule provides that "a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." It is to be observed that the language of the rule is, "a set-off for damages or costs between parties." It seems to me that the reasoning in *Barker* v. *Hemming* applies to that rule. There is no decision directly in point in the Court of Appeal, but in *Edwards* v. *Hope* the Divisional Court expressly held that rule 14 only applies to costs in the particular cause, and not in independent proceedings; and Kay, J., in *Blakey* v. *Latham*, and Chitty, J., in *Hassell* v. *Stanley*, when sitting as judges of first instance, followed the decision of the Divisional Court in *Edwards* v. *Hope*, and held that rule 14 does not apply to costs in distinct and independent actions or proceedings. Therefore it appears to me that, both upon the reasoning in *Barker* v. *Hemming* and upon the weight of authority, ord. 65, r. 14, does not apply.

There remains the question of the old common law or equitable jurisdiction of the court, which, as was pointed out in *Edwards* v. *Hope*, is still applicable. But that jurisdiction was never applied where the parties were sued in different capacities. Here the action against Ernest Rees was against him in his individual capacity, and the garnishee proceedings were instituted against him in his capacity as trustee for the club. For these reasons the application must be refused.

Application refused.

Solicitors for the plaintiff, *E. F. Turner & Sons*, for *David Richards*, Aberdare.

Solicitors for Ernest Rees, *Milner & Bickford.*

From K. B. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — April 19.

HAMILTON v. SEAL. (a.)

Practice—Application for judgment or new trial—Misdirection of jury—Costs of successful application—Discretion of court.

If a new trial is granted by the Court of Appeal on account of the misdirection of the jury, the costs of the application rest entirely at the discretion of that court.

Bray v. Ford, [1896] *A. C.* 44, 44 *W. R. Dig.* 131, *discussed.*

This was an appeal of the defendant for judgment or new trial from a verdict and judgment of Grantham, J., and a special jury.

The action was to set aside a certain guarantee which the plaintiff had given, on the ground that there was no consideration, and that it had been obtained by duress.

A verdict having been given for the plaintiff, the defendant appealed on the ground that the jury had been misdirected.

THE COURT (VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.) having granted the application for a new trial, a question arose as to whether the costs of the application that succeeded should be the applicant's, or abide the result of the new trial.

On this point

Scott Fox, K.C., and *Thorn Drury*, for the appellant.

Kemp, K.C., and *F. M. Abrahams*, for the respondent.

They cited *Bray* v. *Ford*, [1896] A. C. 44, 44 W. R. Dig. 131.

VAUGHAN WILLIAMS, L.J., in delivering the judgment of the court, said: In practice the order made in *Bray* v. *Ford*, [1896] A. C. 44, 44 W. R. Dig. 131, has not been considered as an order laying down any general rule, but as merely an order in that particular case. It appears that the Court of Appeal, in dealing with these common law cases, have generally done so upon the ground that there was no absolute rule applicable to all cases, but that there was a discretion in the court either to give, or to abstain from giving, or to reserve the costs. Therefore we have to exercise that discretion, and, for myself, although I cannot say that there is any general rule which can be applied to these cases, yet in the absence of special circumstances, where there is an application for a new trial, and one has been ordered, and the other side have opposed that application, I think that *primâ facie* the costs should be borne by those who opposed the application. In our judgment the costs of this application ought to be paid by the respondents. The costs of the first trial will abide the result of the second, subject to directions.

STIRLING and COZENS-HARDY, L.JJ., concurred.

Solicitors, *H. Ellis; Seal & Edgelow.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — March 25, 28, 29.

WELLCOME v. THOMPSON & CAPPER.
In re BURROUGHS, WELLCOME, & CO.'S TRADE-MARKS. (a.)

Trade-mark—Registration—Motion to rectify—Fancy word "Tabloid"—Presumption from long user—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict.* c. 57), *s.* 64.

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

(a.) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

Before 1884, *B. & W. made and sold drugs of solid form and biconvex shape as "Tablets," and had registered "Tablets" as a trade-mark. In* 1884 *they coined and registered the word "Tabloid," as a trade-mark for substances used in pharmacy. They had since made and sold as "Tabloids" solid drugs of the same shape and size.*

In 1903, *T. applied to have the word "Tabloid" expunged from the register.*

Held, affirming the decision of Byrne, J., (*ante, p.* 205), *that, having regard to the long period of time during which the word stood unimpeached on the register, the presumption was that "Tabloid" was, at the date of its registration, a distinctive fancy word.*

Appeal by Messrs. Thompson & Capper against the dismissal by Byrne, J., of a motion to rectify the register of trade-marks by expunging therefrom certain trade-marks of the respondents, Messrs. Burroughs, Wellcome, & Co.

Prior to 1884 the respondents manufactured and sold compressed drugs of a lenticular or biconvex shape as "Wyeth's Compressed Tablets." In 1883 they registered the word "Tablets" in class 3, but there being doubt as to the validity of of "Tablets" as a trade-mark, they invented the word "Tabloid," which was not then known in the English language, and in 1884 registered it in classes 3 and 42 in respect of chemical substances not included in class 1 used in medicine and pharmacy and preparations of food for human use. In 1885 they registered the word "Tabloids" in a frame in respect of the same substances. These registrations were still in force. From the date of the first registration of "Tabloid" the respondents had made and sold drugs of the original size and shape and also drugs of various sizes and shapes, chiefly however of a biconvex form. They had continually sold their compressed drugs in connection with the word "Tabloid" or "Tabloids." In 1890 they ceased to use "Tablets" as a trade-mark altogether. Subsequently they began to manufacture a great variety of compressed goods besides medicines, such as foodstuffs, and in 1899 they registered "Tabloid" in classes 1, 2, 39, 44, and 48.

A. J. Walter and *J. H. Gray*, for the appellants.—"Tabloid" has become part of current literature. [They referred to the current dictionaries and periodicals.] A fancy word must not be descriptive: *In re Van Duzer's Trade-Mark*, 35 W. R. 294, 34 Ch. D. 623; *In re "Bovril" Trade-Mark*, 45 W. R. 150, [1896] 2 Ch. 600. "Tabloid" is not an invented word: *Eastman Photographic Materials Co.* v. *Comptroller-General*, 47 W. R. 152, [1898] A. C. 571; *Field & Co. (Limited)* v. *Wagel Syndicate*, 48 W. R. 390, 17 Rep. Pat. Cas. 266; *In re Hannay's Trade-Mark* 7 Rep. Pat. Cas. 46; *Meaby & Co. (Limited)* v. *Triticine (Limited)*, 15 Rep. Pat. Cas. 1, 14; *In re Grossmith's Trade-Mark*, 6 Rep. Pat. Cas. 180, 37 W. R. Dig. 184; *Linoleum Manufacturing Co.* v. *Nairn*, 26 W. R. 463, 7 Ch. D. 834; *Perry Davis & Son* v. *Harbord*, 15 A. C. 316, 320, 39 W. R. Dig. 239.

Moulton, K.C., Neville, K.C., Levett, K.C., Sebastian, and *Kerly*, for the respondents.—It is no objection to a trade-mark that the owner has not used it on all his goods: *Kodak (Limited)* v. *London Stereoscopic Co. (Limited)*, 20 Rep. Pat. Cas. 337; *In re Chesebrough's Trade-Mark "Vaseline,"* [1902] 2 Ch. 1, 50 W. R. Dig. 170. *In re "Uneeda" Trade-Mark*, 50 W. R. 467, [1902] 1 Ch. 783, was held bad because the word was a mere misspelling of known words. *In re Van Duzer's Trade-Mark* has no application to a new word. *In re "Bovril" Trade-Mark* shows that where a mark has been openly used for many years, the benefit of any doubt ought to be given to the proprietor: *In re Chesebrough's Trade-Mark "Vaseline"*; *In re Bass, Ratcliffe, & Gretton's Trade-Marks*, 51 W. R. 86, 19 Rep. Pat. Cas. 529, 539.

R. J. Parker, for the Comptroller-General.

VAUGHAN WILLIAMS, L.J.—I think one may say generally of the law that it is now defined by *Van Duzer's case* as modified by the "*Bovril*" *case*. The question of fact here is, what did "Tabloid" convey to those who heard it in 1884? We have had quoted to us dictionaries and literary productions published between 1884 and the present time, and I do not think that that sort of evidence has assisted us much. In fact it has had a direct tendency to make our task more difficult, because it is difficult to eradicate altogether from one's mind the statements which have been made about the user of "Tabloid" and its meaning at the date of registration. I think, as appears from the judgments of Stirling and Cozens-Hardy, L.JJ., in the *Chesebrough case*, that the court, when it has had to deal with a question of fact of this sort long after the date of registration, has laid it down that the presumption ought to be in favour of the persons who have had that registered trade-mark for that length of time; and the onus of proof as to what was the user of the word, and what it was understood to convey at the date of registration, ought to be thrown upon the persons who seek, after such a lapse of time, to say that the trade-mark ought not to have been registered. But I take it, if the evidence showed clearly that it ought not to have been registered at the date when it was, no presumption would justify us in keeping it on the register. Now, what did "Tabloid" convey at the moment of registration? It was a distinctive word and suggested the source of the goods covered by it. It was not a descriptive word. It was a fancy word. Having regard to the "*Bovril*" *case* it cannot be said that a word is descriptive because it might suggest some idea to the hearer. In fact when a man chooses his trade-mark his mind will naturally run on words cognate to the articles with reference to which the trade-mark is proposed to be registered. His next care is that the cognate word shall not describe the quality, form, or purpose of those articles. A really descriptive word must describe something which is materal to the composition—*i.e.*, the quality, form, or purpose of the article. The person registering must be careful never to violate the rule that you must not adopt as your trade-mark any word whatsoever which would deprive the public of the full and free user of that word, when it is a known word, and especially when it is a known word in a particular trade. Even at the present moment there seems to be a great difficulty in saying what "Tabloid" is supposed to convey. If you take the meaning of the word "table," or "tablet," it does not suggest to my mind anything of the form of these tabloids. As a juryman I cannot express my conclusion in fact better than Byrne, J. He says: "I think the case is near the line; but treating it as a matter of fact in the particular case, I come to the conclusion that in March, 1884, the word was not 'really intelligibly describing the thing sold,' which is the way in which Lindley, L.J., in the '*Bovril*' *case* puts the form of direction to the jury." I agree that you cannot say that the word is absolutely unsuggestive; but any suggestion which you derive from it is a very inaccurate suggestion as to shape, and an inaccurate suggestion as to a matter which was in no sense essential, or of any practical materiality in the articles to which it was applied. As to the previous user of "Tablet," I think the word did not really

convey anything material about the article to which the trade-mark was to be applied. Then I do not think it can be said that, because the respondents registered "Tabloid" two years afterwards, their previous user of "Tablet" converted that which, but for such previous user, would have been an invented word, into a word which by that time had acquired a meaning. In my opinion the judgment of Byrne, J., is quite right.

STIRLING, L.J.—The meaning of "fancy word or words," as used in the Act of 1883, has been considered in *Van Duzer's case* and *In re "Bovril" Trade-Mark*, and by those decisions we are bound. In the latter case Lindley, L.J., says: "It would be altogether wrong for us to take the Act of 1883 and substitute for the words 'fancy word' 'a non-descriptive word.' . . . But I agree that a word which describes the article to which it is applied will not do. Let us therefore ask ourselves whether 'Bovril' is a descriptive word." Then later he says: "I think it is purely and eminently a question of fact." That is the process which we ought to apply to "Tabloid." I can only say that I entertain greater doubt than Byrne, J., and my brother seems to have entertained as to the result of the evidence in this case. My difficulty is this. Before 1884 "tablet" was well known in connection with medicines. Further, the respondents had, prior to 1884, made up and sold medicines in the form of tablets, which were, broadly, small quantities of medicine of somewhat globular shape. They had registered "Tablet," but had been advised that its registration could not be maintained, and had fixed on "Tabloid," which suggests a connection either with "Table" or "Tablet." The termination "oid" is not uncommon and means of a shape or kind similar to that directed by the initial part of the word to which "oid" is affixed. I feel a great deal of hesitation as to whether "Tabloid" did not mean a preparation made up, not precisely in the same form as that which had been hitherto designated as "tablet," but in a somewhat similar form, and that it is descriptive in this sense. But when a trade-mark is impeached after such a long time, the person who has had his trade-mark on the register for that long period, and has openly and largely used it, should have the benefit of any doubt. For these reasons I am not prepared to differ from Byrne, J., or my brethren, and I think that the appeal fails.

COZENS-HARDY, L.J.—I feel to a large extent the difficulties of Stirling, L.J. If this case had fallen to be decided ten years ago, I cannot doubt that the mark would have been taken off the register. The real difficulty is in putting a meaning on "fancy." It certainly means something more than new or newly coined or "invented." The real difficulty is to say what more it involves. The present case is extremely near the line, but there is nothing sufficiently near to description to distinguish it from the "*Bovril*" *case*. Under these circumstances, I cannot say that Byrne, J., was wrong in declining to remove from the register a mark which had been on for nearly twenty years; and I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the respondents, *Markby, Stewart, & Co.*

Solicitors for the appellants, *Sharpe, Parker, & Co.*, for *Alsop, Stevens, Harvey, & Crooks*, Liverpool.

Solicitor for the Comptroller-General, *Solicitor to the Treasury.*

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) March 23, 24, 25.

HAMBRO & SON v. BURNAND AND OTHERS. (*a.*)

Principal and agent—Authority of agent—Underwriters at Lloyd's—Policy guaranteeing that drawer of bill will put acceptor in funds to meet it—Policy authorized by terms of agency, but made to benefit agent and not in the interest of principal—Liability of principal.

Where an agent, who is authorized to make contracts "for and on behalf of" his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted bonâ fide, *repudiate liability, although such contract was made by the agent solely in his (the agent's) own interest and not in the interest of his principal.*

Decision of Bigham, J. (51 *W. R.* 652, [1903] 2 *K. B.* 399), *reversed.*

Appeal by the plaintiffs, a firm of London bankers, against so much of a judgment of Bigham, J., given at the trial of the action as was in favour of four of the defendants. With regard to Burnand, the other defendant, there was no appeal, judgment having been given against him at the trial.

The action was brought to recover £1,000—£200 from each of the five defendants—upon a guarantee policy dated the 1st of October, 1902, which was in these terms: "To Messrs. C. J. Hambro & Son. In consideration of your accepting at our request the drafts of Henry Gaze & Sons (hereinafter called the drawers) to such an amount as you may think proper, such drafts to be drawn and accepted within one year from the 1st of October, 1902, and in consideration of the premium of 1 per cent. paid to us by the drawers on the execution hereof (the receipt whereof we hereby acknowledge), we, the underwriters, agree that, if the drawers do not at or before maturity of any such drafts put you in funds to meet the same, we will within thirty days of receipt of notice from you of such default on the part of the drawers pay to you in cash the amount of such drafts, and will further indemnify and hold you harmless against all moneys, loss, costs, charges and expenses which you may have to pay or to which you may be put by reason of your having accepted such drafts, or by reason of any claims made by any company or person in respect of the transactions above-mentioned, provided that our liability thereunder shall not exceed the amount of our respective subscriptions hereto with interest thereon at the rate of 5 per cent. per annum from the time of payment being demanded."

Messrs. Hambro had been in the habit of making from time to time advances to Henry Gaze & Sons (Limited), the tourist agents, who gave as security underwriting policies in the above form. Burnand was an underwriter at Lloyd's, and formerly was directly interested in that company. This arrangement was by him with the plaintiffs that they should finance Henry Gaze & Sons (Limited). The other defendants were his "names," and were the names appearing with his own on the policies covering these risks.

On the 9th of October, 1902, the plaintiffs accepted a draft of Henry Gaze & Sons (Limited), which was secured by the policy now sued on, subscribed with the names of all the five defendants—the names being all subscribed in the handwriting of Burnand, at

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

ninety days' sight, for £1,000. The bill fell due on the 10th of January, 1903, and Henry Gaze & Sons made default in finding money to meet it. Thereupon the plaintiffs gave notice to the underwriters, who did not pay, and the writ was issued.

The substantial defence of all the defendants other than Burnand, was that Burnand had no authority to sign their names to such a policy, their authority being expressly limited to what is commonly known as underwriting business at Lloyd's.

On this point Bigham, J., held in favour of the plaintiffs, being of opinion, after hearing evidence, that this was a class of business which was ordinarily done at Lloyd's. The learned judge decided, however, against the plaintiffs so far as their claim was against the present appellants, on the ground that Burnand in these transactions was not acting for the benefit of or in the interests of his "names," but for his own benefit, and under these circumstances the plaintiffs were not entitled to treat the names as principals. He accordingly gave judgment for the plaintiffs against Burnand only, and entered judgment for the other four defendants.

The plaintiffs appealed, and the defendants other than Burnand gave notice by way of cross-appeal against the finding of the learned judge, that the underwriting of such a policy as that sued on was within the ordinary course of business of an underwriter at Lloyd's.

Asquith, K.C., *Scrutton, K.C.*, and *Mackinnon*, for the plaintiffs.—The evidence called at the trial proved that the underwriting of guarantee policies like the one sued on came within the ordinary business of an underwriter at Lloyd's. And the judge so held. Therefore the defendant Burnand was acting within the scope of his authority in underwriting this policy in the names of his co-defendants. The defendants other than Burnand cannot set up that they are relieved from liability because this contract made by Burnand with their authority was really made in the interest of himself alone and for his own purposes: *Keighley, Maxsted, & Co.* v. *Durant*, [1901] A. C. 240, 49 W. R. Dig. 41. The plaintiffs cannot be in a worse position because they did not see Burnand's authority or ascertain that he was acting as agent for the other names on the policy. Had they been shown those authorities it would not have been incumbent, even if possible, for them to have instituted an inquiry to see whether he was acting in the true interests of his principals. Bigham, J.'s, attention was drawn to the judgment of Nelson, C.J., the dissentient judge in the American case of *North River Bank* v. *Aymar*, (1842) 3 Hill 262, and he said that it appeared to be so much in point that he referred to it in some detail; but this point has been since then dealt with in other American cases which were not brought to his attention, and has been settled adversely to the view taken by Nelson, C.J.: see *Exchange Bank* v. *Monteath*, (1863) 26 N. Y. (12 Smith) 505; *New York and Newhaven Railway Co.* v. *Schuyler*, (1865) 34 N. Y. (7 Tiff) 30. Lord Brougham in his judgment in *Bank of Bengal* v. *Fagan*, (1849) 7 Moo. P. C. 61, at p. 74, expressed a decided opinion against the defendants' contention, and so does Lord Macnaghten, who adopted the view taken by the American Court in *President, &c., of Westfield Bank* v. *Cornen*, (1867) 37 N.Y. (10 Tiff) 320, when he gave his reasons in the Judicial Committee in the Privy Council in *Bryant, Powis, & Bryant* v. *Quebec Bank*, [1893] A. C., at p. 180.

Montaignac v. *Shitta*, 15 App. Cas. 357, 39 W. R. Dig. 178; *In re Tiedemann & Ledermann Frères*, [1899] 2 Q. B. 66, 47 W. R. Dig. 161; Story on Agency (9th ed.), s. 73, p. 91; and *Summers* v. *Solomon*, 5 W. R. 660, 7 E & B. 879, were referred to.

Lush, K.C., and *A. J. Ashton* (*Isaacs, K.C.*, and *Maurice Hill* with them), for the defendants other than Burnand.—We submit, first, that on the evidence the learned judge was wrong in holding that the underwriting of guarantee policies was a class of business ordinarily undertaken by underwriters at Lloyd's. Therefore we say that Burnand had no authority to subscribe the names of the defendants for whom we appear to the policy now sued on. [COLLINS, M.R.—The decision of Bigham, J., on that question was a finding of fact, and as there is at any rate some evidence to support it, we cannot hold, even if that was not our own view of the evidence, that he was wrong.] Then we say, secondly, that the view of the law taken by the learned judge was right. There was no holding out of Burnand by his co-defendants as their agent to sign these policies. Therefore the defendants other than Burnand are not estopped from repudiating liability on any such ground. As between Burnand and his principals he was acting solely in his own interests, his object being to keep the company of Gaze & Sons, in which he himself was interested, afloat as long as possible in the hope no doubt that they would tide over the difficulties that have since overtaken them. No premiums ever appear to have been paid on any of the series of policies he underwrote, and he incurred very heavy liabilities on behalf of each of his co-defendants on one risk—the solvency of Gaze & Sons. It is suggested that he intercepted letters addressed to them to keep from them any knowledge of these policies. Any such concealment from principals by an agent puts the transaction at once out of the class that it could be argued the authority he had to subscribe these defendants' names extended to. If, therefore, although professing to be, he was in fact not their agent, the plaintiffs must take the consequences. The cases of *Bank of Bengal* v. *Fagan*, 7 Moo. P. C. 61, and *Bryant, Powis, & Bryant* v. *Quebec Bank*, [1893] A. C. 170, turned on the doctrine of the law merchant, and are not in point. [ROMER, L.J.—The indorsement on the negotiable instruments there appear to have been "*per pro*," which would have been notice to the holder that they were signed under a special authority.] The plaintiffs here ought to have inquired whether Burnand had authority to subscribe the "names." [MATHEW, L.J.—No business at Lloyd's could ever be carried on if that was the adopted practice.] The circumstances here were such as to place the plaintiffs on their guard, and they must take the consequences of not making inquiries whether Burnand was acting *bonâ fide* in subscribing these policies.

Grant v. *Norway*, (1851) 10 C. B. 665; *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 35 W. R. 590, 18 Q. B. D. 714; *Houldsworth* v. *City of Glasgow Bank*, 28 W. R. 677, 5 App. Cas. 317; *Whitechurch (Limited)* v. *Cavanagh*, 50 W. R. 218, [1902] A. C. 117; *Coleman* v. *Riches*, (1855) 16 C. B. 104; *Barwick* v. *English Joint-Stock Bank*, 15 W. R. 877, L. R. 2 Ex. 259; *Solomons* v. *Pender*, (1865) 3 H. & C. 639, were also referred to.

Scrutton, K.C., replied.

COLLINS, M.R.—The question raised in this appeal is one of great importance, but I have no reasonable doubt as to what the decision of the court ought to be, nor do I think that anything would be gained by taking time to consider our judgment. [His lordship after referring to the facts as already stated, continuing, said:] There was no doubt that the indebtedness of Gaze & Sons to the plaintiffs and the aggregate of the liabilities undertaken by Burnand on these policies became in process of time very large, and ultimately, the amount secured by the policy of

the 1st of October, 1902, not being paid, this action was brought.

The defendants other than Burnand set up two defences.

They said first that they were not liable because the authority given by them to the defendant Burnand was limited to the purpose of underwriting policies of insurance and carrying on the ordinary business of an underwriter at Lloyd's, in accordance with the usual custom of Lloyd's, and that the underwriting of guarantee policies, such as that sued on is no part of the ordinary business of an underwriter at Lloyd's. Whether that is so or not is a question of fact.

Secondly, they say that, as a matter of law, having regard to the inference of fact drawn by Bigham, J., as to the motives which led Burnand to underwrite the policy, and his relation to Gaze & Sons, that he undertook this liability on their behalf without their authority.

As to the first point, Bigham, J., who had the advantage of hearing the witnesses, has come to conclusion that he was satisfied that the underwriting of guarantee policies of this class was within the ordinary business of an underwriter at Lloyd's. It had to be admitted on the part of the defendants that the underwriting of what are called "solvency policies" formed part of that business. The only distinction between those policies and the so-called guarantee policies is that in one case the underwriter undertakes to pay in the event of the insolvency of a debtor, and in the other he undertakes to pay in the event of non-payment by the debtor. The question is one of fact, and it appears to me that there was evidence to justify the learned judge, exercising as he did the functions also of a juryman, in coming to the conclusion of fact at which he arrived.

I now come to the question of law which has been discussed before us. It has been contended for the appellants, that although express authority was given in writing, as in the present case, authorizing an agent to make such a contract as he has made, it is open to the principal to say that, nevertheless, if it appears, on inquiring into the motives which exist in the agent's mind, that he intended, in making the contract, to misuse for his own ends the opportunity given to him by his authority, and apply it to a purpose which, if the principal had known of it, he would not have sanctioned, then, because the agent was so influenced by improper motives, the principal is not liable upon the contract made by him. I should have said myself, apart from authority on the subject, that such a proposition could not hold water. I am somewhat surprised to find that, in an American case, a view favourable to it has been taken by one of the judges. I gather that it was in consequence of what was said in that case that Bigham, J., for whose opinion on a commercial point I have the greatest respect, was led to the conclusion which he adopted. The case of the *North River Bank* v. *Aymar*, 3 Hill N. Y. Rep. 262, was cited to him, in which there was a difference of opinion between the judges, one of them adopting the view that, though an agent had acted within the terms of his authority, it was competent to the court to look into the mind of the agent, and, if he had misapplied his authority for his own purposes, the principal was not bound. The two other judges did not take that view. Bigham, J., after examining the reasons given in that case, came to the conclusion that the reasoning of the dissenting judge was the stronger; and not being apparently informed that since the case was decided the question had been mooted several times in America, and that ultimately the American courts have authoritatively laid it down as the true principle that, where a written authority given to an agent covers the thing done by him on behalf of his principal, no inquiry is admissible into the motives upon which the agent acted. It would be impossible for the business of a mercantile community to be carried on, if a person dealing with an agent was bound to go behind the authority of the agent in each case, and inquire whether his motives did or did not involve the application of the authority for his own private purpose. But the matter does not rest there, for the view ultimately established in the United States by a strong concatenation of American authorities appears to have been anticipated in England, and at length finally adopted in a recent decision of the Judicial Committee of the Privy Council. There is a very remarkable passage in the judgment delivered by Lord Brougham in the year 1849 in the cases of the *Bank of Bengal* v. *Macleod* and *Bank of Bengal* v. *Fagan*, reported in 7 Moo. P. C. 61, at p. 74. Those were cases of a power of attorney to sell, indorse, and assign promissory notes. Lord Brougham says: "But it is said that the power was given to do the acts in question on the donor's behalf. This is really only saying that, what the agent is to do, he is to do as representing the principal; as doing it on behalf of, or in the place and in the right of, the principal. But it is further said that, even if the expression be read as only amounting to this, the indorsement is to be only made for the benefit of the principal and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and, though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power." That passage seems by anticipation to deal with the very point which was the salient point of the judgment of Bigham, J., in this case, and of the argument before us. In the case of *Bryant, Powis, & Bryant (Limited)* v. *Quebec Bank*, [1893] A. C. 170, Lord Macnaghten, in delivering the judgment of the Committee of the Privy Council, says (at p. 180): "Their lordships agree with Andrews, J., that the fact that Davies abused his authority and betrayed his trust cannot affect the *bonâ fide* holders for value of negotiable instruments indorsed by him apparently in accordance with his authority. The law appears to their lordships to be very well stated in the Court of Appeal of the State of New York in *President of the Western Bank* v. *Conern*, 37 N. Y. R. (10 Tiff.) 322, cited by Andrews, J.: 'Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent, such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority, their lordships will therefore humbly advise her Majesty that this appeal ought to be dismissed."

That being the clearly established law on the subject, it is unnecessary for me to go into the various matters relied upon by the defendants in relation to the question whether in underwriting the policy Burnand was acting for his own benefit and in his own interests and not in those of the defendants.

The appeal succeeds and judgment must be entered for the plaintiffs with costs.

ROMER and MATHEW, L.JJ., gave judgments to the same effect.

Appeal allowed.

Solicitors for the plaintiffs, *Parker, Garrett, Holman, & Howden.*

Solicitors for the defendants other than Burnand, *Merriman, Pike, & Merriman; R. A. Read, jun.; Ward, Bowie, & Co.; Church, Rendell, & Co.*, for *J. B. Clarke & Co.*, Birmingham.

High Court of Justice.

Chan. Div. Warrington, J. April 27, 28.

In re WHEELER.
HANKINSON *v.* HAYTER. (*a.*)

Married woman—Advances—No separate property—Acknowledgment in 1894 *of debt—Contract to pay—Executor—Retainer—Married Women's Property Act,* 1893 (56 & 57 *Vict. c.* 63), *s.* 1—*Will—Construction—Money on deposit—"Ready money."*

A married woman will not render herself liable, under the Married Women's Property Act, 1893, *by acknowledging, in* 1894, *advances previously made to her by a testator in respect of which she could not have been sued, although the acknowledgment would take the debt out of the Statute of Limitations. In such a case the executor cannot retain the advances to the married woman out of such portion of the testator's estate as is bequeathed to her. A bequest of "ready money" does not include money on deposit at a bank withdrawable on fourteen days' notice.*

By his will, dated the 24th of June, 1897, J. B. Wheeler gave certain property to trustees upon trust to sell and divide the residue of the proceeds and his ready money into four equal parts, and to stand possessed of the same for the benefit of his four daughters and their issue. The testator also divided other property specifically amongst his four daughters. Neither the will nor the subsequent codicils contained any hotchpot clause or gift of residue. The testator died on the 6th of September, 1902.

During his lifetime, the testator had advanced to his daughter, Mrs. Hayter, sums amounting to £1,784, none of which she had repaid. She had married her present husband in 1880, and had, on the 6th of August, 1894, signed as correct a document containing particulars of advances amounting to £722 which she alleged had been made to her by the testator prior to 1893, when she had no separate estate. She also alleged that she never intended to admit any personal liability on her part by signing the document.

A sum of £1,011 7s., part of the testator's estate, was on deposit at a bank withdrawable on 14 days notice.

The executor took out an originating summons to determine whether Mrs. Hayter ought to bring the sums lent to her into account as against her share, and whether the sum of £1,011 7s. passed under the disposition of ready money in the will or was undisposed of.

W. J. Lewin, for the executor.

Norton, K.C., and *W. J. Whittaker*, for Mrs. Hayter.—Mrs. Hayter had not at the time of the advances any separate estate. Therefore they were not debts for which she could have been sued, and so she was not liable to bring them into account.

Christopher James, for another daughter of the testator.

Rowden, K.C., and *Cozens-Hardy*, for Mrs. Asheton, another daughter.—The document of the 6th of August, 1894, was a good acknowledgment of the statute-barred debts within the Married Women's Property Act, s. 1: Wolstenholme's Conveyancing and Settled Land Acts (8th ed.), p. 292. The executor can retain or set-off the amount of Mrs. Hayter's indebtedness. Beneficiaries must account for all moneys received from the testator if they claim against the estate: *In re Akerman*, 40 W. R. 12, [1891] 3 Ch. 212; *Courtnay* v. *Williams*, 13 L. J. Ch. 461; *Cherry* v. *Boultbee*, 9 L. J. Ch. 118.

Bryan Farrer, for another daughter.

WARRINGTON, J., stated the facts and gave judgment to the following effect: The sums amounting to £722 admitted by Mrs. Hayter to have been advanced to her were not advances made to her, and she could not have been sued for them, for she was not a single woman nor had she any separate estate at the time the advances were made. Counsel for Mrs. Asheton said that if, after the passing of the Married Women's Property Act, 1893, you find that which under the Statute of Limitations would be a sufficient acknowledgment of the debts, that would be sufficient to constitute a contract under the Married Women's Property Act. Further, he said that the document of the 6th of August, 1894, would satisfy that condition, although it could not, by itself, amount to an obligation covering the whole of the indebtedness.

In my opinion that is not the correct view of the Married Women's Property Act, 1893. For the purposes of that statute you must find a contract entered into by the married woman after the date of that Act. It is not sufficient to find an acknowledgment of a pre-existing debt, even although it would be sufficient to take the debt itself out of the Statute of Limitations. Section 1 of the Act of 1893 contemplates a contract entered into by a married woman, and then entered into for the first time. Here, in the first place, there is no consideration, and even if there were, the terms of the document are not sufficient to amount to a fresh promise the pay the debts. There is not, and never was, any debt for which Mrs. Hayter could be sued. I need not trouble about the Statute of Limitations, because it is admitted that these advances, if they were debts, would be statute-barred.

Now comes the further question: If there is no debt for which Mrs. Hayter can be sued, is there any right of the executor to retain this sum out of the benefits which Mrs. Hayter will take in the testator's estate? It has been contended, and *In re Akerman* has been cited for the proposition, that, although there was no debt for which Mrs. Hayter could be sued, the executor is entitled to retain the money, from the money coming to her out of the testator's estate. I quite agree that if there is a debt—in the proper sense—due by a legatee, the remedy for which is statute-barred, the executor would be entitled to retain funds in respect of that debt; but you have first to find that the legatee owes the money in question to the estate. Kekewich, J., states the principle thus in *In re Akerman*; "A person who owes an estate money—that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

which completes it." Therefore, the executor here has no right of retainer.

[His lordship also held, following *Mayne* v. *Mayne*, [1897] 1 Ir. Rep. 324, that the sum of £1,011 7s. was not ready money, and was therefore undisposed of by the will.]

Solicitors, *C. F. Ingram*, for *C. J. Lacey*, Bournemouth; *Balderston & Warrens*; *Cox & Lafone*; *Lowe & Co.*

K. B. Div. (Farwell, J.) June 9.

ROBINS *v.* GODDARD. (*a.*)

Building agreement — Architect's certificate — Defective work—Damages.

By a building agreement it was provided, inter alia, *that the architect, who was appointed by the employer for the purposes of the agreement, should have power* (a) *to order the removal of any materials which were not in his opinion in accordance with the specification, and the re-erection of any work done with improper materials;* (b) *to direct the contractor to make good at his own expense, unless the architect should decide that he ought to be paid, any defects appearing within twelve months from the completion of the works, and arising in the opinion of the architect from defective materials or workmanship. The agreement also provided that the contractor should be paid under certificates to be issued by the architect, and that no such certificate should be conclusive evidence as to the sufficiency of any work or materials to which it related so as to relieve the contractor from his liability to make good all defects as provided by the agreement.*

The plaintiff, the contractor, claimed payment under the architect's certificates for work done. The defendant, the employer, counterclaimed for damages in respect of defective work and materials and the cost of re-executing such defective work.

Held, that, in the absence of any order by the architect, as provided by the agreement, directing the contractor to make good defects, the court had no jurisdiction, and that the counterclaim could not be sustained.

This was an action by the plaintiff, a builder, for payment for work done under a building agreement dated the 15th of October, 1902, against the defendant, his employer.

There was no defence to the action, but the defendant, by way of counter-claim, claimed compensation on the ground that the work done was defective and that materials had been used which were not in accordance with the specifications contained in the contract and that he would be compelled to re-execute such defective work.

The material clauses of the said contract were as follows:

Clause 16. "The architect," who was appointed under clause 3 of the contract, "shall during the progress of the works have the power to order in writing from time to time the removal from the works within such reasonable time or times as may be specified in the order of any materials which in the opinion of the architect are not in accordance with the specifications or the instructions of the architect and the substitution of proper materials, and the removal and proper re-execution of any works executed with materials or workmanship not in accordance with the drawings, specifications, or instructions, and the contractor shall forthwith carry out such order at his own cost."

Clause 17. "Any defects, shrinkage, or other faults which may appear within twelve months from the completion of the works, arising in the opinion of the architect from materials or workmanship not in accordance with the drawings and specifications or instructions of the architect, or any damage to pointing by frost appearing within the like period, shall upon the direction in writing of the architect, and within such reasonable time as shall be specified therein, be amended and made good by the contractor at his own cost, unless the architect shall decide that he ought to be paid for the same," and, in case of default, power was given to the defendant to employ another or other person or persons to amend and make good such work, and to recover any sums so paid by him from the contractor.

Clause 24 fixed the 31st of January, 1903, as the date for the completion of the works.

Clause 30, after providing that the contractor should be paid from time to time on the certificate of the architect, contained the following proviso: "No certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates, nor shall it relieve the contractor from his liability to make good all defects as provided by this agreement."

Clause 32 was the usual arbitration clause, and provided that the arbitrator should have power to open up, review, and revise any certificate given by the architect.

The plaintiff brought this action to recover the balance of moneys due to him on the architect's certificates. The defendant counter-claimed as above stated, no order or direction in writing having been made by the architect under clause 17 of the contract.

The question to be decided was, whether having regard to the facts as stated the court had jurisdiction to determine the issues raised by the counter-claim.

Duke, K.C., and *Beddall*, for the plaintiff, cited *Lord Bateman* v. *Thompson*, 2 Hudson on Building Contracts, 166.

Marriott, for the defendant.—The employer may question the work done apart from the architect's certificate. The proviso contained in clause 30 of the contract entitles the defendant to open up the architect's certificates. The disputed matters should be referred to an official referee: *Lloyd* v. *Milward*, 2 Hudson on Building Contracts, 454.

FARWELL, J., in giving judgment, said: So far as the action is concerned it is an action upon certificates given by the architect in relation to this contract, and it is really an undefended action, but there is a counter-claim that gives rise to the argument that I have heard. It depends on the construction of the contract, but inasmuch as the contract, I observe, is issued under the sanction of the Royal Institution of British Architects, and is on a printed form apparently in common use, it is, perhaps, a little important as regards what is the true view to be taken in this case.

Now, one approaches contracts of this nature with the knowledge that the employer on the one hand desires to employ a builder, and on the other hand that the employer, for his own protection, uses an expert, an architect whom he appoints, and who is usually imposed on the builder as the judge in relation to any matters which may arise in the course of the construction of the buildings.

In the particular case before me the builder can recover nothing except under the certificates given to him by the architect under clause 30 of this contract. Now that particular clause is qualified by a provision which, in my view, is made explicable by the former

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

clauses in the contract and is not to be extracted, as counsel for the defendant wishes me to do, and treated as a separate sentence or read as something apart and by itself. [His lordship here read clauses 16, 17, and 30 of the contract, which are set out above.]

Reading these clauses together, to my mind, makes the contract perfectly reasonable and plain. In the proviso in clause 30, I should prefer, instead of the word "nor," coupling the two sentences, to read as follows: "No certificate of the architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates so as to relieve the contractor from his liability under clause 17." This, in my opinion, is its true effect. If it were not so, it would be open to argument to say clause 16 tells you the architect may give these directions as to proper materials, &c., during the course of the work; he has given the certificate and so far as materials are concerned he must be deemed to have dealt with the matter by that certificate; and it might be contended that such certificate is final and no longer open to question. The proviso in clause 30 is inserted to prevent this; but that being so, it is only for the purpose of letting in clause 17. That this is so, appears to my mind to be absolutely and conclusively shown by the words "unless the architect shall decide that he ought to be paid for the same." It obviously makes the architect, who, as appears in clause 3 of the contract, is a nominee of the employer and is employed by him for his own protection as between the two parties, the referee as between themselves.

I do not think the present dispute is within the arbitration clause, and at any rate that question is not before me now; the point before me is this, that the counter-claim asks me to decide, either by myself or by the official referee, questions as to workmanship and materials which are alleged to be deficient and not in accordance with the drawings and specifications.

Now that is a matter which is provided for by this particular clause 17, and unless the architect not only expresses his opinion that they are not in such accordance, but also decides that the builder ought not to be paid for them, I do not see how I can possibly adjudicate in any way. I have no jurisdiction, and the result is that in my opinion there is no question of counter-claim at all arising in this action, it is a mere undefended action on the certificates, and judgment must go for the amount claimed.

Solicitors, *Booth & Smee; Goddard, Stanton, & Hudson.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Channell, JJ.) March 4.

HILL (*Appellant*) *v.* PANNIFER AND OTHERS (*Respondents*). (*a.*)

Poor law—Rating—Recovery—Distress—Costs—Charges of taking, keeping, and selling the distress—Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93)—*Distress (Costs) Act,* 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Distress for Rates Act,* 1849 (12 *&* 13 *Vict. c.* 14), *s.* 1.

The provisions contained in the Distress (Costs) Acts, 1817 *and* 1827, *limiting the costs and charges of distresses for poor rates and certain other rates, where the amount due does not exceed £20, are impliedly repealed as regards poor rate, by the Distress for Rates Act,* 1849, *section* 1 *of which authorizes, in connection with the levy of distress for such rates, the levy of the "reasonable charges of the taking, keeping, and selling of the said distress."*

This was a case stated by justices of the peace for the county of Suffolk.

On the 24th of September, 1903, a complaint was heard before the justices sitting as a court of summary jurisdiction at Hadleigh, wherein the appellant, Robert William Hill, alleged that the respondents or some or one of them, having sold or caused to be sold certain goods of the appellant to satisfy a poor rate for the parish of Bildeston, in the county of Suffolk, and certain costs and charges levied by distress upon the goods, on or about the 28th day of July, 1903, levied and received from the appellant and retained and took from the produce of such goods sold greater costs and charges than are mentioned and set down in the schedule to the Distress (Costs) Act, 1817 (57 Geo. 3, c. 93), to wit, a charge of 14s. for the expenses of an "auctioneer," contrary to the form of that statute, and of the Distress (Costs) Act, 1827 (7 & 8 Geo. 4, c. 17), and the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14).

Upon the hearing of the complaint it was proved that the respondent Robert Pannifer was assistant overseer, and the respondents Robert Grimsey and Josiah Shipp, overseers of the poor for the parish of Biddleston.

Robert Pannifer, on the 2nd of July, 1903, obtained from two justices a warrant of distress against the appellant, directing Pannifer to make distress of the goods and chattels of the appellant, and to sell the same if within the space of five days after the making of such distress, the sum of £1 then due and owing from the appellant in respect of poor rate, and the further sum of 5s. 1d., the costs of obtaining the warrant of distress, were not duly paid by the appellant.

The respondent Robert Pannifer, acting under the warrant duly made distress upon the goods and chattels of the appellant and demanded payment of the moneys aforesaid.

On the 13th of July, 1903, the appellant paid to the respondent Pannifer the sum of £1 4s. 1d., being the sum of 5s. 1d. in respect of the said costs and 19s. in respect of the poor rate, but declined to pay the balance of 1s. claimed to be due in respect of the said rate.

On the 28th of July, 1903, the respondent Pannifer sold the goods of the appellant so distrained as aforesaid to satisfy the unpaid balance of the poor rate. After the sale a statutory notice of costs and charges, as required by 57 Geo. 3, c. 93, was given to the appellant by the respondent Robert Pannifer.

The sum realized by the sale was £1 5s., from which the respondents took and retained, in addition to the sum of 1s. for the rate, the following costs and charges: Levy, 3s.; taking, keeping, and use of room, &c., 6s. 3d.; auctioneer, 14s.; and paid the balance of 9d. to the appellant. The said sum of 14s. was one-third of a fee of two guineas paid by the respondent to an auctioneer in respect of the sale at one time of the goods of the appellant and of two other rate-payers against whom distress warrants had been granted.

In all the matters aforesaid Pannifer acted with the knowledge and consent and under the authority and at the instance of the respondents Grimsey and Shipp.

It was contended before the justices by the appellant that the costs and charges to which the respondents were entitled were limited by the Distress (Costs) Act, 1817, as applied to the levy of a distress in

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

respect of poor rates by the Distress (Costs) Act, 1827, and that the charge of 14s. for the auctioneer's fee was an excessive and illegal charge.

The appellant further contended that the Distress for Rates Act, 1849, did not entitle the respondents to reimburse themselves by appropriating any higher or other costs or charges than those which were authorized by the Distress (Costs) Act, 1817, as applied to proceedings for the recovery of poor rates.

On behalf of the respondents it was contended that the words of the Distress for Rates Act, 1849, s. 1, and the express provisions of the warrant of distress, which cited those words, entitled them, notwithstanding the earlier provisions of the Distress (Costs) Act, 1817, and the Distress (Costs) Act, 1827, to deduct and retain from the proceeds of the sale of the appellant's goods, costs and charges—to wit, in the words of the Act, "the reasonable charges of selling"—in excess of and other than those specified in the schedule to the Distress (Costs) Act, 1817, and that the last mentioned statute must be considered to be *pro tanto* revoked and amended.

The justices were of opinion that the respondents' contention was correct, and as they found that the charge of 14s. was a reasonable and proper charge, and one that by law could properly be made in the circumstances of the case, they dismissed the complaint with costs. The question for the opinion of the court was whether the justices were right in so upholding the respondents' contentions. If so, the dismissal of the complaint was to stand; if not, the case was to be remitted to the justices with the opinion of the High Court of Justice thereon.

The Distress for Rates Act, 1849, s. 1, provides as follows: "Whereas provision is already made by law for the recovery of the sum or sums at which any person is rated or assessed to the relief of the poor . . . but no provision is made for levying the costs and expenses incurred by the overseers of the poor . . . in the recovery of the same, be it therefore enacted that it shall be lawful hereafter for all justices of the peace, if in their discretion they shall so think fit, in any warrant of distress they shall make and issue . . . to order that a sum, such as they may deem reasonable for the costs and expenses which such overseers . . . or the person applying for such warrant shall have incurred in obtaining the same, shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted, together with the reasonable charges of the taking, keeping, and selling of the said distress."

Robson, K.C. (*Bodkin* and *Bruce Williamson*), for the appellant.—The provisions the Distress (Costs) Acts, 1817 and 1827, limiting the charges that can be made in connection with the levy of distress where the amount does not exceed £20 have not been repealed by the Distress for Rates Act, 1849. At the time that Act was passed there was power to levy the charges by virtue of the power to levy the rate itself, which included power to levy enough to cover such charges. In *Moyse* v. *Cocksedge and Another*, Willes 636, it was held that parish officers levying a poor rate under a warrant of distress might retain of the goods sold the necessary expenses of the distress and sale. Section 1 of the Act of 1849 only gave the overseers the power to levy for the costs incurred by them in obtaining the warrant. Previous to that Act there was no power to give the overseers such costs. The provisions of the Acts of 1817 and 1827 were left in force as regards distress for rent and taxes and for certain rates not coming within the purview of the Act of 1849. The limitations of the charges imposed by the earlier Acts are still in existence. Even if that contention be wrong the charges made in the present case are manifestly wrong: *Ex parte Arnison*, L. R. 3 Ex. 56.

W. Stewart (*Nolan* with him), for the respondents.—The decision of the justices was right. The respondents were entitled to deduct and retain from the proceeds of the sale of the appellants' goods the reasonable charges of selling in excess of and other than those specified in the schedule to the Act of 1817. Both that statute and the Act of 1827, so far as the provisions limiting the charges, must be taken to be repealed by the Act of 1849, as the provisions of the latter Act are quite inconsistent with those of the former Acts. If it had been intended to preserve them the Legislature would have said so.

He cited *Lumsden* v. *Burnett*, 46 W. R. 664, [1898] 2 Q. B. 177.

Robson, K.C., replied.

Lord ALVERSTONE, L.C.J.—In my opinion this appeal fails. For the purposes of this proceeding we have here to construe section 1 of the Distress for Rates Act, 1849, and the other sections of that Act and the schedules. The preamble of the Act is as follows: "Whereas provision is already made by law for the recovery of the sum or sums at which any person is rated or assessed to the relief of the poor or is rated or assessed in any rate for the highways, in England or Wales, by distress and sale of his goods and chattels, and in default of such distress by commitment to prison until the same shall be paid; but no provision is made for levying the costs and expenses incurred by the overseers of the poor or the surveyors of the highways in the recovery of the same respectively." If it be a just criticism to say that this is not an accurate recital because it ought merely to have referred to the costs of the obtaining of the warrant, to my mind that does not affect the true construction of the enacting words. Of course the preamble ought to be looked at for the purpose of finding a guide to any construction which is doubtful or of deciding between two constructions which may be put upon the words. But it seems to me, even if counsel for the appellant is right, there is a clear enactment that "it shall be lawful hereafter for all justices of the peace, if in their discretion they shall so think fit, in any warrant of distress they shall make and issue for the levying of any sum or sums to which any person or persons is or are now or may hereafter be rated or assessed in or by any rate or assessment for the relief of the poor or for the highways in England and Wales, or in or by any other rate or assessment which by law now or hereafter is or shall be directed to be enforced or recovered in the same manner as a poor rate, or in any warrant for the levying of any arrears of the same, to order that a sum, such as they may deem reasonable, for the costs and expenses which such overseers or surveyors, or the persons applying for such warrant, shall have incurred in obtaining the same, shall also be levied of the goods and chattels of the person or persons against whom such warrants shall be granted"—that deals with the particular point which counsel for the appellant said had been left unprovided for by the existing enactments—"together with the reasonable charges of the taking, keeping, and selling of the said distress."

Then the statutory form of the warrant of distress again contains the words "together with the reasonable charges of taking and keeping the said distress," and directs that if they shall not be paid then the goods and chattels are to be sold, rendering the overplus on demand, "the reasonable charges of taking, keeping, and selling, the said distress being first deducted." Counsel for the appellant contends

that the earlier statute, the Distress (Costs) Act, 1817, is still in force as extended to poor rate by the Distress (Costs) Act, 1827. The Act of 1827 extended the Act of 1817 to "land tax, assessed taxes, poor's rates, church rates, tithes, highways rates, sewer rates, or any other rates, taxes, impositions, or assessments whatever." Therefore it may be regarded as a general statute. Having regard to the existence of that Act, counsel for the appellant suggests that the provisions as to the Act of 1849, as to the costs of distress, mean one of two things—either reasonable charges within the statutory maximum, or else they mean statutory charges.

I think it would require much clearer words than there are in this statute, and much clearer expression of an indication that the old statutory maximum was to be applied, to enable us to put that construction on the Act. It seems to me we must either find words which state that the charges are limited or are provided by law as now existing, or are to be charges not exceeding those that are already provided in respect of the levying of distress by virtue of these statutes. I cannot help feeling that the Act of 1849 is a special statute with regard to poor rates. It is a statute that is enacted in reference to poor rates, and I can well imagine that the Legislature, in dealing with poor rates, meant to give the overseers, subject to the charge being reasonable, a protection against the costs and charges they had to pay. I am satisfied that the construction contended for has not been put upon the charges which have been allowed to be levied under warrants for poor rates, and I can find no trace of any authority which says that with regard to the Distress for Rates Act, 1849, the maximum scale in the Distress (Costs) Act, 1817, was intended to apply. I think the language of the statute is too strong for us.

I think that the statute did mean to say that the overseers of the poor should be entitled to have their reasonable charges for keeping, levying, and selling goods. The magistrates have found the charge of 14s. is a reasonable charge, and I think that this was in accordance with the statute providing that the overseers should have their reasonable charges. Therefore I think this appeal should not be allowed.

KENNEDY, J.—On the whole, though, I confess, not without very great doubt, I think the view my lord has taken is the preferable one. It is not very easy, I think, in many cases where there is no direct reference in any shape or form in a later Act to an earlier Act, to say whether the proper inference is that the later Act has overruled the earlier Act, and abolished it in so far as its directions or enactments are concerned, or whether we ought not to find some way in which both statutes can be applied to a certain extent, the one merely being treated as modifying the other. The argument, which I confess seems to me to be an argument of considerable power, which counsel for the appellant has used in this case is this: That while this last Act—the Distress for Rates Act, 1849 — provides that the magistrates may make an order for a distress that shall include the reasonable charges of taking, keeping, and selling the chattels, yet that ought to be read with the Acts of 1817 and 1827, which certainly have never been specifically repealed, and which, in cases of distress for poor rate, among other things, have enacted that these charges of taking and keeping shall not exceed a certain sum. It is suggested that the fair construction of the later Act is that the charges are to be reasonable, but not to exceed those which by the two earlier Acts have been thought by the Legislature to be sufficient; that the later Act means reasonable within these statutory limits, which are imposed by unrepealed Acts of Parliament. It is true that even the later of these Acts is now an old Act, and that costs and charges will vary, but on the other hand it does seem to me that there is a great deal at any rate to be said in favour of the view that when Parliament passes a later Act without reference to an earlier Act, and that earlier Act is one which has been in force for a long time and is therefore well known, one should try to construe the two consistently, if possible. Another, and it seems to me a still weightier argument was this: The poor rate affects a number of people not of great means with regard to whom Parliament has long ago, as these earlier statutes show, given protection in the form of a limitation of costs. Apparently the procedure for questioning the reasonableness of the charges has disappeared so far as the magistrates are concerned, if the view of the respondents be right. So far as I can see, and so far as the argument has called our attention to the sections, the right of a person who had unreasonable charges attempted to be forced upon him in the levying, would be by bringing an action to recover money which had been obtained by a sort of duress. In other words, he would be driven to the ordinary courts instead of having the speedier and cheaper method of going before the magistrates by such a summons as was taken out in the present case. I think, however, on the whole that we ought to face the conclusion that the Legislature has done two things which are inconsistent. It would have been very easy in the later Act, if it was intended to retain the old and well-known maximum, to have used such words as "the reasonable charges of taking, keeping, and selling the distress, not exceeding those at present by law allowed." That has not been said; therefore, on the whole, although I think there is a great deal to be said for the other contention, as regards the protection of those upon whom these distresses are made, which seems to me a serious matter, I think the case is strong enough to allow me to say, since Parliament has chosen in the later Act to use the words "reasonable charges" without reference to the past, or the existing limitation, that inferentially the earlier sections, so far as poor rate is concerned, have been repealed.

CHANNELL, J.—I agree. I think the only question we have to consider is whether the words of the operative part of the Distress for Rates Act, 1849, are inconsistent with the continued existence of a statutory limit on the charges for these distresses which had previously existed. To me it seems the words are inconsistent. It is inconsistent with there being a limit by way of maximum on the charges to be made to say that the person levying is to have his reasonable costs—the present case shows it. These are costs which do exceed that maximum limit, and which are found to be in fact reasonable. It seems to me, therefore, that the statute of 1849 is necessarily inconsistent with the continued existence, not of the other statutes of 1817 and 1827, but of those other statutes as applicable to poor rate.

Appeal dismissed.

Solicitors for appellant, *Lloyd-George & Co.*, for *Birkett, Ridley, & Francis*, Ipswich.

Solicitors for respondents, *Salmon & Son*, Bury St. Edmunds.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Kennedy, JJ.) Dec. 8.

HARDWICK v. LANE. (a.)

Gaming law—Sweepstakes—Illegal lottery—Gaming Act, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2.

A beerhouse keeper arranged a sweepstakes on his premises and offered certain prizes, but the amount of these prizes did not equal the amount subscribed as entrance money.

Held, that this was an illegal lottery within the meaning of section 2 *of the Gaming Act,* 1802.

Case stated.

At a court of summary jurisdiction an information was preferred by the appellant against the respondent, a beerhouse keeper, alleging that the respondent on the 27th of March, 1903, unlawfully and knowingly did suffer, exercised, kept open, and exposed to be played and drawn by numbers and figures and by other contrivances a certain lottery usually called a sweepstakes not then authorized by Parliament—to wit, a lottery for money prizes in respect of horses who should win, or run second or third to the winner in a certain steeplechase, contrary to the provisions of the statute in such case made and provided.

The following facts were proved or admitted:

The respondent is the proprietor of a beerhouse, and on the 24th of March, 1903, arranged for a sweepstakes to be held in connection with the Grand National Steeplechase. There were 61 entries, each person paying 6d. to the respondent. The respondent offered three prizes of 15s., 10s., and 5s. respectively. One of the conditions of the sweepstakes was that the winner of the first prize was to pay for two gallons of beer to be consumed in the respondent's house; the winner of the second prize was to pay for one gallon, and the winner of the third prize for two quarts. The sweepstakes was drawn for in the usual manner, and the prizes, less the price of the beer to be paid for, were paid by the respondent. The magistrates dismissed the summons on the ground that it was not a lottery within the meaning of section 2 of the Gaming Act, 1802. By that section it is provided that "No person or persons whatsoever shall publicly or privately keep any office or place to exercise . . . any game or lottery called a little-goe or any other lottery not authorized by Act of Parliament . . . upon pain of forfeiting for every such offence the sum of £500 . . . and every person so offending shall be deemed a rogue and vagabond within the true intent of an Act passed in the seventeenth year of his late Majesty King George the Second . . ."

Avory, K.C. (*Stutfield* with him), for the appellant.—This is plainly a lottery. A sweepstakes has in all the authorities been held to be a lottery.

He cited *Allport* v. *Nutt*, 1 C. B. 974; *Gatty* v. *Field*, 15 L. J. Q. B. 408; *Mearing* v. *Hellings*, 15 L. J. Ex. 14.

J. B. Mathews, for the respondent.—It is essential to constitute an illegal lottery that the respondent should have made a profit. Here the profit was so trifling that it may be disregarded. The magistrates were therefore right.

Lord ALVERSTONE, L.C.J.—This is clearly a lottery. If it be necessary to prove that the respondent made a profit out of the sweepstakes then it is clear that he did so, as the prizes awarded did not equal the amount subscribed; but in the absence of that evidence I should have been prepared to hold that the mere fact that persons were attracted to the respondent's licensed premises by means of the sweepstakes was quite sufficient evidence of profit. The appeal will be allowed, and the case must go back to the justices for them to convict.

LAWRANCE and KENNEDY, JJ., concurred.

Appeal allowed.

Solicitors for the appellant, *Blundell, Gorden, & Co.*, for *Thornely*, Worcester.

Solicitor for respondent, *Ernest W. Moore*, Tewkesbury.

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

C. C. R.
(Lord Alverstone, L.C.J., and Grantham, Bruce, Darling, and Channell, JJ.) March 12, 30.

REX v. HUMPHRIS. (a.)

Criminal law—Bankruptcy—Property divisible amongst creditors—Execution of deed of arrangement—Debtor absconding with property—Whether property of trustee or debtor—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 12.

The prisoner being in difficulties, on the 24th of April, 1903, *voluntarily assigned all his property for the benefit of his creditors. The assignment was expressed to be as between the debtor, the trustee, and the creditors, but was not communicated to his creditors, and it was executed by the trustee and the prisoner only. The trustee took possession of the business on the 25th of April. On the 28th of April the prisoner left England with £120, which he ought to have handed over to the trustee. On the 13th of May a receiving order was made against him, and on the 30th of May he was declared a bankrupt.*

Held, that he was rightly convicted under section 12 *of the Debtors Act,* 1869, *for having within four months next before the presentation of a bankruptcy petition against him quitted England and taken with him a part of "his" property—viz.,* £120, *which ought by law to be divided amongst his creditors, as no irrevocable trust of that sum had been created, the trustee never having got possession of the money.*

Reg. v. *Crease*, 22 W. R. 375, 2 C. C. R. 105, *distinguished.*

Case stated by the Recorder of Banbury.

The prisoner was tried at quarter sessions for the borough of Banbury on an indictment charging him with a felony under section 12 of the Debtors Act, 1869, for having within four months next before the presentation of a bankruptcy petition against him quitted England and taken with him a part of his property to the amount of £20 or upwards—that is to say, a sum of £120 which ought by law to be divided amongst his creditors. The prisoner, prior to the execution of the deed hereinafter mentioned, carried on business as a hay and coal merchant in Banbury. On the 24th of April, 1903, the prisoner executed a deed of assignment in favour of his creditors. The assignment was an indenture dated the 24th of April, 1903, and expressed to be made by the prisoner (therein called the debtor) of the first part, William Booth of the second part, and "the several persons and firms whose names and seals are hereunto described and set, being respectively creditors of the debtor, of the third part." The prisoner, as beneficial owner, assigned to the trustee all his property, including sums of money, the

(a.) Reported by ALAN HOGG, Esq., Barrister-at-Law.

trustee being directed to sell the property and to pay to himself the costs of the sale and divide the residue among all the creditors. It was witnessed that the trustee and the creditors named in the schedule thereby released the debtor from all claims, but in case a receiving order should be made against the prisoner within three months the release should be void and of no effect.

The deed was executed by the prisoner and the trustee, but had never been executed by any creditor, nor was the name of any creditor or his debt inserted in the schedule. At the time the prisoner executed the deed he had in his possession the sum of £161, which he retained instead of handing it over to the trustee.

On the 25th of April, 1903, the trustee took possession of the prisoner's business, and continued it until the appointment of the official receiver under the bankruptcy hereinafter mentioned.

On the 27th of April, 1903, the deed was registered under the Deeds of Arrangement Act, 1887.

On the 28th of April, 1903, the prisoner went to Canada, taking with him £120, part of the £161, the remainder having been spent by him between the 24th and the 28th of April.

On the 30th of April, 1903, a bankruptcy petition was presented against the prisoner. A receiving order was thereupon made on the 13th of May, 1903, and on the 18th of May, 1903, the prisoner was adjudicated a bankrupt. There was no evidence before the recorder that any creditor knew of the prisoner's intention to execute the deed, or that any creditor had ever in any way assented thereto, or that any creditor ever knew of its existence, or that the trustee had ever done anything under the deed beyond taking possession of prisoner's property and effects, and carrying on the business.

At the close of the prosecution it was submitted by counsel, on behalf of the prisoner, that there was no case to go to the jury, because, on the evidence, the said sum of £120 was, under and by virtue of the deed, the property of the trustee, and therefore, on the authority of *Reg.* v. *Creese*, 22 W. R. 375, 2 C. C. R. 105, the case was not within section 12 of the Debtors Act, 1867. The recorder declined, however, to withdraw the case from the jury, but consented to reserve the point. The jury returned a verdict of guilty, and the prisoner was sentenced to six months' imprisonment in the second division.

The question for the opinion of the court was whether the sum of £120 so taken away by the prisoner when he quitted England as aforesaid on the 28th of April, 1903, was "his property" within the meaning of section 12 of the Debtors Act, 1869.

By the Debtors Act, 1869, s. 12, it is provided: "If any person who is adjudged a bankrupt or has his affairs liquidated by arrangement after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months before such presentation or commencement quits England or takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of property to the extent of £20 or upwards which ought by law to be divided amongst his creditors he shall (unless the jury is satisfied he had no intention to defraud) be guilty of felony punishable with imprisonment for a time not exceeding two years with or without hard labour."

Vachell, for the prisoner.—This case is covered by *Reg.* v. *Creese*.

Sutton, for the prosecution.—*Reg.* v. *Creese* is distinguishable. The deed there was communicated to the creditors. Here no irrevocable trust was created, as the creditors never knew of the deed: *Acton* v. *Woodgate*, 2 My. & K. 492; *Johns* v. *James*, 26 W. R. 276, 2 Ch. D. 744. The trustee never had possession of this money, and it therefore remained the property of the prisoner.

Vachell replied.

Cur. adv. vult.

March 30.—Lord ALVERSTONE, L.C.J., read the following judgment: This was a case stated by the Recorder of Banbury on the conviction before him of the prisoner on a charge of having within four months next before the presentation of a bankruptcy petition against him quitted England and taken with him a part of his property to the amount of £20 and upwards—that is to say, a sum of £120, which ought by law to be divided amongst his creditors. The prisoner was proved to have so quitted England, but he had shortly before going executed a deed of assignment of all his estate to a trustee for the benefit of his creditors, and it was contended on his behalf, on the authority of *Reg.* v. *Creese*, that the £120 was not part of his property within the meaning of the section. That case is undoubtedly somewhat similar to the present, and we have to consider whether it is distinguishable. There the charge was preferred under sub-section 5 of section 11 of the Debtors Act, 1869, for fraudulently removing "any part of his property," and it is impossible, we think, to put a different meaning on the words "any part of his property" in section 12 to that which they bear in section 11, sub-section 5. But for the doubts created by the decision in *Reg.* v. *Creese* we should certainly have held that "his property which ought to have been divided amongst his creditors" included property which had been his, which remained in his possession, and the title to which, so far as parted with at all, had only been parted with by him in such a way as to leave it still divisible amongst his creditors in the event of bankruptcy. The concluding words in the section, "unless the jury are satisfied there was no intention to defraud," would be sufficient to protect the accused when he had acted innocently and not in contemplation of bankruptcy. We have, however, to see whether, if we so hold, it would be contrary to anything really decided in *Reg.* v. *Creese*, and for that purpose we have to consider the facts of that case and this.

In *Reg.* v. *Creese* the assignment of the 21st of December, 1872, had been acted upon, and was undoubtedly a genuine transaction, further advances were made upon it, Creese entered the service of Lakin & White, the trustees under the deed, pursuant to the terms of it, and for several months continued to act as the agent and bailiff of the trustees. The bankruptcy of Creese did not take place until the 17th of October, 1873, nearly a year after the date of the deed, and the removal, which was the alleged offence under section 11, sub-section 5, took place on the 14th, 16th, and 17th of October, 1873. The only ground on which the title of the trustees of the deed failed was that the deed of December, 1872, had not been registered as a bill of sale. It seems to us, therefore, that the court was right in holding that at the date of the alleged fraud the property really belonged to the trustees and not to Creese. We agree, therefore, that *Reg* v. *Creese* was rightly decided, the facts of that case being as stated; but if the reasoning of the court lays down any general rule which would exempt the defendant in this case from responsibility, we do not agree with it. The facts in this case appear to be different. Except by the trustee taking possession of the stock and effects the deed does not appear ever to have been acted upon. The £120 with which the prisoner absconded was, no doubt, money which the trustee under the deed might have claimed from him

by virtue of his assignment, but he never did get it, as the trustees of the deed in *Creese's case* got the stock which Creese misappropriated, and at most the trustee here had a paper title. Nothing took place which would make this money—which the defendant was obviously keeping back from his creditors, and which he had in his actual possession, and was not holding for the trustee in any real sense—the property of the trustee under the deed executed three days before the absconding. We do not adopt the view that the deed was revocable so far as regards the property of which the trustee under it got possession, for the trustee had an interest in it. James, L.J., in *Johns* v. *James* says: "You cannot revoke the deed and cannot get the property out of the hands of the trustee until, at all events, you have satisfied all the charges and expenses he has incurred and any right he has acquired in the property. It is not a revocation of the deed, but it is a revocation of the directions given by the deed to the assignor's agent as to what he shall do with the proceeds." The deed was not revocable, but as to the money of which the trustee never got possession no irrevocable trust appears to have been created. We think the recorder was right in leaving this case to the jury, and that on the facts the £120 was, when taken away by the prisoner, his property which ought by law to be divided amongst his creditors; and that any claim which the trustee under the deed might have to have the money handed over to him was insufficient to prevent the operation of section 12 of the Debtors Act, 1869. The conviction must be affirmed and the defendant serve the remainder of his sentence.

GRANTHAM, J.—I agree.

BRUCE, J.—I agree that the conviction should be affirmed, but I wish to add that I think the facts in *Reg* v. *Creese* were very different from the facts in the present case. In this case the deed of assignment was a voluntary deed executed by the debtor for the benefit of his creditors, and was not communicated to them, and was revocable by him except in so far as the trustee had acquired an interest in the property assigned, but so long as there were proceeds to meet the claim of the trustee for his expenses in acting under the directions of the deed, the debtor was at liberty to revoke the mandate contained in the deed so far as it related to the residue of his property. I think there was no evidence whatever to show that the trustee had acquired any interest in the sum of £120 in question. When, on the 20th of April, the debtor appropriated the sum of £120 which had never been in the possession of the trustee, I think he revoked the mandate to the trustee contained in the deed so far as it related to the bond. In the case of *Reg* v. *Creese* the deed was not a voluntary deed, for part of the consideration was a sum of £350 paid by one of the trustees to the debtor. The deed, therefore, in that case was not a revocable deed, and the money which the prisoner appropriated he had received as the servant or bailiff of the trustees, and the money was clearly the money of the trustee.

CHANNELL, J.—I agree.

Solicitors for prisoner, *Crowther & Davis*, Leamington.

Solicitor for Crown, *Solicitor to Treasury*.

House of Lords.

From C. A. (England). March 15.

HUNTER v. ATTORNEY-GENERAL. (a.)

Inland revenue—Income tax—Deductions—Premium on policy of life insurance—Advance by insurance company of half premium—Premium partly paid with money borrowed from insurer at interest and charged on policy—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 54, *Schedules D and E.*

By the terms of a policy of life assurance it was provided that, if the assured should so desire, a part of the premium—viz., £33, *should in each year be advanced by the insurance company, and that the money so advanced should, with interest thereon, be a first charge on the policy. The premium was expressed to be for* £66 17*s.* 6*d. The assured paid in respect of premium each year* £33 17*s.* 6*d., and obtained a receipt for* £66 17*s.* 6*d., the balance of* £33 *being advanced as provided for by the policy.*

Held, that, under section 54 *of the Income Tax Act,* 1853, *the assured was not entitled to deduct from his assessment to income tax the sum of* £66 17*s.* 6*d., as the amount of the annual premium paid by him for life insurance, but only* £33 17*s.* 6*d.*

Decision of the Court of Appeal (Lord James of Hereford *dissenting*) (51 *W. R.* 490, [1903] 1 *K. B.* 514) *affirmed.*

Appeal from a judgment of the Court of Appeal (Vaughan Williams, Stirling, and Mathew, L.JJ.), (51 W. R. 490), which reversed that of Phillimore, J. (50 W. R. 618, [1902] 2 K. B. 255), on a special case stated by consent in a petition of right.

The suppliant, R. L. Hunter (appellant in this House), claimed the right to deduct from his assessment to income tax the sum of £66 17s. 6d., the full annual premium paid upon a policy of insurance upon his life, within the meaning of section 54 of the Income Tax Act, 1853, the commissioners having allowed him to deduct only £33 17s. 6d. in each year.

The suppliant by a policy of assurance dated the 30th of June, 1896, effected an insurance on his life with the London Life Association (Limited) for £1,500. The policy recited that the sum of £66 17s. 6d., including an advance of £33 under the first clause thereof (being the premium for such assurance until the 30th day of June, 1897), had been paid to the association; and, *inter alia*, provided that a portion—namely, £33—of the renewal premium should, if the assured should so desire, be advanced by the association and be a first charge on the policy. By clause 4 it was provided that the association might at any time advance moneys for payment of any sum necessary to prevent the lapsing or avoidance of the policy, and that any such advance should bear interest at 6 per cent. per annum, reducible to 4 per cent. on punctual payment, and that any such advances and interest should be a first charge on the policy and the sum assured. The form of receipt received by Mr. Hunter was as follows: "Receipt No. 1625. The London Life Association (Limited), 81, King William-street, London, E.C. Received this 30th day of June, 1896, the sum of £66 17s. 6d. (including £33 advanced by the association), being the first premium on an assurance of £1,500, on the life of Mr. Robert Lewin Hunter, for which a policy No. 30540, and dated as above, will be

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

issued in due course. C. D. HIGHAM, Actuary and Secretary. £66 17s. 6d. premium (including advance as above). Countersigned E. C. E. Sharpe."

By agreement dated the 19th day of July, 1897, the suppliant, in consideration of £33 then advanced to him by way of loan, and of the same amount advanced to him by way of loan on the 30th of June, 1896, and of five further sums of the same amount to be advanced to him by way of loan, by the association under the terms of the policy, charged the policy and all moneys and benefits thereby assured as security for repayment to the association of the principal sums advanced and to be advanced, together with interest as mentioned in the agreement; and the suppliant further agreed to pay to the association the principal sums and interest, and also, as long as the principal sums or any part thereof remained owing, to pay interest thereon at the rate therein mentioned.

On the 19th of July, 1897, the suppliant paid to the association the sum of £33 17s. 6d. in cash, and the association lent to the suppliant the sum of £33, that amount making up the sum of £66 17s. 6d., the full amount of the renewal premium. A receipt was given in the words and figures following: "Receipt No. 1475. The London Life Association (Limited), 81, King William-street, London, E.C. Policy No. 30540. Due 30th June, 1897. Received this 19th day of July, 1897, the sum of £66 17s. 6d., being the amount of one year's premium, due as above, for the assurance of £1,500 by this policy on the life of Mr. R. L. Hunter. £66 17s. 6d. amount paid. C. D. HIGHAM, Actuary and Secretary. For one of the Directors of the Association. Countersigned, E. C. E. Sharpe."

On the 8th of July, 1898, the suppliant made a similar payment, and the association made a similar loan, which was applied in the same way. A receipt was given similar to that given on the 19th of July, 1897.

The association did not in any of the years 1896, 1897, and 1898 make any actual cash payment to the suppliant, but in each of such years the association debited the suppliant with the sum of £33 in the loan register, and in the renewal premium register he was credited with the full amount of the premium. The suppliant in each of the years 1897, 1898, and 1899 paid interest at 4 per cent. upon the total amount of the loans made by the association then standing to his debit in the loan ledger. In each of the years 1896-7, 1897-8, and 1898-9, Messrs. Hunter & Haynes, the firm of solicitors of which the suppliant was a member, were assessed to income tax under Schedule D in respect of the profits on their business as solicitors, the assessment being based on the assumption that the suppliant was entitled to relief to the amount of £33 17s. 6d. only, in respect of the premium for the said policy, and in each of the said years the special commissioners refused on appeal to grant relief in respect of the whole of the premium of £66 17s. 6d. The suppliant by his petition of right claimed repayment of the sum of £3 6s., being the income tax paid in respect of the sum of £33 in the three years in question.

The Attorney-General consented, in order to obtain the decision of the court in the promptest way, to waive any objection that might be raised, as a matter of law, that a petition of right did not lie, but such waiver was not to be taken as a precedent in other cases.

Phillimore, J., gave judgment for the suppliant, but this was reversed by the Court of Appeal.

Section 54 of the Income Tax Act, 1853, provides that "any person who shall have made insurance on his life . . . shall be entitled to deduct the amount of the annual premium paid by him for such insurance from any profits or gains in respect of which he shall be liable to be assessed under either of the Schedules D or E of this Act."

Danckwerts, K.C., and *Acland, K.C.*, for the appellant.

Sir R. B. Finlay, A.G. (*Sir E. Carson, S.G.*, and *Rowlatt* with him), for the respondent.

Earl of HALSBURY, L.C.—It appears to me that this judgment ought to be affirmed. The whole point is that the exemption or deduction, or whatever it is to be called, is to be allowed to the assured if the premium has been "paid by him"; and the whole reason I give for my judgment is that it has not been paid by him. I move your lordships that the appeal be dismissed with costs.

Lord MACNAGHTEN.—I quite agree.

Lord DAVEY. — I am of the same opinion. No doubt the argument presented by counsel for the appellant based on the charge on the policy appears to have some weight, because it appears that, as between him and the insurance company, the premium has been paid. But that is not the question; the question is whether he has paid the premium so as to obtain the benefit of the exemption. Looking at the whole transaction, it appears to me that it was a scheme of some ingenuity whereby the insurance company invited people to insure their lives in their office on the footing of half the annual premiums for seven years not having to be found in cash, and the very merit of the scheme, as pointed out in some of the documents, in the invitation or prospectus, or whatever they are called, is that the insured will not have to pay in cash the whole of the premiums. In these circumstances I think the entry in the ledger is a perfectly accurate entry, that £33 17s. 6d. is paid and £33 remained "on credit." It may be that the insured was liable to be sued for that £33; but he was willing to run that risk, no doubt for the sake of obtaining the very favourable terms which were offered to him by the insurance company, who were not likely to spoil their business by taking such a step.

Lord JAMES OF HEREFORD.—I have entertained considerable doubt in this case, and I express the opinion which I now do before your lordships with very great hesitation as to whether I am right or not; but on the whole I have come to the conclusion that this payment does in fact exist, and that therefore the appellant is entitled to succeed.

I am aware of the statement that this transaction as regards the £33 was described as "on credit"; that, of course, is substantially in favour of the opinion your lordships have expressed. But I am disposed to look rather at the real substance of the transaction as it is found in the charge on the policy. It is admitted that the parties have acted in perfect good faith in this arrangement which has taken place; whether it is an ingenious one or not, it is certainly an honest transaction, and there, as between the two parties, this sum is treated as an advance upon loan, and it is admitted that upon that document between them an action could have been brought, so that at any time if the company chose to take that course (although it may be one which they would not have taken in fact) they could have sued upon it.

It appears to me that there is nothing in the transaction that can be condemned either in the nature of the transaction itself or as being legally in fault. If one party chose to say to the other, "I will lend you money with one hand and receive it with the other," it seems to me that that was a transaction of loan with a charge of interest upon that loan; and that

being so, it would be a "payment" in the same way, as has been mentioned at the bar, as if the money had been borrowed from a third person, or as if there had been two different departments in the same office in which the transaction had taken place.

For these reasons, with very great diffidence, I differ from my noble and learned friends who have expressed their opinion; for, looking at the case as a whole, which is full of difficulties—though it is a short one—it appears to me that the appellant is entitled to succeed.

Lord ROBERTSON.—I agree with the motion which has been proposed, upon the very simple and sufficient ground stated by my noble and learned friend on the woolsack. The whole argument of the appellant has been that, in a question as between the assured and the insurance company, he must be held to have paid the larger sum. But in point of fact, in a question of the extent by which his income was diminished during the year by the payment, there can be no doubt it was only by £33 and not by £66.

Lord LINDLEY.—I am of the same opinion. I think the judgment of Mathew, L.J., is absolutely unanswerable. I say this, bearing in mind that under the old common law plea of payment you could prove a plea by settlement of account on a balance payment; but that is not such a payment as is contemplated by the Income Tax Act at all.

Appeal dismissed.

Solicitors for the appellant, *Hunter & Haynes.*

Solicitors for the respondent, *Solicitor of Inland Revenue.*

Court of Appeal.

From K. B. Div. (In Bkcy.) (Vaughan Williams, Stirling, and and Cozens-Hardy, L.JJ.) — May 6.

In re O. C. S. (A DEBTOR). *Ex parte* THE DEBTOR. (*a.*)

Bankruptcy—Bankruptcy notice—Notice based on two judgment debts—Irregularity—Right of court to amend—Practice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g); *s.* 143.

If a bankruptcy notice is founded on two judgment debts, and objection is taken to it on that account, leave to amend such notice will not be given by the court.

In re Collier, Ex parte Dan Rylands (Limited), 8 *Morr.* 80, 40 *W. R. Dig.* 21, *followed.*

This was an appeal by a debtor from an order of Mr. Registrar Linklater.

The facts were shortly as follows: The petitioning creditors of the debtor alleged that the debtor owed them a sum of £659 1s., which was the amount of two final judgments made against him in the King's Bench Division on the 30th of March, 1904, and that he had committed an act of bankruptcy in not complying with a bankruptcy notice, which had been served on him on the 30th of March. They presented the petition on the 12th of April. The notice was a notice requiring the debtor within seven days after service to pay the said sum of £659 1s., as being the amount due on the aforesaid two judgments in the King's Bench Division. The debtor opposed the making of any order, and disputed the debt. The registrar having made a receiving order, the debtor appealed, disputing the debt and the act of bankruptcy, and claimed that such notice was bad because it was based on two judgment debts.

H. Reed, K.C., and *A. H. Carrington,* for the debtor.—It is an invalid notice: *In re Low, Ex parte The Argentine Gold Fields* (*Limited*), 39 W. R. 181, [1891] 1 Q. B. 147.

Montague Lush, K.C., and *H. Kisch,* for the creditors.—The case of *In re Low* was quite a different case from this. The test is under section 143 of the Bankruptcy Act, 1883, under which the court can amend, and if no injustice will ensue, this order should be made. [STIRLING, L.J.—Section 143 appears to me only to apply to formal defects.] Here there are special circumstances. [VAUGHAN WILLIAMS, L.J.—Here is a case by Cave, J., and myself: *In re Collier, Ex parte Dan Rylands* (*Limited*), 8 Morrell 80, 40 W.R.Dig. 21.] It is too late to take this objection now, as the appellant did not do so before the registrar.

He also cited *In re Wenham, Ex parte Battams,* 48 W. R. 627, [1900] 2 Q. B. 698.

H. Reed, K.C., in reply.

He cited *In re Bassett, Ex parte Lewis,* 43 W. R. 427, 2 Manson 177 and 524, 43 W. R. Dig. 32.

VAUGHAN WILLIAMS, L.J.—It is not in dispute here that this bankruptcy notice is defective, by reason of its being based upon two judgment debts; but having regard to the decision of *In re Collier, Ex parte Dan Rylands* (*Limited*), we ought not to amend this bankruptcy notice in this case. Speaking for myself, as the bankruptcy judge in that case, that case of *In re Collier* has been acted on for many years in bankruptcy administration, and I do not think we ought to depart from it now. Counsel for the creditors said in the course of argument that no injustice would result from allowing this amendment. I think we ought to be very careful about that. With regard to the costs, I think the successful appellant ought to have them as far as the appeal is concerned, but not the costs of the original hearing.

STIRLING and COZENS-HARDY, L.JJ., concurred.

Appeal allowed.

Solicitors, *Raphael & Co.; Beyfus & Beyfus.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — March 29.

In re CARR'S TRUSTS. CARR *v.* CARR. (*a.*)

Lunacy—Trust fund—Beneficiary of unsound mind not so found by inquisition—Maintenance of lunatic—Undertaking—Jurisdiction—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 116.

A lunatic not so found was absolutely entitled to a trust fund under a will and settlement. An originating summons was taken out in the Chancery Division for the purpose of having it declared that a certain part of the investments representing the fund might be expended for the personal benefit and maintenance of the lunatic, and also so much of the capital as the court should think fit. The fund was represented by some India Stock and mortgages.

Held, that if the trustees transferred the stock and deposited the mortgage deeds in court, and if the sister of the lunatic, who was also one of the trustees of the settlement, gave an undertaking to apply the income for the

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

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lunatic's benefit, the trustees might pay to the sister the income of the fund during the lunatic's life or until further order.

Decision of Joyce, J., *who held the administration was more properly one in lunacy jurisdiction, reversed.*

This was an appeal from a decision of Joyce, J.

The facts were as follows: By his will, dated the 24th of April, 1880, Mathew Carr directed that the trustees of his marriage settlement should, in pursuance of a power given to him therein contained, stand possessed of certain trust funds upon trust as to £4,500 for his daughter Caroline Emily Carr, subject to a trust for investment, and should, during a period of twenty-one years from his death, apply the income of said sum or of the investments thereof for her benefit. And the testator further added that the trustees should have absolute discretion either to apply the said income or any part thereof immediately for the purposes aforesaid or pay it or any part thereof at such times and in such manner as they should think fit into his daughter's hands, if they thought she was capable of managing her own affairs.

The testator died in 1882. The daughter was of unsound mind not so found and was living in an institution in Germany, where she had been placed in 1878. Since the testator's death, *i.e.*, for twenty-one years, the whole of the income of the investments representing the £4,500 (except £164 18s. 5d.) had been applied by the trustees for her maintenance and benefit. The lady was under German authority, and she took out an originating summons, in the Chancery Division, in England, by her next friend against the trustees of the settlement and H. Carr, a son of the testator (as the person who might ultimately acquire under the will and settlement), to have the question determined whether proper directions might not be given for her maintenance out of the income of the said funds, and to have the residue thereof applied as required, and also whether she could be allowed by the court a certain portion of the capital, as the court should think fit, for her comfort and personal benefit, and also for administration by the court of the said sum of £4,500. The trustees were a sister and near relative, and the fund to which the daughter was entitled was represented by India 3½ per cent. Stock, and some mortgages. It was certified that it was unlikely she would recover.

Joyce, J., declined to make the order sought, as he was of opinion that, having regard to section 116 of the Lunacy Act, 1890, the application for maintenance should be more properly made in the lunacy jurisdiction.

The plaintiff by her next friend appealed.

Section 116 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), is as follows: "(1) The powers and provisions of this Act relating to management and administration apply (*a*) to lunatics so found by inquisition; (*b*) to lunatics not so found by inquisition, for the protection or administration of whose property any order has been made before the commencement of this Act; (*c*) to every person lawfully detained as a lunatic though not so found by inquisition; (*d*) to every person not so detained and not found a lunatic by inquisition, with regard to which it is proved to the satisfaction of the judge in lunacy that such person is, through mental infirmity arising from disease or age, incapable of managing his affairs; (2) In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge shall be exercised by such person in such manner and with or without security as the judge may direct, and any such order may confer upon the person therein named authority to do any specified act or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the judge. (3) Every person appointed to do any such act or exercise any such power shall be subject to the jurisdiction and authority of the judge as if such person were the committee of the estate of a lunatic so found by inquisition. (4) The powers of this Act relating to management and administration shall be exercisable in the discretion of the judge for the maintenance or benefit of the lunatic or of him or his family, or where it appears to be expedient in the due course of management of the property of the lunatic."

Micklem, K.C., and *H. Greenwood*, for the appellant.—The Chancery Division has jurisdiction, and this is a proper case for exercising it.

They referred to *In re Watkins*, 44 W. R. 609, [1896] 2 Ch. 336; *In re Tuer's Will Trusts*, 34 W. R. 751, 32 Ch. D. 39; *Vane* v. *Vane*, 24 W. R. 602, 2 Ch. D. 124; *In re Brandon's Trusts*, 13 Ch. D. 773, 28 W. R. Dig. 114; *New York Security and Trust Co.* v. *Keyser*, 49 W. R. 371, [1901] 1 Ch. 666; *Didisheim* v. *London and Westminster Bank*, 48 W. R. 501, [1900] 2 Ch. 15; *In re Bligh*, 27 W. R. 876, 12 Ch. D. 364. [VAUGHAN WILLIAMS, L.J.—*In re Barlow's Will*, 36 Ch. D. 287.]

L. F. Potts, for the trustees of the settlement.

THE COURT (VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.), after conferring together, allowed the appeal, and simply ordered that the order of Joyce, J., refusing to give directions for maintenance, &c., should be discharged. Their lordships held that the stock must be transferred into court, and the mortgage deeds deposited in court; and that the sister, one of the trustees, must undertake to apply the income of the fund for the personal benefit of the plaintiff before they authorised the trustees to pay to the sister the balance of income in their hands, and the future income, for the purpose required, until further order. General liberty to apply reserved.

Solicitors, *Carr; Scott; Smith & Gorringe.*

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — March 4, 7, 8.

LONDON AND NORTH-WESTERN RAILWAY CO. v. MAYOR, &c., OF WESTMINSTER. (*a*.)

Metropolis—Local government—Public health—Public convenience—Approaches—Subway—Trespass—Subsoil of roadway and footway—Injunction—Public Health (Metropolis) Act, 1891 (54 & 55 *Vict.* c. 76), *s.* 44.

By the Public Health (London) Act, 1891, *s.* 44, *power was given to a sanitary authority to construct and maintain public sanitary conveniences in situations where they deem the same to be required, and to defray the expense of providing such conveniences and of any damage occasioned to any person by the construction thereof, and the expense of keeping the same in good order; and for the purpose the subsoil of the road, exclusive of the footway adjoining a building, was vested in the sanitary authority.*

(*a*.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

A sanitary authority constructed under the middle of a public thoroughfare underground lavatories, which were so built as to infringe upon the subsoil of the plaintiffs, who were the owners of certain premises on one side. On each side of the street were staircases which communicated with subways, which ran from side to side of the street, and so communicated with the convenience. The subways were capable of being used as the means of persons passing from one side of the street to the other, and were wider than was absolutely necessary for persons using these conveniences. The statute did not empower the sanitary authority to construct subways.

Held, that, as it appeared from the evidence, the real object of the defendants was to construct a means of passage by which persons could cross the road in safety, it was a subway; that they had exceeded their statutory powers, and that the plaintiffs were entitled to an injunction against the defendants.

Decision of Joyce, J. (50 *W. R.* 268, [1902] 1 *Ch.* 269), *reversed.*

This was an appeal from a decision of Joyce, J. (reported 50 W. R. 268, [1902] 1 Ch. 269).

The facts were as follows: The plaintiffs, by a conveyance dated the 26th of July, 1886, purchased certain freehold messuages and tenements, Nos. 34, 35, and 36, Parliament-street, and Nos. 11 and 12, Bridge-street, Westminster, occupying a portion of the corner house as building and offices. At the date of this conveyance the footway pavement in Parliament-street was twelve feet wide opposite to these premises. There were certain vaults belonging to the premises in Parliament-street under the pavement and projecting into the roadway. In 1899 Parliament-street was widened by the then local authority, and the footway pavement was increased to a width of twenty-one feet. A few years ago, the defendants considered the advisability of constructing certain public conveniences for the public and strangers visiting that part of London. They first of all thought that the north side of Parliament-street would be best, and hoped to be able to obtain some public authority to construct one, but soon abandoned it on account of the difficulty with regard to the traffic. In November, 1900, the defendants, as the sanitary authority of the district, constructed certain underground sanitary conveniences in the centre of Parliament-street, and provided them with approaches by means of a subway from either side of the street, with staircases down to them at either end, at or near the edge of the pavement. One of these staircases was opposite the plaintiffs' premises, and was situated partly in the roadway and extended for thirty-three feet along the footway, being fenced off from it and the roadway by an iron railing. This staircase to the to the extent of 2ft. 9in. was within the line of kerbstones of the pavement as altered in 1899. The wall of the staircase was quite close to the wall of the plaintiff's vault. The height of the subway was eight feet, and ten feet wide for its whole length. In the course of these operations, part of the subsoil of the plaintiffs, both under the footway and the road, had been used by the defendants.

The plaintiffs claimed that by the conveyance of 1886 the land to the centre of the roadway belonged to them, and they contended that the defendants had committed a trespass, and that the free access of the highway was interfered with by placing this staircase and railing opposite their premises, that the defendants had no power under the Public Health (Metropolis) Act, 1891 (54 & 55 Vict. c. 76), s. 44, to make subways under the street, and therefore that the act of the defendants was *ultra vires*.

The plaintiffs further claimed an injunction to restrain the defendants from continuing their trespass upon the plaintiffs' premises by permitting the subway, staircase, and railings to remain; or in the alternative an injunction to restrain the defendants from so causing an obstruction to their use of the highway to the peculiar damage of the plaintiffs.

The defendants denied the plaintiffs' title to the soil to the middle of the roadway, and pleaded justification of their act by reason of their statutory powers under section 44 of the Public Health (Metropolis) Act, 1891.

Section 44 of the Public Health (Metropolis) Act, 1891 (54 & 55 Vict. c. 76), is as follows: "(1) Every sanitary authority may provide and maintain public lavatories and ashpits and public sanitary conveniences other than privies, in situations where they deem the same to be required, and may supply such lavatories and sanitary conveniences with water, and may defray the expense of providing such lavatories, ashpits, and sanitary conveniences, and of any damage occasioned to any person by the erection or construction thereof, and the expense of keeping the same in good order, as if they were expenses of sewerage. (2) For the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority."

Joyce, J., in the course of his judgment, held that the defendants' act was not *ultrà vires*. Their primary object was the construction of the conveniences with the requisite and proper means of approach. [His lordship referred to Pratt's Law of Highways (14th ed.), p. 39; Elphinstone, Norton, & Clarke on the Interpretation of Deeds, at p. 179; and *Beckett* v. *The Corporation of Leeds*, 20 W. R. 454, L. R. 7 Ch. App. 421, with reference to the question as to the vesting of the soil of the highway up to the middle of the road in the adjacent owners]. He granted an injunction, however, against the defendants for the removal of that portion of the staircase which projected over the plaintiffs' land to the extent of 2ft. 9in., but directed it to be stayed for six months, with liberty to apply to the judge in chambers to extend that period in the event of an appeal from his decision, and he further stated that in his opinion the result was most unsatisfactory, as he could not help suspecting that the land in question did not really belong to the plaintiffs, and that this order would do them no good; and also he could not compel the defendants to restore the old line of the kerb as it existed at the end of 1899. He made no order as to costs.

The plaintiffs appealed.

Further negotiations took place, which, however, proved abortive, and the appeal came on for hearing.

Younger, K.C., Montague Shearman, K.C., and *Eustace Hills*, for the appellants.—The correspondence and the evidence show that the scheme was originally one for a subway, and the convenience was only subsidiary. In making the convenience the defendants have exceeded their powers in two ways—(i.) by burrowing under the soil of the plaintiffs in a place where it was not necessary for the entrances, and (ii.) by making two entrances instead of one. The defendants are not justified under section 44 of the Public Health (Metropolis) Act, 1891. The effect of so exceeding their powers is to make them trespassers, *ab initio*, however lawfully they may have entered on the work.

They cited *Hickman* v. *Maisey*, 48 W. R. 385, [1900] 1 Q. B. 752, 48 W. R. Dig. 68; *The Mayor, &c., of Tunbridge Wells* v. *Baird*, [1896] A. C. 434, 45 W. R. Dig. 92; *Harrison* v. *Duke of Rutland*, 41 W. R. 322, [1893] 1 Q. B. 142, 41 W. R. Dig. 86. [STIRLING, L.J., referred to *Stockton and Darlington*

Railway Co. v. *Brown*, 8 W. R. 708, (1860) 9 H. L. Cas. 246, 8 W. R. H. L. Dig. 6.] [COZENS-HARDY, L.J., referred to *Dodd* v. *The Salisbury and Yeovil Railway Co.*, 1 Giff. 158, 7 W. R. Ch. Dig. 67.]

Hughes, K.C., and *Dighton Pollock*, for the respondents.—The learned judge was right. It was admitted at the trial that the conveniences were in a suitable place, and the case was decided on the footing of this being a convenience plus a subway: *London, Brighton, and South Coast Railway Co.* v. *Truman*, 34 W. R. 657, 11 App. Cas. 45, 34 W. R. Dig. 131. It is said by the appellants that, supposing the corporation have power to make a convenience, they are to be prevented from doing it because it might involve the making of something besides. [VAUGHAN WILLIAMS, L.J.—You have no authority to make these long approaches. If you had, you might extend them even as far as Charing Cross.] The authority to make the convenience implies power to make a necessary approach. The sanitary authority must exercise its discretion *bonâ fide* and make entrances where they can be best used by the public. [VAUGHAN WILLIAMS, L.J.—There is no necessary implication of a right to make a long subterranean approach. When you say "*bonâ fide*," do you mean that the corporation is acting *bonâ fide*, in accordance with the duty imposed on them by statute?] Yes. [VAUGHAN WILLIAMS, L.J.—Suppose the surveyor of the corporation told them that a certain situation would do as well as another for a subway to the convenience, would the corporation, acting on that advice, be acting *bonâ fide* in accordance with the duty imposed on them by statute?] If this were the best place, there could be no want of *bona fides*. The proper authority did select this spot, and there is no evidence to show that there was any other spot available. The entrance to the convenience is just as much at the discretion of the authority as the situation. It is not necessary to take the shortest way to get in, the power given to the local authority by the Act does not give that, the convenience of getting there must be considered. If they are making conveniences with certain entrances, and these entrances form a subway, that fact is quite immaterial. Here it is the duty of the local authority to make the most suitable access to these conveniences, and if the corporation think the entrance from the footway is more convenient than from the road, they have not only the right, but are under a duty. These are entrances for access. [VAUGHAN WILLIAMS, L.J.—The word "subway" is constantly used in respect of bridges.] Yes; they are simply entrances to these conveniences from the nearest possible spot: *Wilkinson* v. *Hull, &c., Railway and Dock Co.*, 30 W. R. 617, 20 Ch. D. 323, 30 W. R. Dig. 53, 175; *Lewis* v. *Weston-super-Mare Local Board*, 37 W. R. 121, 40 Ch. D. 55, 37 W. R. Dig. 114. Here the words of the Act are similar. [VAUGHAN WILLIAMS, L.J.—May I say shortly that the *London, Brighton, and South Coast Railway* v. *Truman* really was an action brought to restrain the user of land for that purpose, but you did not acquire this land for a statutory purpose, and so that case is against you.] Only the local authority can decide what is the most convenient mode of access. As the corporation have power under section 44 to make conveniences, they must have approaches, and it is purely a question of the plan of construction.

Younger, K.C., in reply.

He cited *Goodson* v. *Richardson*, 22 W. R. 337, L. R. 9 Ch. 221, 22 W. R. Dig. 121.

[VAUGHAN WILLIAMS, L.J., referred to *Battersea Vestry* v. *County of London and Brush Provincial Electric Lighting Co.*, [1899] 1 Ch. 474.]

VAUGHAN WILLIAMS, L.J.—So far as the objects of the vestry, who were the predecessors of the Corporation of the City of Westminster, and the objects of the corporation are concerned, I have a good deal of sympathy with them, and I cannot doubt myself but that they acted in good faith in this sense, that their desire was a desire to do that which might be best for the public. Of their good faith in that sense I have not the slightest doubt. Moreover, I think that they rather drifted into the position which they ultimately took up than took that position up delib-rately. Their first object was to make a provision for the comfort and convenience of strangers visiting this part of the metropolis. It is known that a great many persons of all nations, as well as the inhabitants of this country, go to see the Houses of Parliament and Westminster Abbey, and the desire at first was that some accommodation of this sort should be provided for those visitors; and it was desired to provide it somewhere near the Abbey or the Houses of Parliament. There was a difficulty about that. The vestry could not do it without obtaining certain consents which they could not get. Then the notion seems to have occurred to them that they might provide this accommodation at some point more to the north than the Houses of Parliament and Westminster Abbey, and that, inasmuch as a considerable number of carriage-ways converge in that direction, the visitors and others coming from Westminster Abbey or the Houses of Parliament might get there by a subway. Then it seems to have occurred to somebody that if they had a subway there it was just as well to have a system of subways. They found, when they came to deal with this matter, that there was great difficulty in arranging for it, and they then seem to have given up the notion of a convenience to be established in Victoria-street, or in that neighbourhood, or, as was at one time thought, at Great George-street, and it seems to have occurred to them that it would be a good place to have a convenience at the southern end of Parliament-street. Then it occurred to them that it would be a very good position to place that convenience, if they could place it, somewhere adjacent to a subway, and get some public authority—the First Commissioner of Works, and one other authority, I think, were asked about it—to make the subway for them. Then their notion was to make a convenience which should have its entrance from, and its exit to, this subway, which they hoped to persuade other people to make. I think one gets the plainest indication of this view in the minute of the 27th of July, 1898, which I find in the extracts from the minutes of the United Vestry of St. Margaret's and St. John's. It runs thus: "Parliament-street and Parliament-square subway and convenience.—The surveyor has submitted a plan showing a proposal for the formation of a subway to facilitate vehicular traffic and to provide a safe crossing for foot passengers under Parliament-street and Parliament-square in connection with the widening of the first-named thoroughfare, and embracing in the scheme a project for the construction of a large convenience." Then it goes on: "The committee recommend that the vestry give their approval in principle to the proposition, and that the scheme be submitted to the First Commissioner of Works for his consideration, with an intimation that the vestry would undertake the construction and maintenance of the convenience." That was on the 27th of July, 1898. On the 11th of January, 1899, there is a further minute: "In reference to the proposal for the construction of a convenience and subway at the south end of Parliament-street, and to the representations made in the matter to the First Commissioner of Works by direction of the vestry on the

27th of July last, it has now been reported by the surveyor that the department does not intend to take any steps to provide the suggested subways, and has expressed the opinion that the construction of the convenience should not be commenced until after the coming Session of Parliament." That, to my mind, shows very plainly how this matter was initiated—how at first the vestries had no notion of making the subway themselves, and no notion of doing anything more than availing themselves of the subway when it should come to be made, as a place into which the exit from which the conveniences should be made, and from which the entrance should be made. In this state of things which has come about, it seems to me quite clear that eventually the corporation determined that they would make the subway themselves, from which the entrance was to be to the convenience, and into which the exit was to be.

Now, for the moment, I will not say any more about the evidence which, to my mind, shows conclusively that that was the truth, but I will deal for a moment with what the powers of the authority were under the Public Health (London) Act, 1891, and in particular section 44. [His lordship read that section, and continued:] My view of that section is, first, that I do not think that subsection 2 really intends that there should be vested in the sanitary authority immediately so much of the subsoil as could possibly be used for the purposes mentioned, but I think that what that section seems to point to is, that if the sanitary authority in fact do use the subsoil for this purpose, then *ipso facto* the subsoil shall vest in the sanitary authority. I mention that because, if that is the right view, it seems to me to negative altogether the idea that the sanitary authority are to acquire the land and pay for it, or pay compensation for it, in any shape whatsoever. I do not think, if that is the right view, that it could be that the words, "may defray the expense . . . of any damage occasioned to any person by the erection or construction thereof," could possibly cover the money payment in respect of the vesting of the land taken in the sanitary authority. That is of some importance, although, in the view that I take of this case, it is not essential that I should determine the matter now. But I think it right to mention that this view which I have taken of the construction of this section might be of importance if one had to decide whether or not the sanitary authority were intended to be the judges of what land should be taken, and how much of it, because when the House of Lords had to deal with a similar question in *Stockton and Darlington Railway Co.* v. *Brown*, 8 W. R. 708, (1860) 9 H. L. Cas. 246, I find in the speech of Lord Cranworth these words: "Some general propositions admit of no doubt. In the first place, I think it clear that when the Legislature authorizes railway directors to take, for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands, provided only that they take them *bonâ fide* with the object of using them for the purposes authorized by the Legislature, and not for any sinister or collateral purpose. This is the construction to be put on all such legislative powers, whether the language of the Act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or is expedient to be taken, or simply (as in this case) that the company may take lands for the purposes of the undertaking. In such cases the Legislature, having provided what it considers sufficient means for securing adequate compensation to the owners of the land, leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers." I am not quite sure myself—assuming it to be an essential part of Lord Cranworth's definition as to the occasions on which the company, or others, taking the land, have jurisdiction to decide to what extent they will take the land, that the land so taken shall be taken under the condition that there is secured to the landowner adequate compensation for the taking of the land—that this is a case in which one could say that that was true, because for reasons that I have already given I have great doubts whether the words in section 44 as to damage do secure adequate compensation to the landowner. But I do not propose to decide that question or enter into it, because in my judgment it is not necessary in this case to do so. I say that it is not necessary in this case to do so, because, in my judgment, in the present case, it is not true to say that the corporation have taken this land, which they have taken, with the object of using it for the purposes authorized by the Legislature. If the language of Lord Campbell, who delivered the first judgment, is looked at, as well as the judgment of Lord Cranworth, to which I have been referring, both of them affirm in the clearest possible manner that if a company or other authority purporting to acquire the land under the powers of the Act of Parliament is not acquiring it for the purposes mentioned, but is acquiring it for other and different purposes, then the duty of the court would be to restrain that authority. Lord Campbell's words are: "If it had been proved that the company was acting *malâ fide*, and trying under the powers of the Act of Parliament to get possession of lands of Brown, which were to be applied to other and different purposes, I think the court would have been justified in interfering by injunction," and Lord Cranworth says precisely the same thing.

Now I want to say one word about *mala fides*. Lord Campbell uses the words "*malâ fide*." Joyce, J., said that he could not find on the evidence here that the corporation or the vestry, or either of them, acted otherwise than *bonâ fide*. I think that when Lord Campbell says here "was acting *malâ fide*, and trying under the powers of the Act of Parliament to get possession of lands which were to be applied to other and different purposes" than those authorized by the Act of Parliament, he meant merely to explain there what would be *mala fides*. You are acting *malâ fide* if you are seeking to acquire and are acquiring lands for a purpose not authorized by the Act of Parliament. In such a case it is right to restrain persons who are misapplying the powers of an Act of Parliament. Now, as I have already said, my view is that the defendants here, and their predecessors did acquire these lands for purposes not justified by the Act. It really was hardly denied during the argument, that the defendants did construct this approach, as it has been called, of dimensions which were wider than would be required for the approach to a sanitary convenience, and which were suitable for a subway. It also really was hardly denied that in so doing they did it for the very purpose that this subway might be used as a thoroughfare. They have no parliamentary authority to acquire land for the purpose of making a subway, and, under those circumstances, it seems to me that they ought to be restrained. I have said that in argument it was hardly denied that the facts were such as I have stated. But really it could not be denied in the face of two such letters as the letters of the 20th of September, 1900, and the 4th of December, 1900. The letter of the 20th of September, 1900, written to the solicitor of the London and North-Western

Railway Co., runs thus: "I am constructing on behalf of the Westminster Vestry, and in accordance with their directions, a subway from one side of Parliament-street opposite your offices to the western side which is approached by staircases on footpaths. Unfortunately this will necessitate the acquiring by lease or purchase a portion of your vault. I should therefore feel obliged if you would inform me what your company would require for assisting in giving a great convenience to the public at so dangerous a crossing and enclose a plan."

Now, as to that letter I wish to say that it seems to me couched in most accurate language, and exactly describes the true facts, and also recognizes the legal consequences following upon the adoption of the course indicated by the letter. Then we come to the letter of the 4th of December, 1900, which is again written to the solicitor of the London and North-Western Railway Co.: "Your letter of the 19th ultimo on the subject of the works in progress at the south end of Parliament-street was laid before the Works, Sewers, and Highways Committee of the City Council at their last meeting, when I was directed to explain that the intention is the construction of a subway to facilitate pedestrians crossing from one side to the other of a thoroughfare of great width, and very considerable traffic, an object with which the committee consider your company will be in the fullest accord. The formation of an entrance at the position in question is necessarily obligatory to give proper effect to the scheme. Admission to the conveniences which will be accessible from the subway could otherwise have been provided from the refuges above them. I may add for your information that the plan and project generally received the approval of Her Majesty's Office of Works."

Now, in the face of those letters it is not to be wondered at that there was considerable hesitation in arguing that the object and purpose which the Corporation of Westminster had in view here was not the construction of a subway. We find an argument about whether the Act of Parliament authorized or justified the taking of the subsoil for the purpose of making approaches to the sanitary convenience—I shall say one word about that in a moment—but let me assume to the full that the Act of Parliament does justify that. It only justifies such a course in a case where the making of the approach where it is made is really necessitated by the condition of access to and egress from the convenience. But how can it be said to be so here, when this very letter tells us that admission to the convenience which will be accessible from the subway could otherwise have been provided from the refuges above? It ceases, if that is so, to be true that these subways have in fact been constructed as approaches to the sanitary convenience. It is merely that these subways having been built by the Westminster Corporation, they supposed that it would be convenient that there should be placed sanitary conveniences, the access to and egress from should be in a subway which was being constructed by the corporation.

With regard to the approaches I agree with a great deal that counsel for the respondent said. I think that where you are to have underground conveniences you must have approaches other than mere access (entrance to) and egress (exit from) them, because in the nature of things you must have some stairs or some slope, which will occupy considerable lateral space, leading you to immediate proximity to the situation of the conveniences. Therefore I think that you must have an approach, and I think probably that if the corporation or other sanitary authority had really fixed upon a particular passage as affording a proper approach for the conveniences as such, it would not have been right for us to review their discretion in that respect. But no such question arises in the present case if you arrive at the conclusion that I have arrived at, in fact which I cannot put better than this, that the true position of affairs is accurately described in the letter of the 4th of December, 1900, which I have just read.

Under these circumstances, I think that this appeal ought to be allowed. I think that the remedy which should be given to the plaintiffs here should be wider than that which Joyce, J., gave. Now, what is the best way of giving this remedy? As I said before, one wishes, in giving this remedy, to give it in such a manner as shall be least detrimental to the public. There is the subway; there are the conveniences. Whether they are in a convenient position or not it is not for me to say—the sanitary authority will consider that. But I have no doubt that, apart from the conveniences, the subway at the present moment is a considerable convenience to pedestrians crossing that wide thoroughfare. Under these circumstances, although I think that we ought not to limit our injunction to what has been called the excess of 2ft. 9in., yet I want to give an opportunity for the defendants, the corporation, to do that which I am sure they would wish to do—that which is most for the benefit of the public, and at the same time consistent with the law as we lay it down. If we now say that this is a case in which it may be right ultimately to grant an injunction, we can yet give to the corporation an opportunity of making or undertaking to make alterations which will relieve us from the necessity of granting any injunction at all. If we hold our hand in that way and give to the corporation liberty to apply to us—of course the plaintiffs must have liberty to apply in case there is delay—it may be that the corporation will satisfy us that they have either made, or are immediately going to make, such alterations as will justify us in saying we shall not grant an injunction at all.

I think that is all I have to say at present, except that I take it for granted that the plaintiffs will, in a matter of this sort, facilitate the work which the corporation has to do, and will be prompt and ready to agree to any alterations which may reasonably and properly be suggested by the corporation.

STIRLING, L.J.—In this case the defendants, the Corporation of the City of Westminster, purporting to act under statutory powers conferred on them as the sanitary authority within the city of Westminster, have erected two subterranean constructions at the south end of Parliament-street, one being a public sanitary convenience and the other a subway. Both those erections stand in part on the subsoil of Parliament-street at a point where that subsoil is vested, or is admitted to be vested for the purpose of the present proceeding, in the plaintiffs, the London and North-Western Railway Co., who are the owners of a house in Parliament-street. The plaintiffs allege in this appeal that that subway has been erected without any statutory power for the purpose. In this appeal, whatever may have been the case at other times, the erection of the sanitary convenience is not complained of, but it is alleged, as I have already said, that the subway has been erected without any proper authority, and, at the bar, an injunction has been asked against the defendant corporation to restrain that corporation from maintaining or using the subway. That relief is sought on two grounds: First, on a ground which is thus stated by Lord Cranworth in *Galloway v. The Mayor and Commonalty of London*, L. R. 1 H. & I. App. 34, at p. 43, 14 W. R. H. L. Dig. 8: "It has

become a well-settled head of equity that any company authorized by the Legislature to take compulsorily the land of another for a definite object will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing." That is one ground. The other ground is, that the corporation, having erected this subway without any authority, are in the position of trespassers and continuing trespassers on the soil of the plaintiffs. And for that reason, in accordance with the decision of this court in *Goodson* v. *Richardson*, 22 W. R. 237, L. R. 9 Ch. App. 221, the plaintiffs are entitled to the injunction which is sought. If the fact be that the subway has been erected without any statutory authority, it seems to me that relief may properly be given on both these grounds, and that the main question in the action really is whether or not this subway has been so improperly erected. Now, as regards the statutory authority, the matter stands thus: However useful it may be that in such frequented streets subways for the use of passengers should be made, the Legislature has not yet thought fit to confer that power on any corporate body having authority within this city. It has conferred by section 44 of the Public Health (London) Act, 1891, a power on every sanitary authority within the area which is governed by the Act to provide and maintain, amongst other things, public sanitary conveniences in situations where they deem the same to be required, and has provided that for the purpose of such provision the subsoil of any road shall be vested in the sanitary authority. And it is under this section of the Act, and under this alone, that the defendants, the Corporation of Westminster, justify what they have done. The corporation allege that it is within their power, under the section, not merely to determine the situation where this sanitary convenience is to be placed, but also the proper and reasonable mode of providing for the entrance and exit of the persons who use it. And they contend that they are not limited to making these entrances and exits simply by lifts or by stairs, but that they may, if they see fit, make proper approaches to the conveniences from the pavement to the place where it is situate in the roadway. I will assume that the contention is well founded, and then the question simply reduces itself to this: Was this subway constructed as an approach to the convenience, or was it constructed with an object that it might be used by the public for passing from one side of Parliament-street to the other? Now, upon that I come to the conclusion on the evidence that the latter was the real object with which the subway was constructed. I do not desire to go through the evidence, much of which has already been referred to by my lord. But I will state very briefly some of the—to my mind—striking passages of the evidence. I refer first of all to the minutes of the predecessors of the defendants—namely, the United Vestries of the Parishes of St. Margaret and St. John, Westminster, under the dates of the 29th of July, 1898, and the 27th of June, 1900, and to the minutes of the defendant corporation under date the 6th of December, 1900. I also refer, as my lord has already referred, to the two letters of the 20th of September, 1900, and the 14th of December, 1900. In addition to that I should like to read two short passages from the evidence of the defendants' witnesses. [His lordship did so, and continued:] Therefore it seems to me from its size, and from the statement of the chairman of the committee, it has actually been constructed in such a way as to be far more than an approach, and that it is not merely a reasonable and proper approach to the convenience which has been lawfully erected. Under these circumstances, I think that the plaintiffs are entitled to the injunction which they asked. But at the same time, as it is possible that the subway may be so altered as to make it a reasonable and proper approach to the convenience, I think that it is reasonable that the corporation should have an opportunity of making such alteration if they see fit to avail themselves of leave for that purpose. Therefore I quite agree in the form of judgment which is proposed.

COZENS-HARDY, L.J.—I am of same opinion, and I entirely agree with what has fallen from my lord, and Stirling, L.J., and I should not desire to add anything were it not for the fact that we are differing from the judgment of Joyce, J. Now, two things, I think, are quite clear here: first, that the corporation have no power at all to construct a subway, or at least, if they have power under some of their general Acts to incur the expense of constructing a subway, although no such statutory power has been called to our attention, they certainly have not any power to take the plaintiffs' land for the purpose of constructing a subway. I think it is equally clear that they have power under 44 section of the Act of 1891, to provide and maintain sanitary conveniences, and for the purpose of such provision to take and use that portion of the property of the plaintiffs which is under the road, exclusive of the footway. But those two propositions being quite clear, I think we must approach the consideration of this question having regard to the perfectly well established and extremely important jurisdiction which the Court of Chancery have exercised from the earliest days of railway legislation, and probably long before—the jurisdiction, I mean, to say, that public bodies authorized by Parliament to take certain land shall not be allowed to take that land except for the purpose authorized by Parliament. And if that doctrine is important in ordinary cases where compensation is provided for all land taken, it is specially obligatory on the court to have regard to it in a case where a public body is authorized to take another person's property without making any provision for his compensation.

In my view therefore, the question for our consideration is really this—with what purpose was this land of the plaintiffs taken? I think you cannot avoid considering that question first. The language of Lord Cranworth in *Stockton and Darlington Railway Co.* v. *Brown* was this: that although the railway company are the sole judges of what they require, and will take for their purposes, there is this proviso, "Provided only that they take them *bonâ fide* with the object of using them for the purposes authorized by the Legislature, and not for any sinister or collateral purpose."

Now, here I cannot bring myself to doubt what was the purpose for which this land was taken. My lord and Stirling, L.J., have both gone through the evidence, and it would be a waste of time for me to repeat it. I observe that Joyce, J., said, and this is no doubt the foundation of his judgment: "Their primary object was, in my opinion, the construction of the conveniences with requisite and proper means of approach thereto and exit therefrom." If I had come to that conclusion of fact, I think I should probably have agreed almost entirely with the judgment, but being unable to come to that conclusion of fact, having satisfied myself from the documentary evidence that the primary object was to construct a subway for facilitating the passage of passengers from one side of Parliament-street to the other, I come to the conclusion that the Westminster Corporation are now seeking to justify that which was a wrongful act, and saying that they might justify the taking not the whole, but a part of it, for a purpose

authorized by section 44 of the Act of 1891. I do not think that they ought to be allowed to do that. I feel very strongly that in every case in which a public body entrusted with the duties of performing a public work say that they have, in the exercise of their discretion, fixed upon a particular place and a particular mode, the court ought to be extremely slow to interfere with their discretion. But when they have not really been acting under the authority of the Act, when they have been doing something outside the parliamentary power, and have been governed by considerations of a different kind, and for a different purpose, the question of discretion seems to me to have no bearing whatever on the case.

For these reasons I agree with what has been said, and think that the injunction ought to be granted, qualified as my lord has said. I observe that in the court below, the learned judge finding as he did that the plaintiffs had succeeded in part and failed in part, gave no costs, but the plaintiffs must have the costs in the court below as well as the costs of the appeal.

[Their lordships granted an injunction, ordering the defendants to pull down the whole of the staircase railings and other works placed upon the plaintiff's land, other than the conveniences, and such further portion of the construction as the court might upon application sanction as a proper approach to the conveniences; and the operation of the order was suspended with liberty to apply to the court. Their lordships also acceded to an application that the injunction should be suspended for two months, to enable the defendants to decide whether they would appeal to the House of Lords, and, if they should appeal, the injunction was to be suspended pending the appeal.]

Appeal allowed.

Solicitors for the appellants, *C. de G. Andrewes.*

Solicitors for the respondents, *Allen & Son.*

High Court of Justice.

Chan. Div. }
Buckley, J. } April 23; May 7; June 4.

In re TAYLOR'S AGREEMENT TRUSTS. (a.)

Company—Winding up—Agreement for sale of letters patent by liquidator—No assignment—Dissolution of company— Bonâ vacantia*—Vesting order—Trustee Act,* 1893 (56 *&* 57 *Vict. c.* 53), *ss.* 25, 35 (1) (*ii.*) (c), 36.

The liquidators of a limited company in process of winding up contracted to sell certain letters patent to a purchaser. The purchase-money was paid, but, by inadvertence, the company was dissolved before the letters patent were assigned. A petition was presented asking for an order under the Trustee Act, 1893, *vesting the letters patent in the purchaser for all the estate of the company therein.*

Held, that the legal estate in the letters patent having vested in the Crown, the court had no jurisdiction to make such an order.

In re General Accident Assurance Corporation (Limited), ante, *p.* 332, [1904] 1 *Ch.* 147, *not followed.*

Petition.

Prior to the 28th of August, 1903, the Niger Patent Elastic Enamel Co. was the registered proprietor of letters patent for an invention. On that day the company passed a resolution for voluntary winding up, and two persons were appointed to be liquidators.

On the 16th of September, 1903, the liquidators entered into an agreement with the petitioner to sell the letters patent to him.

On the 23rd of November, 1903, the meeting of the company required by section 142 of the Companies Act, 1862, was held, and all the requirements of that section were complied with.

The return mentioned in section 143 having been subsequently made to the Registrar of Joint Stock Companies, the company, on the 24th of February, 1904, was dissolved.

No assignment of the letters patent having been executed, the purchaser presented a petition under sections 35 and 36 of the Trustee Act, 1893, and under section 90 of the Patents, Designs, and Trade-Marks Act, 1883, as amended by section 23 of the Patents, Designs, and Trade-Marks Act, 1888, for an order that the invention and letters patent might vest in the petitioner for all the estate of the company therein, and that the register of patents might be varied by substituting the name of the petitioner as the registered proprietor of the said patent for that of the company.

A. J. Walter, for the petitioner.—The company, having ceased to exist, is a trustee which "cannot be found," within the Trustee Act, 1893, s. 35. There is, accordingly, jurisdiction to make a vesting order, as was done by Farwell, J., in *In re General Accident Assurance Corporation* (*Limited*), *ante*, p. 332, [1904] 1 Ch. 147, where the facts were similar to those in the present case. It is possible that the legal estate may be in the Crown (*In re Higginson & Dean*, 47 W. R. 285, [1899] 1 Q. B. 325; *Pryce Jones* v. *Williams*, 50 W. R. 586, [1902] 2 Ch. 517), although in *In re General Accident Assurance Corporation* the petition was presented because the Crown was unable to admit that the legal estate was in it.

BUCKLEY, J., intimated that he was unable to follow *In re General Accident Assurance Corporation* (*Limited*), but allowed the petition to stand over to enable the Crown to be served.

This having been done,

May 7.—*A. J. Walter*, for the petitioner.—I must admit that the legal estate has vested in the Crown, and that a vesting order cannot be made against the Crown. The Comptroller of Patents has refused to enter the petitioner on the register in respect of these letters patent on the ground that he has not the legal estate. A new trustee might be appointed under section 28 of the Trustee Act, 1893, on the ground that no trustee exists.

R. J. Parker, for the Attorney-General.—While not admitting that under such circumstances the Crown is a trustee, in the present case it would be willing that a vesting order should be made. Under similar circumstances the comptroller has been advised to register the ownership of a trade-mark.

BUCKLEY, J.—In this case the liquidator of a limited company, which was being wound-up, agreed to sell a patent to the applicant, and the purchase-money was paid. The result was that the applicant obtained an equitable title to the patent, but by inadvertence no assignment was ever executed. After the necessary proceedings had taken place, the company was dissolved. In that state of facts a petition is presented to the court, asking, not for the appointment of a new trustee, but simply for a vesting order. The jurisdiction to make a vesting order arises under section 35 of the

(a.) Reported by H. L. ORMISTON, Esq., Barrister-at-Law.

Trustee Act, and the words upon which reliance is placed in the present instance are those in sub-sections (1) (ii.) (*c*), that a trustee "cannot be found." The context in which these words occur is this: "Where a trustee . . . (*a*) is an infant, (*b*) is out of the jurisdiction of the court, or (*c*) cannot be found." To my mind, the words "cannot be found" in that context mean that the trustee is somewhere, but that you do not know where he is; that if you knew where to look, you would be able to find him. That is to say, he is an existing person but you do not know where he is. I regret very much that I find myself unable to concur in the decision on that point at which I understand Farwell, J., arrived in *In re General Accident Assurance Corporation* (*Limited*). He is there reported to have said that a case exactly similar to the present, fell "within the provisions of the section." Now, I agree with that statement if its meaning is that if the Legislature during the passage of the Trustee Act had thought of this case, no doubt they would have provided for it. But I do not agree with it if it means that the case is provided for by the Act of Parliament as it stands; it seems to me to be reasonably clear, reading the Act, that the case was not thought of at all, and is not provided for. The fact, therefore, that this limited company, which was a trustee, has disappeared altogether, does not, in my opinion, satisfy the words that it "cannot be found." Further, when the company was dissolved the legal estate in the patent unquestionably, I think, became vested in the Crown. In other words, it is not a fact that I cannot find the trustee. I know exactly where he is—that is, if I may speak of the Crown as a trustee. But there is this further difficulty, that, although the legal estate is so vested in the Crown that it would be a trustee if such a thing were possible, yet the Crown cannot be a trustee. The Crown is entitled to say that, although it does in general give effect to a trust, yet it is not bound by it, and in that sense is not a trustee.

Then it has occurred to me that it might be possible for me to give leave to amend the petition by asking for the appointment of a new trustee, and thereupon for me to make a vesting order. That turns on section 25 of the Act, which enables me to appoint a new trustee although there is no existing trustee. Now in a sense those words are satisfied—that is to say, the company which has disappeared is not existing, and the Crown, in whom the legal estate is vested, is not, in a strict legal sense, a trustee at all. The Crown is existing, but is not a trustee, so that I may say that in a sense there is no existing trustee. I do not say that that is the case, because, of course, the Crown might become a trustee if it was so minded. But supposing that condition to be satisfied—that there is no existing trustee—could I even then appoint another trustee and make a vesting order as against the Crown? It is plain that I could not, for the Crown is not bound by the Act. Then Mr. Parker suggests, in order to get over the difficulty, which everybody desires to do, if it be possible, that the Attorney-General might consent to my making a vesting order and waive the right of the Crown. But could I even then make a vesting order? It seems to me that I could not. Mr. Parker's concession could only be that the Crown, although not bound by the Act, would not raise the point. Does that give me jurisdiction? Certainly not. I cannot enlarge the Act of Parliament. My powers remain where they were. If the Crown were minded to deal with the matter by assignment or in some other way, well and good; but I cannot make a vesting order.

Then there is this further difficulty, which seems to me formidable. Inasmuch as the Crown cannot be a grantee from itself, when the legal estate became vested in the Crown, what became of the patent? That goes to the existence of the subject-matter upon which I am asked to make a vesting order.

On all these grounds it seems to me that it is impossible on this petition to assist the petitioner, although I should wish to do so if I could, unless this course be possible, and it is said that is possible. It is perfectly obvious what are the applicant's rights. He is entitled to a patent unless the Crown is going to set up some claim of merger on the principles which I have stated. If the Crown does not set up such a claim, it may be possible for the comptroller to exercise his jurisdiction over the register by entering the applicant's name as the proprietor of this patent. If the comptroller will do so, if any technical impediments in the way are removed, that will resolve the difficulty, but that is for the comptroller, and not for me. I will not, therefore, dismiss the petition now, although I confess I do not see my way to make any order on it, but will allow it to stand over to see if anything can be done to get over the difficulty.

June 4.—*A. J. Walter*, for the petitioner.—The Board of Trade has advised the comptroller to enter the name of the petitioner on the register as proprietor of the patent; I ask, therefore, that the petition be dismissed.

BUCKLEY, J., dismissed the petition.

Solicitors, *A. M. Longhurst*, for *Mackay, Taylor, & Goffey*, Liverpool; *Solicitor to the Treasury.*

Chan. Div. Joyce, J. April 14, 16.

In re VENN.

LINDON *v.* INGRAM. (*a.*)

Will—Construction—Ambiguity—Codicil—Explanation by reference—Gift to a class—Common characteristic.

It is permissible to refer to a codicil to clear up an ambiguity in a will where the recital of the will in the codicil is not obviously erroneous.

Darley *v.* Martin, 13 *C. B.* 683, *and* Groves *v.* Raper, 5 *W. R.* 134, *followed.*

Originating summons by the trustees of the testatrix's will praying the determination of the question as to the persons entitled to the residuary estate after the death of the tenant for life.

By her will, dated the 18th of November, 1890, the testatrix, Sarah Venn, after providing for the payment of her debts and testamentary expenses and devising a certain pecuniary legacy, gave, devised, and bequeathed all the rest of her real and personal property to the trustees therein mentioned upon trust to sell and convert the same into money and pay the interest, dividends, and income thereof to the testatrix's niece, Emily Alice Ingram, for her life, and proceeded as follows: "And upon her decease I direct my said trustees to divide all my said trust estate equally between the brothers and sisters of the said Emily Alice Ingram living at her decease and Thomas William Gaze, Francis Thomas Brooker Gaze, and William Brand Parker in equal shares, and should either of them be dead leaving children such children are to take the share their deceased parent would have been entitled to if living."

On the 1st of June, 1893, the testatrix executed a codicil in the following terms: "Whereas in my will I have directed my residuary estate to be sold and the

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

proceeds divided between the persons therein named, now I desire my great-niece, Louisa Emilie Ingram, to have a share in my residuary estate equally with the others named in the said will, and I bequeath her the same accordingly. In all other respects I confirm the said will."

On the 7th of August, 1901, the testatrix died without having altered her will or codicil, which were duly proved on the 20th of September, 1901. There was no realty belonging to the testatrix.

On the 14th of May, 1902, the tenant for life, Emily Alice Ingram, died.

Francis Thomas Brooker Gaze died before the testatrix. Thomas William Gaze survived her, but died before the tenant for life. The tenant for life had living at her death one brother only and no sister. William Brand Parker survived her. Francis Thomas Brooker Gaze and Thomas William Gaze were half-brothers of the testatrix. William Brand Parker was not a relation.

The trustees took out an originating summons asking for the decision of the court as to the persons entitled to the residuary estate of the testatrix; whether the share of Francis Thomas Brooker Gaze devolved on the next-of-kin of the testatrix, or whether the estate were divisible between the other legatees named in the will and codicil, and whether the gift to Thomas William Gaze was contingent on his surviving the tenant for life.

W. J. Burt, for the trustees of the will and codicil.

J. G. Fawcus, for the surviving brother of the tenant for life.—One moiety of the estate is left to the brothers and sisters of the tenant for life, the remaining moiety is to be divided between persons named in the will and the testatrix's great-niece, Louisa Emilie Ingram, named in the codicil. If, however, it should be held that the whole estate is to be divided in equal shares, the estate of Thomas William Gaze is not entitled, for survival of the tenant for life is a condition of sharing as much in the case of the named legatees as in that of the brothers and sisters of the tenant for life.

R. M. Pattison, for the personal representative of Thomas William Gaze.—The estate is divisible equally among all who take, and not in moieties; the words used in the codicil make that clear. The condition as to surviving the tenant for life is confined to class—namely, brothers and sisters of the tenant for life.

G. S. Alexander, for William Brand Parker.—I support the contention that Thomas William Gaze's estate cannot share, as he did not survive the tenant for life. The bequest to Francis Thomas Brooker Gaze was given to him as one of a class, and therefore does not lapse, as a gift to a class—*i.e.*, a number of persons indicated by a general description, and to a named individual equally is *primâ facie* a gift to a class: *In re Moss, Kingsbury* v. *Walter*, 47 W. R. 642 (Romer, L.J., p.644), [1899] 2 Ch. 314. The House of Lords, in that case, affirmed the decision of the Court of Appeal (1901, A. C. 187), and though Lord Davey disapproved of this judgment of Romer, L.J., yet his disapproval can only be taken as a *dictum*, as that part of the case was not argued.

Fawcus replied.

JOYCE, J.—The question in this case is as to the mode in which the residuary estate of the testatrix is to be distributed among the persons named or referred to in her will and first codicil. [His lordship read the will and codicil, and continued:] Various difficulties have arisen. The first question is, whether the trust estate is to be divided in moieties, one moiety going to the surviving brothers and sisters of the tenant for life and the other moiety to the persons particularly named in the will, together with the great-niece named in the codicil; or whether it is divisible in equal shares between all those persons. Taking the will alone, I think the true construction thereof is that the division is not to be in moieties, but equally between all entitled. I admit, however, that on the will alone there is an ambiguity as to this, and that it is well arguable that the testatrix intended the division to be in moieties. If, however, I may refer to the first codicil to clear up the ambiguity, there is no doubt but that the estate is to be divided equally among all the beneficiaires. If there were an obviously erroneous recital of the will in the codicil that would not alter the construction of the will (see *Skerratt* v. *Oakley*, 7 T. R. 492, 4 R. R. 584); but if the recital in the codicil be not obviously erroneous, I have no doubt that I may refer to the codicil to clear up an ambiguity in the will. The principal authority for this is *Darley* v. *Martin*, 13 C. B. 683. There Jervis, C.J., in delivering the considered judgment of the Court of Common Pleas, says, at p. 690: "And, as to the effect of the codicil, it was argued that an erroneous reference in a codicil to the disposition of the will cannot constitute a new bequest in opposition to the will; and *Skerratt* v. *Oakley* was relied on. But it appears to us that the argument with respect to the effect of the codicil, when rightly considered, is not that the will is at all revoked or varied by the codicil; but, rather that, the will and codicil being *all one* testament, the language of the will may be interpreted by that of the codicil; and that, accordingly, the gift over in the will, in default of such issue, being capable of importing a bequest over on failure of issue living at the death, it ought to be inferred that the testator employed it in that sense, because in the codicil he refers to it as if it were a gift over in default of his daughter having no issue, which, as regards personalty, is tantamount to a gift on failure of issue living at her death. The argument, thus viewed, appears to us to be well founded." But the authorities do not rest there, for Kindersley, V.C., than whom a more careful or accurate judge never existed, did the same thing in *Groves* v. *Raper*, 5 W. R. 134. In that case there was an ambiguity in the words of the will, and the Vice-Chancellor, after expressing the inclination of his opinion as to the meaning of the will, said that the codicil, however, put the matter beyond all doubt. I think, therefore, that, following the considered judgment of the Court of Common Pleas in *Darley* v. *Martin* and this decision of Kindersley, V.C., I may have recourse to the codicil to clear up the ambiguity in the will; and I hold, therefore, that the testatrix's residuary estate is divisible in equal shares among all who take.

One of the persons particularly named, Francis Thomas Brooker Gaze, died after the testatrix, but in the lifetime of the tenant for life. It is contended that his representatives are not entitled to share, on the ground that on the true construction of the will the gift is contingent on his surviving the tenant for life. There is not a word in the will to that effect, though no doubt the testatrix uses the expression "would have been entitled to." This, however, is not enough for the purpose, especially as the supposed gift over would, in my opinion, apply equally in case of death in the lifetime of the testatrix. I therefore hold that Francis Thomas Brooker Gaze's representatives are entitled to a share. Then another point arises. Thomas William Gaze died in the lifetime of the testatrix, and I have to determine what becomes of his share. Does it lapse to the next-of-kin, or does it pass to the other legatees? Having carefully read

and considered the judgment of the House of Lords in *Kingsbury* v. *Walter*, I am of opinion that the gift in question here cannot be construed as a class gift. The persons to take have no common quality or characteristic except that of being residuary legatees. I therefore hold that Thomas William Gaze's share has lapsed to the testatrix's next-of-kin.

Solicitors, *Lewis & Sons; Mason & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy and Channell, JJ.) March 4.

TOUGH (*Appellant*) v. HOPKINS (*Respondent*). (*a.*)

Local government—Metropolis—Nuisance—Funnel of steam-tug sending forth black smoke—Chimney—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 5, *sub-sections* 4, 5; *s.* 24, *sub-section* (b).

The funnel of a steam-tug is a "chimney" within the meaning of the Public Health (London), Act, 1891, *section* 24 (b) *of which provides that "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance" is a nuisance liable to be dealt with summarily under that Act.*

Case stated by an alderman of the City of London sitting at the Mansion House.

An information was preferred by the respondent under section 24 of the Public Health (London) Act, 1891, for that on the 24th of August, 1903, between Customs House and Southwark Bridge on the north side of the River Thames, in the City of London, and within the Port of London, upon a certain vessel—to wit, the steamship *Richmond*, a nuisance existed—namely, a chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be nuisance, and that the appellant, being the owner of the vessel, had made default in complying with the requisitions of a notice dated the 25th of April, 1903, served upon him under section 24 of the Public Health (London) Act, 1891, requiring him to abate the nuisance and to execute such works and do such things as might be necessary for that purpose.

On the hearing of the information the following facts were proved or admitted by the appellant.

The appellant was the owner of a steam-tug known as *The Richmond*.

On the 25th of April, 1903, a notice was served upon him at the instance of the Port Sanitary Authority of the City of London requiring him within forty-eight hours from the service of the notice to abate a nuisance on the steam-tug arising from a chimney—to wit, the funnel of the boiler furnace on the tug (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance.

On the 24th of August, 1903, the steam-tug was towing six barges and was proceeding from below the Custom House to Southwark Bridge and beyond, within the jurisdiction of the Port Sanitary Authority, and while the steam-tug was proceeding between the Custom House and Southwark Bridge there was being sent forth from the funnel thereof dense black smoke for the space of five minutes in such quantity as to be a nuisance.

The steam-tug was then being navigated by a master engineer and crew employed by the appellant, who was not on board, and who had no personal knowledge of such emission of black smoke.

The steam-tug did not stop or lie up at any point of the said voyage.

The engines and boilers on board the steam-tug were of modern construction and of the best-known type of marine engines and boilers, and were constructed so as to consume, as far as possible, all the smoke caused therein, having regard to the funnel being a short one, and adapted for passing under bridges at high-water level by hinging backwards nearly to deck level.

The appellant had given strict instructions to his servants to prevent, as far as possible, the production of black smoke on the steam-tug, and good Welsh steam coal procured by the appellant was burnt on board, and the furnaces of the tug had been freshly stoked with such coal at about opposite the Custom House on the 24th of August, and from three to four minutes was not an unreasonable time to allow the fresh fuel to cease emitting black smoke on such a vessel.

The emission of smoke from the funnel of the tug could have been prevented by the fire being kept bright by frequent and careful stoking.

Upon the above facts it was contended by the appellant: That section 24 of the Public Health (London) Act, 1891, was inapplicable to a steam-tug such as *The Richmond* while plying to and fro on the River Thames, and that proceedings in respect of smoke from vessels plying on the River Thames can only be taken under the provisions of section 23 of that Act.

On behalf of the respondent it was contended that the funnel of the steam-tug was a "chimney" within the meaning of that expression in section 24 (*b*).

The alderman found as a fact that the funnel of the steam-tug was a chimney within the meaning of section 24, and that black smoke had been sent forth from it in such quantities as to be a nuisance at the place and time and on the day mentioned in the information. He also found as a fact that no works that could be ordered would cure the alleged nuisance, but that it was a question of stoking with proper fuel, and that if a bright fire were kept up by frequent and careful stoking the nuisance could be prevented.

He was of opinion that the information had been properly laid under section 24 (*b*) of the Public Health (London) Act, 1891, and that the appellant was a person by whose default or sufferance the nuisance arose, and he convicted the appellant and made an order upon him prohibiting the recurrence of the nuisance.

The questions for the opinion of the court were whether the alderman was right in law in convicting the appellant, and whether the prohibition order made upon him under the above circumstances was a good and valid order under the Public Health (London) Act, 1891, s. 5, sub-sections 4 and 5.

J. A. Hamilton, K.C. (*Bigham* with him), for the appellant.—The conviction was wrong. Section 24 does not apply to the funnel of a steam-tug; it refers only to chimneys in the ordinary sense. If the word "chimney" in section 24 (*b*) included the funnel of a steamship there would be no need for sub-section 3 of section 23, which specially deals with nuisances arising from smoke being emitted from the furnaces of steam vessels plying on the River Thames.

Danckwerts, K.C. (*R. C. Glen* with him), for the respondent.

Lord ALVERSTONE, L.C.J.—I think the alderman's decision was right. I agree that the order of the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Local Government Board of the 25th of March, 1892, has not increased the responsibility of persons who own tugs in respect of nuisances from tugs or ships. It merely provided that the port sanitary authority was to take such proceedings as could be taken under the Act in respect of "ships, vessels, boats, waters, or persons within their jurisdiction . . . ," and it includes section 24. The mere inclusion of section 24 in that order would not increase the responsibility if section 24 did not apply to the chimney or funnel of a steam-tug plying on the Thames. The point has admitted of argument, and there is some ground for thinking at the first glance that the reading of section 24 would indicate that it was intended to apply to chimneys on land in the ordinary sense of the word; but when we look at the object of the legislation and at certain expressions in section 24 itself, I think any such construction would be too narrow. It is, as far as this part of the section is concerned, essentially what may be called a black smoke section—that is to say, it is a section which provides that "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance" shall be a nuisance liable to be dealt with summarily. Section 23, the previous section, has undoubtedly dealt specifically with the steam engines and furnaces used in the working of steam vessels which were being worked in the district where this tug was being worked. It provided in sub-section 3 that they "shall be constructed so as to consume or burn the smoke arising from such engine and furnace; and if any such steam engine or furnace is not so constructed, or being so constructed is wilfully or negligently used so that the smoke arising therefrom is not effectually consumed or burnt, the owner or master of such vessel shall be liable to a fine not exceeding five pounds, and on a second conviction to a fine of ten pounds." Then sub-section 4 says: "Provided that in this section the words 'consume or burn the smoke' shall not be held in all cases to mean 'consume or burn all the smoke,' and the court hearing an information against a person may remit the fine if of opinion that such person has so constructed his furnace as to consume or burn, as far as possible, all the smoke arising from such furnace, and has carefully attended to the same, and consumed or burnt, as far as possible, the smoke arising from such furnace." Those two sub-sections show that there are special provisions with regard to the construction of furnaces and engines upon the steamers, and the non-negligent user of them, but it is to be observed that there is a corresponding provision with regard to furnaces upon land, because sub-section 1 of section 23 also provides that the furnaces employed in the working of engines by steam and a number of other furnaces, all on land "shall be constructed so as to consume or burn the smoke arising from such furnace," and then follows a corresponding provision with regard to non-negligent user. Therefore we have, in section 23, with regard to both furnaces on land and furnaces on ships, a provision as to the proper construction of engines and furnaces and their non-negligent user. Then we come to section 24, which is unquestionably a nuisance section. I think it is not without importance that it immediately follows section 23, and is under the same heading, "Smoke Consumption." If the words to which I am about to refer can fairly apply to a chimney on board a steamship there is no reason why the section should not apply. Section 24, sub-section 1, says: "Any fireplace or furnace which does not so far as practicable consume the smoke" shall be a nuisance liable to be dealt with summarily. Then comes the important clause: "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance" shall be a nuisance liable to be dealt with summarily. I think that that sub-section, quite apart from negligence, is meant to deal with the case which has not been covered by the previous sub-section, of a chimney other than that of a dwelling-house sending forth black smoke. We have had our attention directed to the other legislation of a similar character with regard to railway engines and with regard to traction engines, and there does not seem to be any black smoke nuisance section in any of them. Therefore one would rather assume that this legislation is something which may be said to be additional protection and to be superadded to the legislation with regard to construction, and unless the words "any chimney (not being the chimney of a private dwelling-house)" are sufficiently strong to show that a steamship would not be included, I think both the purview of this section and the object of the legislation would point to black smoke being emitted from the chimney or funnel of a steamer within the port, as constituting an offence.

It is quite obvious there may be cases in which the black smoke would come from a chimney which would not ordinarily be called a funnel. I do not think that any argument can be based upon the fact that the word "chimney" is used, because the word "funnel" is a technical and almost secondary meaning for that kind of chimney. I cannot see any reason why emission of black smoke from steamers plying on the Thames should not be prevented as much as the emitting of black smoke from chimneys on land. I therefore come to the conclusion that section 23 does not contain the whole code with regard to nuisance arising from steamships or smoke coming from steamboats. The language of section 24 is not enough to enable us to hold that it does not include the chimney of a steamship. Therefore I think this conviction was right.

KENNEDY, J.—I am of the same opinion. To my mind the only point which is not wholly free from difficulty is the question as to whether the words in section 24, sub-section (*b*), "Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance" include the funnel of a tug-boat or steamer. Usually, no doubt, "chimney" is a word applicable to that through which smoke passes from a fire of some sort in a building. It is not the term which is technically the proper term to describe those passages or funnels on a steamboat which convey the smoke from the furnace of the steamer to the upper air, but I see nothing to prevent the word "chimney" being here used in what one may call its natural sense—namely, that of being a passage by which smoke from a fire is carried upwards. Otherwise you would have no "black smoke section," as my lord has described it shortly, with regard to the description of thing which may send out smoke in quite as great a nuisance, as what may be more usually described by the word "chimney"—namely, the smoke passage from the roof of a building. There is no definition clause relating to the word "chimney" in this Act, as far as I know, and certainly one would have expected it to have been referred to if there was one. We have not heard that the word "chimney" is anywhere defined, and if it is not defined, it seems to me naturally enough intended to cover here that which it may cover in a popular, though not in a technical, sense.

CHANNELL, J.—I agree. I think the word "chimney" in this section is used simply as the

thing from which smoke does issue into the outer air. It might quite well be that the funnels of steam vessels, or funnels of locomotive engines, or other movable smoke-producing apparatus might be so dealt with elsewhere in the Act as to lead one to come to the conclusion that they were not intended to be included in these general words in section 24 (*b*), but in fact the operation of section 24 is only to apply the particular summary procedure to certain cases of smoke nuisance.

The result seems to me that sections 23 and 24 are dealing, not with different subject-matters, but with different consequences of the same subject-matter, and there is no reason, therefore, because steam vessels are specifically dealt with under section 23, to say that they cannot come under section 24. I see no reason for cutting down what seems to me the primary meaning of the word "chimney" in section 24.

Appeal dismissed with costs.

Solicitor for appellant, *John A. Roberts.*

Solicitor for respondent, *The City Solicitor.*

K. B. Div. (Phillimore, J.) } Feb. 27; March 4.

BARRETT & SONS (LIMITED) *v.* DAVIES.
SAME *v.* WITHERS. (*a.*)

*Limitations, Statute of—Acknowledgment of debt—Conditional promise to pay—Implied promise to pay—*21 *Jac.* 1, *c.* 16—*Lord Tenterden's Act,* 1828 (9 *Geo.* 4, *c.* 14).

In an action by a creditor to recover money lent the debtor pleaded, in his defence, that the claim was barred by the Statute of Limitations. The debtor, however, before the expiration of six years after the debt was incurred wrote the following letter: "I am willing to sell the 5,230 *shares that I hold . . . for the sum of* £816 4*s.* 6*d., and in the event of my doing so I will with the money pay the ten-shilling call on* 629 *of the above shares, amounting to* £314 10*s., and the balance in settlement of my account with R. Barrett & Son (Limited),"* the creditor, *"amounting at the* 31*st of December last to* £501 14*s.* 6*d."*

Held, that this was a sufficient acknowledgment of the debt to take the case out of the statute, as the letter was a general acknowledgment of the debt with a conditional promise to pay, but without any distinct statement that except upon the performance of the condition the debtor would not or could not pay, and that therefore there was an implied promise to pay the debt.

These two actions were tried before Phillimore, J., without a jury, under order 14.

The claim in both cases was for money lent, and the defence was that both claims were barred by the Statute of Limitations.

The facts and arguments of counsel are sufficiently set out in the written judgment of the learned judge.

Compston, for the plaintiffs.

Lush, K.C. (*W. S. Shaw* with him), for the defendants.

Cur. adv. vult.

March 4.—PHILLIMORE, J., read the following judgments: In the first action the plaintiff company sues for £557 15*s.* 3*d.*, money lent and interest; in the second action for £418 3*s.*, money lent and interest. In each case the defence is the Statute of Limitations. Taking the case against Davies first, the last loan was made by the plaintiff company on the 11th of February, 1897, and the writ was not issued until the 27th of January, 1904. The only acknowledgment on which reliance is placed to take the case out of the statute is a letter dated the 13th of March, 1901, which came into being in the following circumstances: Just before the 31st of December, 1900, an account was rendered by the plaintiff company to the defendant showing the total then due from him £501 14*s.* 6*d.*, of which £87 4*s.* 6*d.* was for interest. This account was accompanied by a letter written on the company's paper signed "C. A. Barrett, managing director," in which Mr. Barrett says that he encloses the company's account, and that if Mr. Davies could not arrange to pay the whole at the end of the year he must ask him at least to pay the interest. It is agreed that after this there was a meeting between Mr. Barrett and Mr. Davies which resulted in Mr. Davies writing the letter of the 13th of March, 1901. The letter was as follows: "Dear Sir,—I beg to confirm our conversation of yesterday—viz., that I am willing to sell the 5.230 shares that I hold in the Preston Davies Ball Bearings Co. (Limited) for the sum of £816 4*s.* 6*d.*, and in the event of my doing so I will with the money pay the 10*s.* call due on 629 of the above shares amounting to £314 10*s.*, and the balance in settlement of my account with R. Barrett & Son (Limited), amounting at the 31st of December last to £501 14*s.* 6*d.*—Yours faithfully, PRESTON DAVIES." It was suggested that this letter was not an acknowledgment made to the plaintiff company, and that it might arise out of some private transactions with Mr. Barrett. I do not think there is any force in this. Barrett was managing director; he had written on behalf of the company; the letter is addressed to him at the premises which happen to be the company's office, and I was told that the plaintiff company had an interest in the Preston Davies Ball Bearings Co. (Limited) which would connect them with the proposal to reconstruct this latter company and with the advantages to be gained by such reconstruction. The transaction fell through. There was no quotation for the Preston Davies Ball Bearings shares on the Stock Exchange. These are apparently all the facts.

It has been decided upon the construction of Lord Tenterden's Act (9 Geo. 4, c. 14) that an acknowledgment of a debt is not enough; that there must be a promise to pay. I agree with what Bramwell, L.J., says in *Meyerhoff* v. *Froehlich,* 27 W. R. 258, 4 C. P. D., at p. 64, and I think it difficult to see why an acknowledgment in writing has not of itself been held sufficient compliance with the statute. But it has certainly been decided not to be of itself sufficient. The next steps are plain. From a general acknowledgment without more it is proper to infer a promise to pay: (see *Gardner* v. *McMahon,* 3 Q. B. 561; *Mitchell's claim,* 19 W. R. 1130, L. R. 6 Ch. 822; *Skeet* v. *Lindsay,* 25 W. R. 322, 2 Ex. D. 314. From an acknowledgment coupled with a promise to pay upon condition, and declaring inability or unwillingness to pay except upon this condition, no general promise can be inferred, and the acknowledgment does not operate unless the condition is satisfied: (see *Tanner* v. *Smart,* 6 B. & C. 603; *Smith* v. *Thorne,* 18 Q. B. 134; *Mitchell's claim*; *Meyerhoff* v. *Froehlich,* and many other cases. This, however, still leaves some of the ground uncovered. There are cases in which the reference to a particular source of payment has been held to point to that source as a primary one, but not as the only one; and, as the acknowledgment stands as a general promise to pay, with a suggestion

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

only that the payment may be made out of a particular fund. Lastly, there may be a case where there is a general acknowledgment of the debt with a conditional promise to pay, but without any distinct statement that except upon the performance of the condition the debtor will not or cannot pay. That, I think, is this case; and I do not think that it is covered by authority. There are no doubt cases, such as *In re Bethell*, 35 W. R. 330, 34 Ch. D. 561, and *Meyerhoff* v. *Froehlich*, already referred to, where the statement that the debtor will not or cannot pay except upon condition is not put forward in precise words, and yet the acknowledgment has been held insufficient. But in these cases the whole tenor of the language was such as distinctly to negative any prospect of payment unless the condition was fulfilled. In the case before me I have a distinct acknowledgment of the debt coupled with a promise to pay it upon a particular condition happening and silence as to what is to occur if this condition does not happen. Arguments can be adduced on either side. For the debtor it will be said *expressum facit cessare tacitum*, where there is an express promise no other promise can be implied—or, to put it in another way, the express promise cannot be enlarged by implication. For the creditor it could be urged that, if an acknowledgment of a debt implies a promise to pay, there is no reason, in the absence of negative words, for cutting down that promise; that the further promise to pay upon the happening of a particular condition is at worst surplusage, and should in this case rather be treated as explanatory. It might be said that the object of the debtor when he wrote the letter of the 13th of March, 1901, was to secure himself from being pressed for payment during such reasonable time as he would require to realize the shares, and that in order to secure his practical immunity—I do not say his legal immunity—for that period he indicated that he would pay as soon as he realized, while by a separate admission he kept alive the debt, which was not at that time statute-barred. Upon the whole I think that the creditor is right, and that there must be judgment for the plaintiff company.

I must not forget to notice the further contention put forward on behalf of the plaintiff company that the letter of the 13th of March, 1901, gave a fresh cause of action upon an account stated, which would run for six years from that date. If this were so, every admission of debt with a conditional promise to pay would be an account stated and would take the case out of the statute; and this is certainly not so. The defendant was not intending to agree to an account; he was, I think, intending to acknowledge the debt, and therefore I have inferred a promise to pay; but the case for the plaintiff company is not made really stronger by substituting the words "account stated" for "acknowledgment."

In the action against Withers the plaintiff company has tried to strengthen the case by two letters written by the defendant on the 31st of December, 1900, and the 20th of December, 1902. I do not think that these letters add strength to the plaintiffs' case. Both are promises to pay when things get better, coupled with positive statements of inability to pay until things are better. *Meyerhoff* v. *Froehlich* shows that such letters do not keep the debt alive. The case, therefore, against Withers is no stronger than the case against Davies, but it is equally strong. I give judgment for the plaintiffs in both actions, with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs, *Edmonds & Co.*

Solicitor for defendants, *Alfred Withers.*

IN BANKRUPTCY.

K. B. Div. (Bigham, J.) — June 6.

In re ROWE.

Ex parte WEST COAST GOLD FIELDS (LIMITED) (a.)

Bankruptcy—Proof—Amendment—Omission to value security—Inadvertence—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Schedule I., r.* 10; *Schedule II., rr.* 13, 14.

A limited company presented a proof against a bankrupt's estate for calls on partly-paid shares, stating that the company held no security for their debt. After the proof had been admitted the company altered its articles of association so as to give itself a lien for calls upon fully-paid shares, a large number of which had been held by the bankrupt and were still held by his trustee. The company applied for leave to amend their proof by inserting such lien upon the fully-paid shares as security for the debt and valuing the same.

Held, that the company had not omitted to value their security through inadvertence and could not be allowed to amend their proof and rely on their security, which they must be deemed to have surrendered to the trustee.

Motion by the West Coast Gold Fields Co. (Limited), creditors, for leave to amend their proof by inserting and valuing certain securities therein, or to withdraw their proof and substitute a fresh proof.

A receiving order was made against Rowe early in January, 1903. At that date he possessed 3,588 fully-paid shares in the creditor company, and 1,800 shares shares upon which ten shillings only had been paid.

On the 26th of January, 1903, the company presented a proof claiming £90 for calls already made on the 1,800 shares, and £810 in respect of future calls, and stating that they held no security whatever for their debt. This proof was admitted to rank for dividend at £819, and the company had received a dividend upon it. Early in 1904 it was decided to wind up the company voluntarily, and it appeared that there would be a surplus of two shillings per share after the payment of all liabilities. Upon the 2nd of March the company passed a resolution altering the articles of association so as to give themselves a lien on fully-paid shares. On 31st of April the company passed a resolution for voluntary winding up. Subsequently the present notice of motion was served, asking for leave to amend the proof by inserting the 3,588 fully-paid shares held by the trustee, and claiming a lien upon them for the calls due upon the 1,800 partly-paid shares, or to withdraw the proof and substitute a fresh one.

Reed, K.C., and *Tindale Davies*, for the motion.—Unless the company be allowed to amend and rely upon their security the trustee will get about £350 in respect of the fully-paid shares while the company will only get a dividend of 3s. in the £1 on their admitted proof for £819, which will only amount to about £100. The company have power to alter their articles so as to extend their lien to fully-paid shares, and to give a retrospective effect to such alteration: *Allen* v. *Gold Reefs of West Africa* (*Limited*), 48 W. R. 452, [1900] 1 Ch. 656.

P. M. Francke (*Muir Mackenzie* with him), for the trustee.—There is no debt due to the company over which they can claim a lien. They proved in the bankruptcy, their proof was admitted, and their debt must be held to be satisfied: *Stammers* v. *Elliott*, 8 W. R. 489, 3 Ch. App. 195. [BIGHAM, J.—But have they not the right to amend their proof?] No.

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

rule 10 of Schedule I. of the Bankruptcy Act, 1883, a creditor who votes in respect of his whole debt is deemed to have surrendered his security unless the court is satisfied that the omission to value the security was due to inadvertence. Here it cannot be said that there was "inadvertence" within the definition in the cases on that rule: see *In re Safety Explosives (Limited)*, *ante*, p. 470, [1904] 1 Ch. 226. [He was stopped by the court.]

Reed, K.C., replied.

BIGHAM, J.—I am not disposed to allow this amendment. At the time they presented their proof the company knew, or must be taken to have known, that there was the possibility of acquiring this security by the alteration of their articles by such a resolution as they subsequently passed; and if they had wished to claim that security, or value it, they ought to have mentioned it in their proof. It may be that they might have valued it inaccurately, but if they had done so, they could afterwards have applied for leave to amend their valuation. If they had passed their resolution first, and then made this proof and set up their security, probably in that case also they might have amended their valuation. I have come to the conclusion that they elected to omit all reference to this security in their proof, and by their own act they have since altered the position of matters. In my opinion it is not a case of inadvertence, and this application must be dismissed with costs.

Application dismissed.

Solicitor for the applicant, *R. F. Yeo.*

Solicitors for the trustee, *Morley & Shirreff.*

House of Lords.

From C. A. (England). March 10.

SARAGOSSA AND MEDITERRANEAN RAILWAY v. COLLINGHAM AND OTHERS. (a.)

Practice—Compromise—Power to bind absent parties—Time-limit for absent parties to come in—R. S. C., 1883, *ord.* 16, *r.* 9a.

In an action brought by certain bond-holders of a railway company against their trustees and the company claiming the enforcement of the trusts under which the moneys subscribed in respect of the bonds were held, the court in 1894 *sanctioned a scheme for compromise under which all the bond-holders were to receive a certain sum in respect of each bond. The scheme was sanctioned by the Court of Appeal, and, under ord.* 16, *r.* 9a, *made binding on all the bond-holders of the company. A small minority of bond-holders failed to claim their rights within six years from the sanctioning of the compromise, and the railway company applied for an order limiting the time within which the outstanding bond-holders must accept the scheme or be excluded therefrom.*

Held, that the court had jurisdiction to make such an order.

Decision of the Court of Appeal (sub nom. Collingham *v.* Sloper, 49 *W. R.* 404, [1901] 1 *Ch.* 769) *reversed.*

Appeal from an order of the Court of Appeal (Rigby and Stirling, L.JJ., Vaughan Williams, L.J., dissenting).

The Court of Appeal had in 1894 sanctioned a scheme for the compromise of three actions by which a sum of money was appropriated for distribution among the bond-holders, and £2 10s. for each bond to be paid to the holders who should accept the scheme and come in. About 60,000 out of 61,000 bond-holders had come in under the scheme, and an application was made on behalf of the appellant company to fix a time within which those who had not accepted the scheme or could not be found should be excluded. The Court of Appeal refused to make the order.

The case is stated at some length in the court below.

Upjohn, K.C., and *Martelli*, for the appellants.

Butcher, K.C., and *A. F. Peterson*, for the respondents.

THE HOUSE gave informal judgment, but expressed their dissent from the views of the majority of the Court of Appeal, and directed that the case should stand over that an order might be drawn up.

On the 10th of March

Earl of HALSBURY, L.C., moved the following order: Order of the Court of Appeal discharged, and, in lieu thereof, cause remitted to the Chancery Division, with directions to order that, the railway company undertaking not to dispute the right of the holders of the outstanding bonds or obligations to a valid charge on the property of the railway, a period of six months' time be limited within which the holders of the first mortgage bonds or obligations issued by the said defendant company should come in under the provisions of the scheme sanctioned by the order of the Court of Appeal dated the 9th of August, 1894, and accept the sum of £2 10s per obligation under the provisions of that scheme, and that the holders of such bonds or obligations who do not come in under the provisions of the said scheme and accept the said sum of £2 10s. per obligation in pursuance thereof within the time so limited, be deemed to have elected not to take the benefit of the said scheme, but to rely on the charge on the railway property comprised in, or charged by, the said obligations, and the trust deed dated the 6th of October, 1887, for securing the same, and that such holders be excluded from the benefit of the said scheme, and the judgment dated the 27th of January, 1893, and the said order dated the 9th of August, 1894; and that the said order be advertised forthwith in such form and in such newspapers as the master may approve. The costs of the appellants and the respondents incurred in respect of the appeal to this House to be paid out of the fund in court standing to the credit of certain actions.

Solicitors, *Francis & Johnson; Petch & Co.*

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) July 1

BATEMAN v. HUNT. (a.)

Mortgage—Assignment—Mortgage debt—Assignment by way of sub-mortgage—Notice of assignment given by executors of sub-mortgagee—Validity of notice—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6—*Mortgage by client to solicitor—Receipt for sum exceeding actual advance—Right of assignee to rely on*

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

receipt—Constructive notice—Conveyancing Act, 1882 (45 & 46 *Vict. c.* 39), *s.* 3, *sub-section* 1.

The defendants, who were clients of H., a solicitor, executed a mortgage deed in favour of L., who was a clerk in the service of H., to secure £9,200, the receipt of which sum they thereby acknowledged. L. assigned the mortgage debt and security to H., and H. by way of sub-mortgage assigned the debt and security to E., who was also a client of his, to secure an advance of £6,000. Neither H. nor E. gave the defendants notice of either assignment. After the death of E. his executors gave notice in writing to the defendants of both the assignments, and brought an action on the covenant for repayment contained in the original mortgage.

Held, that the notice given by the plaintiffs to the defendants was good notice under section 25, *sub-section* 6, *of the Judicature Act*, 1873; *and that, even if a less sum than £9,200 had actually been advanced to the defendants, the plaintiffs were entitled to rely on the statement by the defendants in the original mortgage that they had received that sum in full.*

Bickerton *v.* Walker, 34 *W. R.* 141, 31 *Ch. D.* 151, *followed.*

Appeal from the judgment of Grantham, J., at the trial of an action without a jury.

The plaintiffs, as the legal personal representatives of Thomas Cannock Elliott, deceased, sued the defendants on a covenant for payment of £9,200 contained in a mortgage granted by the defendants to one Thomas Charles Line, which mortgage the plaintiffs alleged to have been duly transferred to their testator.

The plaintiffs made out their title by the following documents:

By an indenture dated the 1st of July, 1898, and made between the defend ants, thereinafter called the mortgagors, of the on e part, and Thomas Charles Line, described as of Chiswick, in the county of Middlesex, gentleman, thereinafter called the mortgagee, of the other part, after reciting, amongst other things, that the mortgagee had agreed to lend to the mortgagors on joint account the sum of £9,200 upon having the repayment thereof, with interest, secured in manner thereinafter appearing, it was witnessed that, in pursuance of the said agreement and in consideration of the sum of £9,200 then paid by the mortgagee to the mortgagors (the receipt whereof the mortgagors thereby acknowledged), the mortgagors jointly and severally covenanted with the mortgagee to pay to him in September then next the sum of £9,200, with interest thereon in the meantime at the rate of £4 10*s.* per cent. per annum from the date thereof; and the mortgagors thereby granted and assigned to the mortgagee certain property therein particularly described, subject to a power of redemption therein contained.

By an indenture dated the 1st of January, 1899, between Thomas Charles Line, described as of Chiswick, in the county of Middlesex, gentleman, thereinafter called the transferor, of the one part, and Cartmell Harrison, described as of 67, Lincoln's-inn-fields, in the county of London, esquire, thereinafter called the transferee, of the other part, after reciting that the indenture was supplemental to the said indenture of the 1st of July, 1898, and that the principal sum of £9,200 was still owing to the transferor on the security of the said principal with current interest, and the transferee had agreed to pay to the transferor the sum of £9,200 upon having such transfer as thereinafter expressed of the said principal sum of £9,200 and the interest to grow due thereon and the securities for the same, it was witnessed that, in pursuance of the said agreement, and in consideration of the sum of £9,200 paid to the transferor by the transferee (the receipt whereof the transferor thereby acknowledged), the transferor as mortgagee thereby assigned unto the transferee all that the principal sum of £9,200 then owing on the security of the principal indenture and the interest thenceforth to become due for the same and the full benefit of and the right to exercise and enforce all powers and securities for compelling payment of the said sum and interest, to have and receive the same unto the transferee absolutely; and transferor thereby granted and assigned to the transferee all the property granted by the principal indenture subject to the right of redemption subsisting therein under the principal indenture.

By an indenture dated the 4th of January, 1899, and made between Cartmell Harrison, of 67, Lincoln's-inn-fields, in the county of London, Esquire, thereinafter called the mortgagor, of the one part, and Thomas Cannock Elliott, thereinafter called the mortgagee, of the other part, after reciting that this indenture was supplemental to the following indentures:—viz., (*a*) the principal indenture dated the 1st of July, 1898, being a mortgage to secure the repayment of the principal sum of £9,200 and interest; and (*b*) an indenture dated the 1st of January, 1899, and made between the said Thomas Charles Line, of the one part, and the mortgagor of the other part, being a transfer of the said morgage debt and the securities for the same; and that the principal sum of £9,200 still remained owing to the mortgagor on the security of the principal indenture, and that the mortgagee had agreed to lend to the mortgagor the sum of £6,000 upon the security as hereinafter mentioned; it was witnessed that in consideration of the sum of £6,000 paid to the mortgagor by the mortgagee, the mortgagor as beneficial owner thereby assigned unto the mortgagee the said principal sum of £9,200 then due and owing to the mortgagor on the security of the principal indenture and all interest then due and thenceforth to become due for the same and the benefit of all securities for the same, together with full power to demand, sue for, recover, and receive, and give effectual receipts and discharges for the said principal sum and interest in the name of the mortgagor or otherwise, to hold the same under the mortgagee subject to the proviso for redemption thereinafter contained; and it was also witnessed that, for the consideration aforesaid, the mortgagor as beneficial owner thereby conveyed unto the mortgagee all the property granted by the principal indenture and then vested in the mortgagor subject to redemption and subject to such right or equity of redemption as the same were then subject to by virtue of the principal indenture, and also subject to the proviso for redemption thereinafter mentioned, being a proviso for redemption on payment by the mortgagor to the mortgagee of the sum of £6,000 with interest thereon in the meantime at the rate of £4 5*s.* per cent. on the 4th of November then next.

It appeared that by another indenture dated the 5th of June, 1899, and made between Cartmell Harrison, of the one part, and T. C. Elliott, of the other part, which contained no reference to the sub-mortgage of the 4th of January, 1899, Harrison purported to sub-mortgage the security of the 1st of July, 1898, to Elliott to secure £8,000, but it was admitted that the title of the plaintiffs under the sub-mortgage of the 4th of January, 1899, if valid, was sufficient to enable them to maintain the present action.

Harrison died in November, 1899, shortly after a receiving order in bankruptcy had been made against him.

T. C. Elliott died in 1901.

No notice of the deeds of the 1st of January, 1899,

or the 4th of January, 1899, was given either by Harrison or by Elliott; but on the 3rd of June, 1902, the plaintiffs gave to the defendants notice in writing of both deeds.

The action was brought on the 16th of June, 1902.

At the trial Line was called as a witness for the plaintiffs, and gave evidence to the effect that he was an accountant, and had been for forty years in the employment of Messrs. Ingram, Harrison, & Ingram, solicitors, of Lincoln's-inn-fields, in which firm Cartmell Harrison was a partner; that he remembered Harrison taking a security in his name in 1898; that after July, 1898, he remembered Harrison coming into his room and wanting him to execute a transfer of the security to Elliott; but he objected to make the transfer because he might be liable; that he then looked into the accounts in the firm's ledger, and £6,000 appeared to have been advanced so far as he remembered; that he resented the transaction having the mortgage made in his name, and he executed the transfer back to Harrison in January, 1899, but that he had previously executed a declaration of trust and got it destroyed when he executed the transfer. He heard of the deed of July, 1898, within about a month of its execution. Both the defendants and Elliott were clients of Cartmell Harrison. The defendants borrowed money of him. Elliott placed money exceeding £9,200 in his hands for the purpose of being invested on mortgage.

The accounts kept by Harrison were put in evidence and were referred to by both parties; but it did not appear from them that the full sum of £9,200 had been advanced to the defendants on the 1st of July, 1898. A correspondence was referred to as containing an adm'ssion by the defendants that that sum had been advanced. One of the defendants, who presumably had knowledge on the subject, was not called, though present at the trial.

Grantham, J., held that the plaintiffs' case was made out, and he gave judgment for the full amount claimed.

The defendants appealed.

Levett, K.C., and *J. A. Simon*, for the defendants.

Rufus Isaacs, K.C., and *Lewis Thomas*, for the plaintiffs

Cur. adv. vult.

July 1.—STIRLING, L.J., delivered the judgment of the court. After setting out the facts as above, he continued: The defendants contended before us that the evidence did not warrant the conclusion arrived at in the court below as to the amount advanced by Harrison to the defendants; but, although that evidence is far from satisfactory, and the transaction remains in considerable obscurity, we are not prepared to differ from the learned judge. The plaintiffs, however, insisted that, even if a less sum than £9,200 was actually advanced, they were entitled to rely on the express statement contained in the deed of the 1st July, 1898, under the hands and seals of the defendants that that sum had been received by them, and it appears desirable to deal with this part of the case, which was very fully discussed before us.

It was contended on behalf of the defendants that the plaintiffs were not entitled to sue the defendants at law, and that their rights were equitable only. Now the action is brought under the provisions of the Judicature Act, 1873, s. 25, sub-section 6, which provides that "any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal *chose in action*, of which express notice in writing shall have been given to the debtor . . . shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or *chose in action* from the date of such notice . . ." It was not disputed that the deed of the 4th of January, 1899, although only a sub-mortgage, constituted an absolute assignment within the meaning of the enactment (see *Durham* v. *Robertson*, [1898] 1 Q. B. 765, 46 W. R. Dig. 9; *Hughes* v. *Pump House Hotel Co.*, 50 W. R. 660, [1902] 2 K. B. 190); but it was said that as Harrison and Elliott never gave any notice of the deeds of the 1st and 4th of January, 1899, to the defendants, neither of them ever acquired a legal title to the debt, and that the notice given by the plaintiffs before the bringing of this action, coming as it did after the death of Harrison, was not effectual to give them a legal title to sue. We are unable to assent to this argument. It is indeed true that neither Harrison nor Elliott ever acquired a legal right to sue the defendants. Still, each of the deeds of the 1st and 4th of January, 1899, is an "absolute assignment by writing under the hand of the assignor" of the debt due to Line under the deed of the 1st of July, 1898, and under or by virtue of those deeds the plaintiffs, as the legal personal representatives of Elliott, have become and are entitled in equity to all the rights of Line under the deed of the 1st of July, 1898. In order that this title should become effectual at law as well as in equity all that the statute requires is that "express notice in writing" should be given to the debtor, and such notice was given by the plaintiffs before action brought. The statute prescribes no limit of time within which notice must be given, nor does it lay down that the notice must be given by any particular person: and we can see no good ground for holding that the notice given by the plaintiffs was ineffectual. Certainly no such limitations were found in the rules of the courts of equity on whose practice the statutory enactments were probably founded: see *Lloyd* v. *Banks*, 16 W. R. 988, L. R. 3 Ch. 488.

It was then said (and correctly) that the plaintiffs' right, even if legal, was by the express terms of the statute subject to all equities which would have been entitled to priority if the Judicature Act had not passed. The equity claimed on behalf of the defendants was based on the rule laid down with respect to securities in *Lewes* v. *Morgan*, 5 Pri. 42, and applied to conveyances in *Gresley* v. *Mousley*, 3 De G. F. & J. 433; that a solicitor taking a security or conveyance from his own client cannot rely on any statement in the instrument as to the amount advanced or paid by him to the client, but must prove it by independent evidence. Line, it was said, was a mere trustee for Harrison, who could not be allowed to escape from the rule by taking the mortgage in the name of a trustee instead of to himself directly. To this it was answered that on the face of the deeds there was nothing to show that Line was a trustee for Harrison; that there was no evidence that Elliott knew that the full sum of £9,200 had not been advanced, and that, however the case might have stood as between Harrison and the defendants, the case of *Bickerton* v. *Walker*, 34 W. R. 141, 31 Ch. D. 151, was a binding authority in support of the proposition that the plaintiffs were entitled to rely on the express statement as to the receipt by the defendants of £9,200 contained in the deed of the 1st of July, 1898.

In *Bickerton* v. *Walker* a mortgage was executed as security for the repayment of £250. There was in the body of the deed an acknowledgment by the mortgagor of the receipt of that sum and a receipt signed by him for the amount was endorsed. The mortgage was shortly after its execution transferred to a transferee, who had no notice that the full sum of £250

had not been advanced. Afterwards the mortgagors brought an action alleging that they had received £91 only and claiming redemption on repayment with interest of what they had actually received. The Court of Appeal considered that the evidence was sufficient to entitle the mortgagors to judgment on that footing as against the original mortgagee, but held that as against the transferee who had no notice that the full amount had not been advanced, the account must be taken on the footing of its having been advanced. Fry, L.J., in delivering the judgment of the court, says: "We are of opinion that if an assignee is willing to take the risk of any payment having been made after the date of the mortgage, he is not guilty of carelessness or negligence if, in the absence of any circumstances to arouse suspicion, he relies on the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by the mortgage deed, upon the possession of that deed by the mortgagee, and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor." The mortgage in *Bickerton* v. *Walker* bore date in 1879, and the endorsed receipt was in conformity with the practice of conveyancers at the time. In the present case the deed of the 1st of July, 1898, has no receipt endorsed, but it is provided by the Conveyancing Act, 1881, s. 55, that "a receipt for consideration money . . . in the body of a deed . . . shall, in favour of a subsequent purchaser not having notice that the money . . . thereby acknowledged to be received was not in fact paid . . . wholly or in part, be sufficient evidence of the payment . . . of the whole amount thereof." The absence, therefore, of an endorsed receipt does not prejudice the plaintiffs.

It was, however, contended that Elliott had, not actual, but constructive notice that the full amount had not been paid. This was sought to be made out as follows: It was said that when Harrison applied to Line to execute a transfer to Elliott he must be taken to have been acting as Elliott's solicitor, and that if an independent solicitor had been employed by Elliott and made the like application to Line, he would have discovered the whole truth; and consequently that Elliott was brought within the terms of the Conveyancing Act, 1882, s. 3, sub-section 1, which provides that "a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless . . . (ii.) in the same transaction with respect to which a question of notice to the purchaser arises it . . . would have come to the knowledge of his solicitor or other agent as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." Now the transaction in which Harrison was employed by Elliott was to find a security suitable for the investment of money placed by Elliott in Harrison's hands. Harrison was at the same time the owner of a security which he desired to make available for Elliott's purposes. An independent solicitor employed by Elliott would have dealt with Harrison, not with Line; and it seems improbable that he would ever have come in contact with Line, especially if it was the object of Harrison (as there is ground for supposing) to pass off the deed of the 1st of July, 1898, as a security on which the full amount of £9,200 had been advanced. His application to Line ought to be regarded as made, not on behalf of Elliott, but in his own right as equitable owner of the mortgage of the 1st of July, 1898. We are, therefore, unable to arrive at the conclusion that the true facts as to the amount advanced or the position of Line would have come to the knowledge of an independent solicitor employed by Elliott. On the whole we are of opinion that the principle laid down in *Bickerton* v. *Walker* applies to the present case, and that the plaintiffs have a better equity than the defendants. The appeal, therefore, fails and must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Morgan, Upjohn, & Leech.*

Solicitors for the defendants, *Hunter & Haynes.*

From K. B. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — April 21, 22.

JOHNSTON v. GREAT WESTERN RAILWAY CO. (a.)

Practice—New trial—Railway accident—Damages—Application for a new trial—Excessive damage—Personal injuries—Loss of income—Misdirection of jury—Wrong measure adopted by jury.

If a jury in awarding damages to a plaintiff injured in a railway accident applied a wrong measure or took into consideration matters which they ought not to have taken into consideration in contravention of the direction of the judge, and the court can draw such an inference from the amount awarded and all the circumstances of the case, a new trial may be ordered, although the court is not in a position to say that the mere quantum of excess was so large that no reasonable jury could have arrived at such an amount. But if the jury in estimating the amount took into consideration the fact that the plaintiff would be debarred from following the profession for which he had fully qualified himself, and other relevant matters, then, although the amount awarded appears excessive, it is not for the court to traverse the verdict, and an application for a new trial on the ground of excessive damage will be refused.

The decision of the Court of Appeal, laid down in Praed v. Graham, 38 *W. R.* 103, 24 *Q. B. D.* 53, *although it binds the court, does not prevent the court from looking at other decisions of the Court of Appeal—viz.,* Phillips v. London and South-Western Railway Co., 27 *W. R.* 797, 4 *Q. B. D.* 406, 28 *W. R.* 10, 5 *Q. B. D.* 78, *as construing* Praed v. Graham *in the light of those decisions.*

Decision in Rowley v. London and North-Western Railway Co., 21 *W. R.* 869, *L. R.* 8 *Exch.* 221, *adopted.*

This was an application by the defendants for judgment or new trial from a verdict and judgment of Grantham, J., and a special jury of Middlesex.

The facts were as follows: The action was brought to recover damages for personal injury caused to the plaintiff in a railway accident on the defendant company's railway.

The plaintiff, Mr. G. W. P. Johnston, was engaged in business as an engineer, and was travelling from Cardiff to Liverpool for the purpose of inspecting some property on the day in question. When he was only a few miles from his destination, the carriage in which he was, was derailed owing to the negligence of the company's servants, and dragged on its side for about 150 yards, and in consequence the plaintiff's left leg was seriously injured, and he was under medical treatment for several months.

The question of negligence was not disputed by the defendant company, and the only question in dispute was as to the amount of damage to which the plaintiff was entitled.

At the trial evidence was given by medical men

(a.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

that the plaintiff's leg would never probably be as good again as before the accident, but an operation, if successful, would certainly considerably benefit him, though even in that case he would have to be very careful as to how he used it.

The plaintiff was connected with a firm well known in the engineering world, the partners in the Johnston Line, a well-known Liverpool firm, being his uncles, and he had gone through a very strict training for an engineer, had obtained a first-class certificate, and was well qualified, his intention being to obtain the post of superintending marine engineer, and as he had such good qualifications, had every prospect of obtaining the post. At the time of the accident he was living with his father, and was temporarily employed by him on some engineering business, at a salary of £3 per week. Evidence was given relating to the necessity of a superintendent marine engineer being obliged to be sound in wind and limb, as the work consisted to a great extent of going up and down ladders and into places difficult of access. Also that he was well qualified for the post, which were usually well paid, the salary varying from £750 to £1,000 a year, and sometimes £1,500 a year.

The plaintiff had applied for the post as engineer manager at a high salary, and which, but for his physical condition, he would have obtained.

At the time of the trial he was earning £2 10s. per week.

The defendants on their part showed that by certain evidence such would not be the case, and that he would still be able to attend to his profession.

The jury awarded the plaintiff £3,000 damages.

The defendant company appealed for misdirection by the judge in misstating and not explaining to the jury the medical evidence, and by omitting to tell them how they should assess the damage for loss of income, and that the damages were excessive.

Lawson Walton, K.C., and *Park Goff*, for the appellants.

Rufus Isaacs, K.C., and *Chester Jones*, for the respondent plaintiff, referred to *Praed* v. *Graham*, 38 W. R. 103, 24 Q. B. D. 53, 38 W. R. Dig. 109.

Lawson Walton, K.C., in reply, cited *Rowley* v. *London and North-Western Railway Co.*, 21 W. R. 869, L. R. 8 Exch. 221, 21 W. R. Dig. 8. [VAUGHAN WILLIAMS, L.J.—*Phillips* v. *London and South-Western Railway Co.*, 27 W. R. 797, 4 Q. B. D. 406, at p. 409, 27 W. R. Dig. 68, 28 W. R. 10, 5 Q. B. D. 78, 28 W. R. Dig. 73.]

VAUGHAN WILLIAMS, L.J.—I have endeavoured to give this case every consideration. In these railway company cases it is impossible to ignore the fact that juries are prone, when damages are being sought in respect of injuries sustained in an accident, to give a larger amount than justice would permit. Undoubtedly £3,000 does seem somewhat large, and I do not hesitate to say that is a larger amount than I myself would have given. But it is plain upon the authorities that the fact that the verdict is for a larger sum than the court would itself have given is not a sufficient reason for granting a new trial. If the only matter that the court has brought before it is an overestimate of the damages, I take it that the rule laid down by Lord Esher, M.R., in *Praed* v. *Graham*, 38 W. R. 103, 24 Q. B. D. 53, if properly understood, plainly binds us. By that I mean that though this case, a decision of the Court of Appeal, binds the court in the present case, now it does not prevent us from looking at other decisions of the Court of Appeal and construing *Praed* v. *Graham* in the light of those other decisions. But I repeat that if it had been only an overestimate of the damages which could be urged against the verdict, then the rule laid down by Lord Esher, M.R., should govern our decision, and there is nothing, so far as I can see, in any of the other decisions of the Court of Appeal which at all impugns our decision. Now, the rule laid down by Lord Esher, M.R., in *Praed* v. *Graham* is thus expressed: "I think that the rule of conduct is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the court, having fully considered the whole of the circumstances of the case, came to this conclusion only—'We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them'—then they ought not to interfere with the verdict." If one looks merely at the alleged overestimate of the damages in this case before us, I am not prepared to say that the damages are so large as that twelve sensible men could not reasonably have given them. But in my judgment if one looks at the decision in *Phillips* v. *London and South-Western Railway Co.*, 27 W. R. 797, 4 Q. B. D. 406, 28 W. R. 10, 5 Q. B. D. 78, either in the Queen's Bench in the judgment of Cockburn, L.C.J., or in the Court of Appeal in the judgment of James, L.J., it seems to me that it may be right to order a new trial, although one could not say that the damages are so large that twelve sensible men could not reasonably have given them—that is, in a case in which, although the court cannot come to the conclusion that the damages are perversely large, yet the amount enables the court to say that the jury must have disregarded a direction as to the measure of damages which they ought to have regarded. In *Phillips* v. *London and South-Western Railway Co.* the damages were impugned, not as being too large, but as being too small, and the suggestion apparently was that, the plaintiff having been so injured that he would be thereby debarred from continuing to earn his livelihood in his profession, the jury, instead of measuring his loss in relation to the amount of his earnings antecedently to the accident, chose to take into consideration the fact that he had a wealthy wife and was therefore not placed in circumstances which made it necessary for him to earn his own livelihood. That was an inference, then, drawn from the circumstances of the case, together with the amount of damages. And I take it the same principle applies if the damages, instead of being impugned as being too small, as in *Phillips* v. *London and South-Western Railway Co.*, had been impugned as being too large, as in the present case. In either case I think it is equally true that if the court, from the circumstances of the case and the amount of the damages, can draw the inference that the jury must have applied a wrong measure of damage in contravention of the direction of the judge, the court may order a new trial, although it is not in a position to say that the mere *quantum* of excess is so large that no reasonable jury could have arrived at such an amount. I would refer to the following passage in the judgment of Cockburn, L.C.J. (4 Q. B. D., at p. 407). [His lordship read the passage, and continued:] So in the present case, if I could come to the conclusion that, looking at the figures, the jury must have taken into account some head, or some measure of damage not properly involved in the plaintiff's claim, I should say that we ought to order a new trial. The Court of Appeal affirmed the decision of Cockburn, L.C.J., and James, L.J., said: "We agree that judges have no right to overrule the verdict of a jury as to the amount of damages merely because they take a

different view, and I think that if they had been the jury they would have given more or they would have given less, still the verdicts of juries as to the amount of damages are subject, and must for the sake of justice be subject, to the supervision of a court of first instance, and, if necessary, of a court of appeal, in this way, that is to say, if in the judgment of the court the damages are unreasonably large or unreasonably small, then the court is bound to send the matter for reconsideration by a jury."

It seems to me that there is nothing in these words of James, L.J., inconsistent with Lord Esher's rule in *Praed* v. *Graham*. The Lord Justice continued: "The Queen's Bench Division came to the conclusion in this case that the amount of the damages was unreasonably small, and for the reasons which were given by the Lord Chief Justice, pointing out that certain topics which the jury could not have taken into consideration, I am of opinion, and I believe my colleagues are also of opinion, for the same reasons and upon the same grounds, that the damages are unreasonably small, to what extent of course we must not speculate, and have no business to say."

Now, in my opinion, the only way in which the figure of the damages and the circumstances of the present case could prove that the jury in measuring the damages took into consideration topics which they ought not to have taken into consideration, or applied a measure of damage which they ought not to have applied, would be, if we could draw the inference that the amount of the verdict proved that the jury had disregarded the fact to which their attention was called by Grantham, J., that the accidents of life and other elements ought to be taken into consideration so as to prevent a jury from giving a plaintiff such a sum as would be simply an investment, enabling him to do nothing to earn his livelihood. Now, one can only come to such a conclusion if it could properly be said that no jury, having regard to the evidence, could have put the difference between the prospective earnings of the plaintiff if he had been uninjured and those earnings after his injury at a higher figure than, say, £X a year, and then if you found that the amount of the verdict, after deducting all special damage, and all damages given for personal pain and suffering, was a sum which equalled or exceeded the sum which would purchase a life annuity for a person of the plaintiff's age equal to the difference to which I have referred. In such a case I think a new trial might be ordered without reference to any perversity of mind of the jury in regard to the *quantum*. In any case in which you are able to draw the inference that the jury either included a topic which ought not to have been included, or measured the damages by a measure which ought not to have been applied, I think there ought to be a new trial. But I am not prepared to say that that is so in the present case. It certainly is very difficult to estimate the damages in this case, but I think that if you take the evidence as a whole, it is not unreasonable to say that the jury were entitled to take into consideration as a material and substantial matter the possibility that this plaintiff would never be able to accept the position of a superintendent of marine engineering, as there is no doubt he was qualified for it; and at the time of the accident it was the intention of his life. He was just putting a finishing touch to his education, not in respect of the special matter of marine engineering, but in respect of the general knowledge which every engineer ought to have, and he was doing this because having regard to the interest of his family in shipping, it was reasonably certain that as soon as he was qualified he would obtain such a post; and that he was qualified and highly qualified there is no doubt.

What, then, ought we to do if there is evidence which would justify a jury in coming to a conclusion that it was extremely doubtful whether the plaintiff would ever be able to fill such a post? Apparently, from the evidence, the position of a superintending marine engineer is a well-paid position. Under these circumstances it is extremely difficult to form any positive opinion as to the amount of the difference in the plaintiff's prospective earnings—the difference between what he would have got if there had been no accident and what he would be able to get since the accident; and I do not see my way, by reason of the amount of the damages or of the evidence, to say that the jury have taken into consideration either topics or a measure of damages which they ought not to have taken into consideration. I cannot say they have disregarded the rule laid down in *Rowley* v. *London and North-Western Railway Co.*, 21 W. R. 869, L. R. 8 Exch. 221, that the jury may not properly assess as damages a sum of money equal to the present price or value of an annuity equal to that income which would probably have been earned by the plaintiff but for the accident. This being so, I have now only to deal shortly with the suggested misdirection. [His lordship read the summing up, and came to the conclusion that the direction of the learned judge was accurate.] The learned judge further stated: "He is not fitted for that for which he has spent the greater part of his life in qualifying himself, and successfully qualifying himself." Having regard to the fact that the jury had the evidence of the experts before them, I do not think they could have misunderstood that last sentence. On the whole, therefore, my judgment is that the application for a new trial must be refused.

STIRLING, L.J.—I am of the same opinion, and I have really very little to add, but out of respect to the argument which has been addressed to us I wish to state very shortly the grounds on which I have arrived at my conclusion. The question is as to the amount of damages to which the plaintiff is entitled by reason of a railway accident. The plaintiff is a young man of twenty-eight, who has been trained for the position of a superintending marine engineer. He has trained himself for that, not merely because engineering is a profession to which he desires to apply himself, but because he had the prospect through his relatives of filling such a post. At the time of the accident he had not obtained that position. He was then only in the employment of his father's firm temporarily, at a salary of £3 per week, and living at home. Then occurred this accident, and after it he made an attempt to obtain employment in connection with some steamers abroad; his application was refused on the ground of his physical condition. The salary attached to that employment would have been £500 a year, rising annually. There is ample evidence that he was well qualified to fill that position. That is how matters stood at the time of the trial. But it was said that he might submit to an operation which, if successful, would greatly improve his condition, and he was willing to submit to it. Of course there is always a certain amount of risk attending any operation, but in the present state of surgical skill, as I read the evidence, the danger in this case would not be great. But what would be the position supposing that the operation was successful? The plaintiff's principal medical witness said that even if the operation were successful, it would be impossible for him to be as good as before the accident, and that he ought not to take any place necessitating him having to go up or down ladders.

Now, that being the general outline of the case, for I think there is no great difference in the medical opinions, the question is whether the jury have come to a conclusion which we can call in question by reason of their having given a verdict for £3,000. Of that sum about £450 is in respect of expenses and loss of income which at the date of the trial had been already incurred. There remains, therefore, a sum of £2,250, which is the compensation for the prospective loss to this young man in his profession. Looking at all the circumstances and weighing them, I am unable to come to the conclusion that the jury have either taken into consideration matters which they ought not to have taken into consideration, or that the sum is one which twelve sensible men could not reasonably have awarded. In these circumstances, although I do not think I should myself have come to the same conclusion as to the amount of damages, I do not see my way to interfere with the verdict and judgment.

COZENS HARDY, L.J.—I agree.

Application refused.

Solicitors, *R. R. Nelson; Leslie Williams & Alder.*

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) March 11.

HARMAN *v.* AINSLIE. (*a.*)

Landlord and tenant—Lease—Affirmative and negative covenants—Covenant not to assign or sublet without lessor's consent—Proviso for re-entry on breach of any covenant on the lessee's part to be performed.

A lease of a house contained covenants by the lessee to pay rates, taxes, and repairs and not to assign or underlet the premises without first obtaining the lessor's consent in writing, and it contained a proviso for re-entry that "if the lessee shall commit any breach of the covenants hereinbefore contained, and on his part to be performed, then the said lessor may re-enter upon the premises." The lessee underlet the premises without obtaining the lessor's consent.

Held, that the proviso for re-entry applied to breaches of negative as well as affirmative covenants, and that as there had been a breach of the covenant not to assign or underlet without the landlord's consent, a forfeiture had occurred, and the landlord was entitled to recover the possession of the house.

Decision of Wright, J. ([1903] 2 *K. B.* 241), *reversed.*

Appeal by the plaintiff from a judgment of Wright, J., who tried the action without a jury.

The action was brought to recover possession of certain premises by the assignee of the reversion upon a lease of them against the assignee of the lease as upon a forfeiture.

The indenture of lease, which was dated the 8th of July, 1885, witnessed that in consideration of the rent and covenants thereinafter reserved and contained on the part of the lessee to be paid, observed, and performed, the lessor, Mrs. S. Popplesdorf, demised the house No. 76, High-street, Southend, to the lessee, one Alderman, for a term of twenty-one years at a rental of £60.

The lease contained a covenant by the lessee not to use the premises for any business except that of an outfitter without the licence in writing of the lessor. The lease also contained a proviso for re-entry in case the lessee should "make default in the performance of any of the covenants upon his part to be performed."

The original lessor gave the original lessee licence in writing on the 7th of February, 1887, to assign the lease to one Comber, and by the same document gave her consent "that hereafter any art, trade, or business may be carried on in the said premises except that of a photographer, hairdresser, or tobacconist." And by an indenture of even date Alderman, in pursuance of the said licence, assigned the lease to Comber. In July, 1897, the plaintiff Harman purchased the reversion from Mrs. Popplesdorf.

By an indenture dated the 2nd of October, 1899, Comber assigned the lease to the defendant Ainslie, who subsequently permitted part of the premises to be used as a baker and confectioner's shop.

The plaintiff claimed that this constituted a breach of the covenant in the lease of July, 1885, and brought this action to recover possession of the premises under the proviso for re-entry.

It was contended for the defendant that the licence given by the original lessor in February, 1887, to use the premises for trades other than that of an outfitter enured for the benefit of the defendant; and that there was consequently no breach of the covenant; and, further, that if there was a breach, the proviso did not authorize the plaintiff to re-enter for a breach of a negative covenant.

Wright, J., held that the proviso for re-entry applied only to breaches of positive and not of negative covenants. He intimated that the licence given in 1887 by Mrs. Popplesdorf to the then tenant to carry on any trade with certain specified exceptions was in his opinion sufficient licence to the defendant as the assignee of the lease, and therefore he was prepared to hold that there had been no breach of covenant, had it been necessary to decide that question. He therefore gave judgment for the defendant.

The plaintiff appealed.

Younger, K.C., and *Samuel Green*, for the plaintiff.—We rely upon the breach of covenant not to underlet the premises without the consent in writing of the lessor as sufficient to entitle the plaintiff here to judgment. The word "performed" in the proviso for re-entry is applicable to negative as well as positive covenants, and therefore Wright, J., ought not to have held that the proviso for re-entry must be understood as applying only to breaches of the affirmative covenants. *Doe* v. *Marchelli*, 1 B. & Ad. 715, 35 R. R. 420, is a decision on this point. In *Croft* v. *Lumley*, 6 W. R. 524, 6 H. L. C. 672, the words were "performed, observed, and kept," and therefore the question did not arise, but Martin, B. (at p. 719), expressed *obiter* a view in favour of the plaintiff's contention. In *West* v. *Dobb*, 18 W. R. 1167, L. R. 5 Q. B. 460, which is the next in order of date, Kelly, C.B., and Channell, B., seem to have thought that a clause of re-entry applied only to a positive covenant, but there again the opinion was only *dicta*, and seem to be contrary to all the other cases. In *Hyde* v. *Warden*, 25 W. R. 65, 3 Ex. D. 72, at p. 82, the judgment of Amphlett, L.J., which was read by Brett, L.J., there was a *dictum* in favour of the defendant; but in *Barrow* v. *Isaacs*, 39 W. R. 338, [1891] 1 Q. B. 417, there were *dicta* by Lord Esher, M.R. (at p. 419), and of Kay, L.J. (at p. 424), that "performance" was applicable to negative as well as affirmative covenants. Secondly, on the construction of the lease taken as a whole it would seem that the words "performed" and "observed" were used indefinitely and are used interchangeably with reference to affirmative and negative covenants. Thirdly, the substance and not the form of the coven-

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

ant must be looked at, and so regarded, the covenant not to assign or underlet without the lessor's consent is not wholly negative. The covenant is in substance to get the consent in writing of the lessor. The affirmative element is the procuring the lessor's consent before assigning, and in that sense is capable of being performed, and that is really the element of substance; the negative element of that form may be disregarded: *Duke of St. Albans* v. *Ellis*, 16 East 352, 14 R. R. 361; *Clegg* v. *Hands*, 38 W. R. 433, 44 Ch. D. 503, at p. 522; *Metropolitan Electric Supply Co.* v. *Ginder*, 49 W. R. 508, [1901] 2 Ch. 799, at p. 806; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, 49 W. R. 418, [1901] 2 Ch. 37; *Sear* v. *House Property and Investment Society*, 29 W. R. 192, 16 Ch. D. 387; *Mason* v. *Corder*, 7 Taunt. 9, 17 R. R. 427. The lessee having broken his obligation to retain possession until the consent in writing of the lessor to assign the premises was obtained, the proviso as to re-entry applied, and the plaintiff was entitled to judgment.

Hume Williams, K.C., and *R. J. W. Neville*, for the defendant.—The authorities show that a forfeiture clause must be construed strictly, and upon the facts the plaintiff was not entitled to recover. The weight of authority is all in the defendant's favour, for there is no case where there is a direct decision that the word "performed" in such a clause as the one that is now being considered has been held to apply to a negative convenant: *Doe* v. *Marchetti*, 1 B. & Ad. 715, 35 R. R. 420; *Doe* v. *Godwin*, 4 M. & S. 265, 16 R. R. 463; and *Doe* v. *Stevens*, 3 B. & Ad. 299, 37 R. R. 429. Besides these authorities there are *dicta* to the same effect in many cases, from *Croft* v. *Lumley* down to the decision in *Barrow* v. *Isaacs*. Fry, J., in *Evans* v. *Davis*, 27 W. R. 285, 10 Ch. 747, and Lopes, J., in *Timms* v. *Baker*, 49 L. T. 106, 31 W. R. Dig. 167, the word "perform" had an essentially active meaning, and was not held applicable to a negative covenant, for a negative cannot be performed. There is no substance in the plaintiff's contention that a covenant not to assign without the lessor's consent was essentially a positive covenant. The fact that there is a provision for the withdrawal of the prohibition cannot convert the obligation not to assign without consent, which is negative, into an affirmative obligation. Nor does the plaintiff's contention that the words "to be performed" mean to be "observed and performed" really carry the argument further in his favour, for both the words "observe" and "perform" occur at the beginning of the lease and in the covenant for quiet enjoyment. If the words "and on his part to be performed" are construed as merely equivalent to the "lessee's covenants," they fail to have any meaning, for the proviso would have same effect exactly if it had ended at the word "contained." The omission of the word "observed" in the proviso for re-entry was an intentional omission, and effect ought to be given to it on the established rule of construction.

Younger, K.C., replied.

COLLINS, M.R.—The question in this case is whether the plaintiff, who is the assignee of the reversion of certain leased premises, has the right to eject the defendant, who is the assignee of the lease, under a proviso contained in the lease for forfeiture and re-entry in certain events. The alleged grounds for forfeiture are a breach of a covenant not to carry on certain trades on the premises in question, and a breach of a covenant not to assign or underlet without the consent of the lessor. The case has been narrowed down to the question whether there has been a breach by the defendant not to underlet without consent. The main point decided by my brother Wright, J., at the trial was that the proviso for re-entry by its terms was inapplicable to a negative covenant, as the word "performed" pointed, in his opinion, only to positive covenants. It is therefore necessary to consider the exact wording of the lease. It was held by Wright, J., that the words of the proviso being "if the said lessee shall commit any breach of the covenants hereinbefore contained, and on his part to be performed then . . . the said lessor may re-enter upon the said premises," those words made it impossible to give effect to the proviso where the breach was a negative covenant, like that against assigning or underletting, because the word "performed" was inapplicable to such a covenant. The notion upon which the learned judge's ruling is founded goes very far back, the root of it being apparently a statement in Co. Litt. 303*b*, which is referred to in a note to *Doe* v. *Marchetti*, 1 B. & Ad. 715, 35 R. R. 420, and which is as follows: "A man is bound to perform all the covenants in an indenture; if all the covenants be in the affirmative, he may generally plead performance of all; but if any be in the negative, to so many he must plead specially; for a negative cannot be performed." That passage appears to be the basis of the supposed rule. The rule itself seems never to have been the subject of a direct decision, but only of *dicta* in various cases. The *dictum* of Lord Coke was expressly limited to pleading. He said that a man was bound to perform all his covenants, but if any of them were negative, he might plead to them specially. Now it is to be noticed that in this very sentence Lord Coke treats the performance of a covenant as equivalent to giving effect to the obligation imposed by the covenant. A man may very well perform a covenant by refraining from doing that which he has undertaken by the covenant that he would not do. The difficulty which has arisen seems to turn on a confusion between an obligation and the method of giving effect to the obligation—the difference between a bargain and doing the duty imposed by the bargain. A bargain like the obligation of a covenant may in certain cases be performed by not doing that which it had been bargained should not be done. The performance of a covenant may very well mean the giving effect to the obligation of the covenant, whether the covenant be positive or negative. The nearest approach to a decision on this oft cited *dictum* of Lord Coke is to be found in the case of *Doe* v. *Marchetti*. It was there held that a proviso in a lease, giving power of re-entry if the tenant should make default in performance of any of the clauses by the space of thirty days after notice did not apply to the breach of a covenant not to allow alterations in the premises or permit new buildings to be erected thereon without permission. That decision, however, in my opinion, is really not a decision on the question raised in the present appeal, and for the reason expressed in the passage I am about to read from the judgment of Lord Tenterden: "It cannot be supposed that the parties anticipated a thirty days' notice being given to raise the walls or vary from the original plan of the premises or not to suffer buildings to be erected or windows or openings to be made. It is quite different where the notice required is to do some such act as repairing or paying money; there a stipulation for notice is reasonably introduced and is evidently for the benefit of the lessee. Taking the whole clause of re-entry together, I think the introduction of these words 'by the space of thirty days next after notice' confines it to those covenants which are to be performed by the lessee and which not being performed he incurs a forfeiture." Since then there have been a number of other *dicta* on the point, but they do not when carefully looked at amount to a decision either way. Some no doubt support the appellant's view, but

there are others that go to support with equal force that of the respondent. In *Croft* v. *Lumley* Martin, B., at p. 791 of the report in 6 H. L. C. 672, says: "I do not myself consider there is any inaccuracy in language in saying that a man has performed his covenant when he has not done that which he covenanted not to do; or that he made default in performing his covenant when he has done it. The abiding by a covenant is a performance of it; the non-abiding a non-performance." Bramwell, B., did not dissent from that view. At p. 705 of the same report he says: "I think that default of or in performance of all covenants to be performed, observed, and kept applies to covenants not to do something as well as to covenants to do something." Those were *dicta* in the appellant's favour. Now let us see those that are in favour of the respondent's view. The *dicta* in *West* v. *Dobb* expressed by Kelly, L.C.B., and Channell, B., in the Exchequer Chamber of the Court of Appeal in *Hyde* v. *Warden*, and others expressed by Fry, J., in *Evans* v. *Davis* and Lopes, J., in *Timmis* v. *Baker*, were to the same effect. But to my mind the really important authority on this question in modern times is to be found in *Barrow* v. *Isaacs*. There Lord Esher says: "It was argued by the defendant's counsel that the covenant was not to underlet without the landlord's consent was a negative, not an affirmative covenant, and that therefore the stipulation for re-entry for breach of covenant did not apply. But I think that that proposition is disposed of, because the word "observe" as well as "perform" has been put in the stipulation, though I doubt whether it was necessary to put that word in." Kay, L.J., expressed a similar opinion. He said: "Another point made was that the proviso for re-entry refers only to the breach of affirmative and not of negative covenants. This is founded on certain *obiter dicta* in *Hyde* v. *Warden*. Speaking for myself I should think that an extremely narrow construction of the word 'perform' only had been used. 'Perform' has not necessarily an active meaning. We say that a man performs his duty by not answering revilings, by being silent when he ought not to speak, and by many other abstentions from acting as well as by active proceedings."

Now, in this state of the authorities on the point, the opinion I have come to is that the court is still at liberty to decide the question according to their own view, and according to what seems to them to be common sense. Looked at in that view, that it is open to the court to follow its own opinion, I prefer the *dicta* of Martin, B., in *Croft* v. *Lumley* and of the Court of Appeal in the case last mentioned—*Barrow* v. *Isaacs*—to the contrary *dicta* relied upon by the respondent. In a proviso for re-entry for non-performance of covenants, it seems to me that the word "perform" is used as meaning the fulfilment of the obligation or duty undertaken, and not as referring to the thing to be done or left undone in pursuance of the covenant; and that a negative covenant may be said to be performed by a man's not doing the thing which he has promised not to do, as an affirmative covenant is by his doing what he has promised to do. Therefore in absolute strictness, if it is a question of going into the nicieties of language, I think the words of this proviso for re-entry are appropriate to the breach of a negative covenant. With reference to some of the earlier *dicta* on the subject, it may be observed that when the refined distinction upon which the defendant relies was first introduced, there was a natural inclination on the part of the courts to avoid holding that there was a forfeiture. The law with regard to relief against forfeitures was not developed as in more modern times. There is not, now that the Legislature has carefully considered and provided for the various cases in which they think relief ought to be given against forfeiture, the same reason as there once was for not construing provisoes for re-entry according to the fair grammatical meaning of the words used. It does not, I think, affect the consideration that, in the particular case of the breach of a covenant not to assign or sublet, the Legislature has not provided for giving relief to a lessee against forfeiture. It is none the less the case that the reasons which gave rise to the strict mode of construction applied to forfeiture clauses in general in former times no longer exist.

The result of the authorities is that we are left with the right to exercise our own judgment on the construction of the proviso for re-entry in this case, and that the last and most authoritative pronouncement of two judges of this court are in favour of the view contended for by the plaintiff. That being so, there is, to my mind, nothing in the terms of this lease to prevent us from giving to the word "performed" in the proviso for re-entry that meaning which *primâ facie* I should be disposed to give it. I rather gather that Wright, J., would have been disposed to take the same view of its meaning, but that he thought himself bound by the proponderating authorities to the contrary.

For these reasons the appeal on the important point of law that has been argued must be allowed with costs. On the subsidiary point, whether on the facts there had been a waiver of the breach of covenant, unless the parties agree to a settlement, there must be a new trial.

ROMER and MATHEW, L.JJ., gave judgment to the same effect.

Appeal allowed on the question of law; new trial ordered on the question of waiver.

Solicitors for the plaintiff, *Leslie, Antill, & Arnold.*

Solicitor for the defendant, *C. E. Soames.*

High Court of Justice.

Chan. Div.
Farwell, J. } July 5, 6.

SHARPINGTON v. FULHAM GUARDIANS. (*a.*)

Public authority — Payment of debt — Public duty — Damages—Public Authorities Protection Act. 1893 (56 & 57 *Vict. c.* 61)—*Poor Law* (*Payment of Debts*) *Act*, 1859 (22 & 23 *Vict. c.* 46).

Where a contractor brought an action under a building contract against a public authority for payment for work done and damages after the expiration of the time limited by the above-mentioned Acts for the suing of a public authority in respect of acts done in the performance of a public duty,

Held, that the public authority was not entitled to the protection given by the said Acts, and that the plaintiff could recover.

Guardians of West Ham v. Churchwardens of St. Matthew's, Bethnal Green, [1896] *A. C.* 477, 45 W. R. Dig. 111, *followed.*

Action.

This was an action by the plaintiff, a builder, against the defendants, on a building agreement, for

(*a.*) Reported by H. WOLCOTT WARNER, Esq., Barrister-at-Law.

damages in respect of injury to the plaintiff caused by defendants' negligence.

The material facts were shortly as follows:—

On the 18th of January, 1900, the defendants entered into a contract with the plaintiff for converting an existing building into a home for destitute children. In entering into a contract for this purpose the defendants were acting under statutory authority.

The work was completed on the 3rd of May, 1901, and was measured up for purposes of payment in the month of September, 1901.

The plaintiff demanded extra payment in respect of work done which was not included in the contract and expense incurred owing to the defendants neglecting to give proper instructions as to the work to be executed.

On the 9th of April, 1902, the plaintiff demanded that the defendants should consent to arbitration, under the terms of the contract, in respect of the extra sums claimed by him as aforesaid.

This action was brought in the course of the arbitration in order to obtain the opinion of the court on two points of law.

The defendants admitted the facts for the purposes of this action, and relied on the Public Authorities Protection Act, 1893, s. 1 (*a*), which enacts: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in the case of a continuance of injury or damage within six months next after the ceasing thereof."

The defendants further, and in the alternative, relied on the Poor Law (Payment of Debts) Act, 1859, ss. 1 and 4, which are as follows:

Section 1.—"With respect to any debt, claim, or demand which may be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards; the commencement of such half-year to be reckoned from the time when the last half-year's account shall, or ought to have been, closed, according to the order of the Poor Law Commissioners or Poor Law Board."

Section 4.—"If any person claiming any debt or demand shall have commenced, or shall hereafter commence, proceedings in any court of law or equity, or before any justice or other competent authority, within the time hereinbefore limited . . . and shall with due diligence prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians or managers against whom or whose officer the same may be brought, notwithstanding that such judgment may be recovered, or such final settlement arrived at, after the expiration of the period hereinbefore provided, and all proceedings taken, by *mandamus* or otherwise, for the enforcing of such judgment without delay shall be deemed to be within the operation of this section."

The question to be decided was whether, in view of the fact that the plaintiff had not instituted any proceedings against the defendants in respect of his claim within the periods limited by either of the above-mentioned Acts, the defendants were protected by the provisions of those Acts or either of them.

Upjohn, K.C., and *Beddall*, for the plaintiff.—This case does not come within section 1 of the Public Authorities Protection Act, 1893; that section only applies to acts done in pursuance of a public duty. In this case the defendants entered into the contract in the performance of a public duty, but the carrying out of the terms of the contract is a private duty to the plaintiff. There is no authority on this section, but *Midland Railway* v. *Local Board for the District of Withington*, 11 Q. B. D. 788, 32 W. R. Dig. 122, was decided on an analogous section of the Public Health Act, 1875. [*Davies* v. *Corporation of Swansea* 8 Ex. Rep. 808, and *Wallace* v. *Smith*, 5 East 115, were also cited.] Sections 1 and 4 of the Poor Law (Payment of Debts) Act, 1859, refer to debts which the guardians could and ought to have paid within the time limited. Here, until the conclusion of the arbitration, the debt cannot be paid, as it is unascertained: *Midland Railway* v. *Edmonton Union*, [1895] A. C. 485; *Guardians of West Ham* v. *Churchwardens of St. Matthew's, Bethnal Green*, [1896] A. C. 477; and *Manchester, Sheffield, and Lincolnshire Railway* v. *Doncaster Guardians*, 45 W. R. 82, [1897] 1 Q. B. 117.

Butcher, K.C., and *Hudson*, for the defendants.—The acts done under the contract were done in the performance of a public duty. The language of section 1 of the Public Authorities Protection Act, 1893, is wide and must be construed strictly: *The Fdun*, [1899] P. 236, 47 W. R. Dig. 166; *Jeremiah Ambler & Sons (Limited)* v. *Bradford Corporation*, [1902] 2 Ch. 585, 51 W. R. Dig. 43; *Attorney-General* v. *Proprietors of Margate Pier and Harbour*, 48 W. R. 518, [1900] 1 Ch. 749; and *Parker* v. *London County Council*, 52 W. R. 476, 68 J. P. 239. As regards sections 1 and 4 of the Poor Law (Payment of Debts) Act, 1859, an arbitrator is a competent authority within the meaning of that Act. The proceedings before him were commenced out of time, and the defendants are entitled to the protection given by the Act.

FARWELL, J., in giving judgment, said: This is an action by the plaintiff against the defendants for damages under a building contract. The duty to provide such a building as was contracted for was imposed on the defendants by statute; they were consequently enabled to enter into the contract with the plaintiff. The plaintiff has not been paid for additional work done. This is in effect a breach of contract and the matter is before an arbitrator.

This action is brought in order to raise two points of law. The first point is under the Public Authorities Protection Act, 1893, s. 1 (*a*). [His lordship here read the section.] It is said that the breach of the contract on the part of the defendants is a neglect of a public duty within the section. Apparently no decision can be found on this point, but, in my opinion, this is an attempt to carry the intention of the Act too far. Public authorities now perform in many cases the functions of a private contractor, and in every case require authority for so doing in order that their action may not be *ultrà vires*; therefore in a sense their action may be said to be public. This is the first time that it has been attempted to apply the provisions of the Act to a contract of this nature. If I should decide in favour of the defendants, it would follow that any act done by a public authority in pursuance of a contract might be held to be done in performance of a public duty, it would be impossible to draw the line.

The cases cited by the defendants do not touch the question, they are cases of tort founded an negligence in the performance of a public duty, as in the case of *The Ydun*, [1899] P. 236, and in *Jeremiah Ambler & Sons (Limited)* v. *Bradford Corporation*, [1902] 2 Ch. 585. Romer, L.J., in the course of his judgment says: "This action is one which seems to me expressly to fall within the statute, for the sole cause of complaint of the plaintiffs as against the defendants is the erection by the defendants of the sluices and works in question, and the action is one against the defendants 'for' such an act as is specified by the statute."

Parker v. *London County Council*, 52 W. R. 476, 68 J. P. 239, can be explained in the same way. The present case is different. The public public duty here is to supply a receiving house, and a breach of that duty would cause injury to the public. In order to carry out that duty the defendants enter into the present contract; it is a breach of the latter that is complained of by the private contractor. The question of public duty only comes in because if there was no public duty the private contract would be *ultrà vires*. If this were not so, all contracts by public bodies would be within the Act. It must be either all or none, and for the reason I have given in my opinion it should be none.

As regards the second point raised, under the Poor Law (Payments of Debts) Act, 1859, ss. 1 and 4, I think the case is covered by the authorities. The case cited in the House of Lords (*Guardians of West Ham* v. *The Churchwardens of St. Matthew's, Bethnal Green*, [1896] A. C. 477) makes the way plain, and I must follow it. For time to run under the Act the public body must be able to pay and neglect to do so; in the present case the defendants cannot pay, as the sum to be paid is not yet ascertained. The result is that the plaintiff succeeds on both the points raised, and there must be judgment accordingly.

Solicitors for the plaintiff, *Booth & Smee.*

Solicitor for the defendant, *T. Blanco White.*

Chan. Div.
Swinfen Eady, J. } June 17, 18, 20.

PORTER *v.* MOORE.

Trustees—Liability—Mortgage by beneficiary—Inquiry as to prior charge—Trustees induced to sign incorrect statement by concealment of facts—Security deficient—Trustees not liable—Estoppel.

M., donee of a power, appointed £1,000 to her son C. and £1,400 to her son E. E. mortgaged this sum, and notice of the charge was given to the trustees, a fact which they entirely forgot. M., by her will, forgetting the appointment to E., appointed to her two sons and her daughter such further sums as, with C.'s £1,000, exhausted the fund. E. applied to X., one of the plaintiffs, for a loan on his interest under M.'s will, concealing the former appointment. X. required a memorandum from the trustees that they had no notice of a prior charge. He applied for this to P. & A., solicitors to the trust, who informed him they never advised trustees to give such assurance. They, however, authorized X. to call on Dr. M., one of the trustees, to obtain from him a declaration of C.'s identity. X. sent his clerk, who took advantage of the visit to induce Dr. M. to sign the memorandum as to notices. Dr. M. was unwilling to sign without legal advice, but gave way on being informed that P. & A. had been seen and their assent obtained. The sight of Dr. M.'s signature led the other trustee to sign. X. completed the mortgage without informing P. & A. of the signatures he had obtained. E.'s interest, after paying the prior charge, was not sufficient to meet the plaintiffs' mortgage, and they claimed the deficiency from the trustees to whom the receipt of notice of the prior charge had been brought home.

Held, that the circumstances under which the signatures to the memorandum had been obtained precluded the plaintiffs from praying it in aid to estop the trustees from setting up the prior charge as a defence, and that the trustees were therefore not liable.

This was the trial of an action to determine whether a trustee and the representatives of his deceased co-trustee were liable to make good to the plaintiffs, the mortgagees of a share in the trust fund, a deficiency in the security caused by a prior charge not disclosed.

Thomas Nield, who died in 1861, bequeathed £6,000 in trust for his daughter Mary Cordingly for life, with remainder to her three children as she should by deed or will appoint.

She appointed £1,000 to her son Charles by deed in 1882, and £1,400 to her son Edward by deed dated the 10th of July, 1890, and Edward mortgaged this latter sum to R. J. Whitla by deed dated the 23rd of August, 1890, to secure £600 with interest and costs.

Mary Cordingly appeared to have forgotten the appointment to Edward, for by her will, made in 1899, she appointed further sums of £1,000 to Charles and £2,000 to Edward and a sum of £2,000 to her daughter, adding words to the effect that these three sums, together with the £1,000 already appointed to Charles, would exhaust the £6,000.

She died in February, 1900, and Edward, who was in Canada, then returned to England for the purpose of obtaining payment of his share, but finding there would be delay he applied to X., a solicitor in Manchester, for a loan of £1,500 informing him of the appointment by his mother's will but not of the previous appointment or of the mortgage of 1890.

X. was inclined to lend the money, in conjunction with two other persons who were plaintiffs with him in the action, and he was put in communication with Messrs. Parker & Ayre, the solicitors to the trustees of Thomas Nield's will, from whom he obtained information regarding the trust property.

On a date which appeared to have been the 1st of May, 1900, X. had an interview with Mr. Platt, a clerk to Messrs. Parker & Ayre, and asked to be furnished with a memorandum from the trustees stating that they had received no notice of any prior charge on Edward Cordingly's interest. According to Platt's evidence he replied that the firm was not accustomed to advise trustees to sign such statements, but that if X. would state his wishes in writing they should be laid before Mr. Parker, who was away that day.

X.'s account, however, was that he told Platt he should not go on unless he got the memorandum, as he was not inclined to run any risk, and that Platt then made some observations which he took to mean that as this matter had been so long in the office it would be all right in this instance for the trustees to sign.

On the 4th of May, X. wrote a letter to Parker & Ayre enclosing two copies of a memorandum such as he desired to have, and also asking if there would be any objection to his calling on Dr. Moore, one of the trustees, for the purpose of obtaining a statutory declaration from him of Cordingly's identity—the latter stating that the doctor had known him from childhood, and had attended Mrs. Cordingly at his birth.

X. alleged that on the following day, which was

(a.) Reported by R. HILL, Esq., Barrister-at-Law.

Saturday, he, having received no answer, called at Messrs. Parker & Ayre's office, found Mr. Parker and Mr. Platt both absent, and saw a clerk (who was not identified) from whom he obtained some informal authority to call on Dr. Moore on the following Monday. X.'s story was that he explained to the clerk that his object was to obtain a declaration of Cordingly's identity and also a memorandum from the doctor stating he had received no notice of a prior charge. On the Monday he sent Cordingly to the office asking for a reply to the letter of the 4th of May. Cordingly saw Mr. Parker, who gave evidence that, having then for the first time read the letter, he sent back a message that he would have nothing to do with advising the trustees to sign the memorandum. Cordingly called a second time with a message that X. would be glad of a reply in writing, without which he feared the doctor might decline to see him. Mr. Parker then sent round a letter stating there was no objection "to your attending on Dr. Moore to obtain from him the declaration of identity which you require."

X. then sent his managing clerk, accompanied by Cordingly and Mr. Macfie, a commissioner for oaths, to the house of Dr. Moore, who resided a few miles from Manchester, and from whom the clerk obtained not only the declaration of identity, but also, under circumstances which will be found stated in the judgment, his signature to the following document:

"We have not received notice, nor are we aware, that Edward Cordingly, a son of Mary Cordingly, has assigned, settled, charged, or otherwise incumbered the share and interest appointed to him of and in the sum of £6,000 to which the children of the said Mary Cordingly are entitled under the will of Thomas Nield, of &c., dated the 28th of August, 1861, of which will we are the present trustees."

This document, which was dated the 7th of May, was signed by Mr. Howe, the other trustee, on the 8th, on which date X. afterwards wrote to Parker & Ayre asking for a note of their charges, and adding, "Please also write me that you have not received notice of Edward Cordingly having assigned or dealt with his interest under this will." They replied on the same day, "We never give any such assurance as that asked from us by your letter just to hand, nor do we advise trustees to do so. This trust has existed for about forty years and in our hands for more than twenty, and it would involve a long search and perusal of correspondence before we could feel any confidence in making any such statement, but we have no hesitation in saying that we have no recollection of having received any notice of charge effected by Mr. Edward Cordingly."

Neither before nor after the receipt of this letter did X. inform the writers that he had obtained the memorandum from the trustees. The mortgage was completed on the same day.

Early in the year 1901, the trustees, in looking through the trust papers, found evidence that formal notice of the appointment of £1,400 to Edward Cordingly, and of the mortgage by him on the 23rd of August, 1890, had in fact been served on them some years before, though they had completely forgotten the circumstance. X. was communicated with and replied that he should hold the trustees responsible for any loss.

The trustees then presented a petition to the Palatine Court asking what was the true construction of Mary Cordingly's will, having regard to the two appointments to Edward Cordingly; and by an order of the 6th of August, 1901, it was declared that the appointment of £2,000 ought to be deemed as to £1,400, part thereof, to be in confirmation of and not in addition to the appointment of £1,400. The result was that of Edward Cordingly's share (certified by the registrar to be £2,091 3s. 5d.) there remained, after paying Whitla's mortgage with interest and costs, and the costs of the petition and of a further petition presented by the plaintiffs, only £636 10s. 3d. to meet the plaintiffs' charge, and this sum was ordered to be paid out to them. Cordingly was out of the jurisdiction, and was understood to be a person of no means.

The plaintiffs commenced this action on the 25th of June, 1903, and, Mr. Howe dying soon after, an order to carry on proceedings against his executors was obtained. The statement of claim asked (*inter alia*) for a declaration "that George Howe and the defendant Thomas Moore were trustees for the plaintiffs of the share of Edward Cordingly in the said sum of £6,000 free from incumbrances prior in date to the incumbrance of the plaintiffs; and that the said Howe and the defendant Moore were, and the defendants now are estopped as against the plaintiffs from alleging any prior incumbrance or setting up any prior incumbrance in discharge of themselves"; and a declaration "that the defendants are liable to make good to the plaintiffs all the said moneys lost to the plaintiffs by reason of their reliance on the said representations of the said George Howe and the defendant Thomas Moore."

Eve, K.C., and *A. Grant*, for the plaintiffs, cited *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82; *Whitechurch* v. *Cavanagh*, 50 W. R. 218, [1902] A. C. 117.

Macnaghton, K.C., and *Muir Mackenzie*, for defendant Moore, cited *Burkinshaw* v. *Nicolls*, 26 W. R. 819, 3 App. Cas. 1004, 1026 (*per* Lord Blackburn); *Pickard* v. *Sears*, 6 A. & E. 469, 474 (*per* Lord Denman); *Freeman* v. *Cooke*, 2 Exch. 654, 663 (*per* Parke, B.); *Low* v. *Bouverie*, [1891] 3 Ch. 82, pp. 113, 114 (*per* Kay, L.J.); *Whitechurch* v. *Cavanagh*, [1902] A. C. 117, p. 145 (*per* Lord Brampton).

T. C. Eastwood and *Arnold Herbert*, for the executors of Mr. Howe.

Eve, K.C., replied.

SWINFEN EADY, J.—The plaintiffs are assignees by way of mortgage of the share appointed to Edward Cordingly under the will of Thomas Nield, and in form the action is against the surviving trustee and the representatives of the deceased trustee to obtain payment of the unpaid balance of that share. In fact, that balance has been paid away under an order of court to a prior mortgagee, but the plaintiff's case is that the defendants are estopped from setting up that prior charge by reason of a document signed by the trustees on the 7th of May, 1900. Then, if they are right in that, they say the defendants have no other defence, and they ask for judgment. That is the way the action is brought. The defendants deny the estoppel. They say, first, that the document is not sufficiently clear in itself, but apart from that they say that the circumstances under which it was obtained preclude the plaintiffs from using it as an estoppel. [His lordship stated the facts and reviewed the evidence down to the visit to Dr. Moore, and said he had come to the conclusion (1) that the only promise made to X. by Platt at their interview was that he would lay X.'s request before Mr. Parker; and (2) that the authority for the visit to Dr. Moore was obtained, not at X.'s alleged interview with some clerk on the 5th of May, but from Messrs Parker & Ayre's letter of the 7th, which, his lordship was satisfied, had been received before the party set out for the doctor's house. His lordship proceeded: The interview with Dr. Moore is important. Four

persons were present, but I have only the evidence of two—the doctor on the one side and the clerk on the other—besides the probabilities; for Cordingly is not available as a witness, and Mr. Macfie attended only as a commissioner and took but little interest in the proceedings. According to the clerk's evidence he took with him the memorandum and the declaration; he told the doctor that the plaintiffs had agreed to lend £1,500, provided the trustees assured them that they were getting a first charge and that no notice of incumbrance had been received; he read over the declaration, to which the doctor objected as going too far, and it was altered to meet his wishes. "I then," he says, "put before him the memorandum, and he read it over, as I thought, carefully. I told him we required the trustees' assurance, because in these matters that was practically the only security that could be given. He said 'It is all right, Edward, you have had no money; it was your brother Charles,' and Cordingly assented. The doctor then put the date in and signed his name. I did not say anything to Dr. Moore to induce the belief that the document had been approved by the solicitors. I did not say anything about having called by arrangement with the solicitors." Then in the course of his evidence he said, "Dr. Moore said nothing whatever. He knew the importance of getting the document signed. I did not explain the difficulties he might get into if he signed the document. He said nothing about consulting his legal adviser. Not one word was said about his legal adviser during the whole interview. I swear it was never mentioned."

Now, it seems to me very singular that, the clerk's principal having been careful not to approach Dr. Moore, even in the matter of the declaration, without the consent of the legal advisers, the clerk should have said nothing about the letter from them giving that consent. It strikes me as so singular why all the trouble to obtain their permission should have been taken if nothing whatever was said about it, especially as Edward Cordingly had expressly said that without the letter the doctor would not see them; yet according to the clerk they went without the letter, and nothing whatever was said, and the solicitor's name was not mentioned from beginning to end.

Dr. Moore gives a different account. I do not think he can remember the order in which the conversation he speaks to took place—that is, the exact position with regard to signing the two documents. He says, after dealing with the declaration: "The clerk then produced another paper, a form, and wanted me to sign that. I looked at it. I could not thoroughly understand it. I said they had come down upon me very suddenly, and I did not care to sign it without first communicating with Parker & Ayre, the solicitors, as I had always been accustomed to do in signing all papers connected with the trust. The clerk then pleaded urgency, and seemed to suggest I was keeping the transaction back by not signing, and Cordingly wanted to get away to Canada, and the paper was of no importance. I was induced to sign by the pressure brought to bear, in which Cordingly joined. One or the other said it was a matter of great importance. They said they had seen Parker, the solicitor, and everything was perfectly right." Then further on he said: "All the business in the trust was done with Mr. Howe by appointment at Mr. Parker's office. When I signed the paper I relied on their statement that Parker said it was all right." Then in cross-examination he varies with regard to the order of the incidents. First he says the question and answer about their having seen Mr. Parker took place before he made the declaration; then he puts it after; and then he says: "I said I should like to see Parker after I signed the declaration and before I signed the memorandum."

I quite understand that at this distance of time Dr. Moore is not able to recollect the order of the conversation, but of one thing he is perfectly satisfied, and that is that he signed the memorandum on the faith of the statement that was made to him by the clerk that he had seen Parker and that everything was perfectly right.

Now the clerk, of course, knew of the application to Parker & Ayre by X. that they might approach Dr. Moore, and possibly, without fully appreciating what he was doing, and knowing that Parker & Ayre had been communicated with, he thought he was justified in saying that everything was all right. But Dr. Moore certainly took, and had ground for taking, what was said as meaning that what he was doing both as regards making the declaration and signing the memorandum was in fact being done with Parker's assent, and that they had first approached Parker and had come on to him with Parker's knowledge for the two purposes which they then were on. No explanation of the document at all was given to Dr. Moore, and in my view he certainly signed it in reliance upon the statement conveyed to him in that way that Parker considered it was all right. Then the party returned, and the memorandum and declaration were brought away.

What happened next was this. On the 8th Mr. Howe, the other trustee, signed. He signed after Dr. Moore and observing that Dr. Moore's signature was already there on the paper. X. said Mr. Howe was in a hurry to get away and he had some difficulty in inducing him to stop for a moment. X. said: "I told him Dr. Moore had already signed a similar memorandum. The difficulty was to explain the matter to Mr. Howe. He kept on saying 'Oh, it is all right.'"

Then on the same day, the 8th, X. sent a further letter to Parker & Ayre. [His lordship read the extract from the letter printed above.] The memorandum had been placed before Mr. Parker on the morning of the 7th. It was determined then and there that it was not to be signed by the trustees, and Mr. Platt thereupon put a note at the foot of each of them—for there were two—"We decline to advise the trustees to sign this." That was only elicited during the trial. It was not communicated to X., but the documents had not been returned.

Now it will be observed that in this letter of the 8th of May X. does not tell Messrs. Parker & Ayre that he had procured a statement signed by both Dr. Moore and Mr. Howe, but he writes again as if that had not been done. That is a singular letter to write. If he was relying on the memorandum signed by the two trustees, why write the question again to the solicitors? The solicitors would only receive notice as agents for the trustees, and if they had received notice the trustees would have received notice.

Then on the same day the answer comes back, and it is agreed that this letter was received before the completion of the mortgage. [His lordship read the reply of Messrs. Parker & Ayre.] Now it is extraordinary, in face of this notice by the lawyers that they would not themselves give or advise their clients to give any such memorandum, that X., having obtained the signature of the trustees without the knowledge of the solicitors, paid over the mortgage money and then the transaction was carried out.

It seems that all parties had forgotten the mortgage executed by Edward Cordingly, due and formal notice of which had been personally served on each trustee on the 13th of April, 1894; they had evidently confused him with his brother Charles. It only shows what care and caution are necessary where a

trustee is asked to give such an assurance, and how imprudent it is in any case to do so without looking carefully through the various papers of a trust, which here had lasted for nearly forty years, to see whether there is not a notice of some charge or some settlement or some dealing that has passed away altogether from the mind, but yet of which there is a record among the papers.

Under these circumstances it is said both Howe and Moore are personally liable, and that the circumstances are such as to raise an estoppel. The document is clear and unambiguous in its terms, and no doubt was advisedly drawn by a lawyer in that form. [His lordship read the memorandum.] The question is whether the plaintiffs can rely upon it, having regard to the circumstances under which the signatures were obtained.

Now, in the recent case of *Whitechurch* v. *Cavanagh*, Lord Brampton, dealing with the question of estoppel, said this: "I would add that in my judgment no representations can be relied on as estoppels if they have been induced by the concealment of any material fact on the part of those who seek to use them as such; and if the person to whom they are made knows something which, if revealed, would have been calculated to influence the other to hesitate or seek for further information before speaking positively, and that something has been withheld, the representation ought not to be treated as an estoppel." And in *Low* v. *Bouverie*, Kay, L.J., said: "The essence of the plaintiff's case must be that he was misled by the statement. The court must be satisfied of this. If there was fraud, and the statement was intended to mislead, its ambiguity would not be a defence; but where no fraud is alleged, it is essential to show that the statement was of such a nature that it would have misled any reasonable man, and that the plaintiff was in fact misled by it."

In my opinion here if Dr. Moore had been told by X.'s clerk: "We have sent this form to the solicitors to obtain the signatures. We have seen their managing clerk, Platt" (whom, no doubt, the doctor knew) "and he has said that it is a form they never advise trustees to sign, but that he would put it before his principal," he would never have signed the document. He wanted to consult his solicitors and only signed because he thought he was doing so with their approval, and if he had been told the facts as they were, and as they were known to X. and his clerk, he would not have signed. Then can it be said that under these circumstances X. was justified in acting on such a document so obtained? There are not only the circumstances down to the date when the document was signed—the 7th of May—but the further fact that before it was acted on the letter of the 8th of May had been received from Messrs. Parker & Ayre, so that X. knew, at the time he was completing the mortgage and had before him this letter of Parker & Ayre, that they never gave such an assurance and would never advise their trustees to do it, and this had reference to the very statement to which he had obtained the signatures without their knowledge and behind their backs. The only request to Parker & Ayre was in connection with the declaration of identity, and no intimation of any sort or kind was given to them that he was about to obtain or had obtained their clients' signatures without their knowledge.

Under these circumstances I am of opinion that a document so obtained cannot be set up as estoppel, that no reasonable person could have acted upon it knowing the circumstances as X. knew them, and that the circumstances attending the obtaining the document and down to the date when it was acted upon are such as to estop the plaintiffs from praying in aid any estoppel. The result is the action fails and will be dismissed with costs.

Perhaps I ought to say a word as regards Mr. Howe. He is not in the same position as Dr. Moore, because we have not his evidence; he has passed away. But having regard to the ordinary way in which the documents of the trust were signed and that they were signed at Parker & Ayre's office—the fact that Howe's signature was the second signature obtained, after Dr. Moore had already signed—the circumstances under which it was obtained, Mr. Howe being in a hurry—and to the complete absence of any statement to him with regard to the communications between X. and Messrs. Parker & Ayre, I am of opinion that the same result must follow in Mr. Howe's case as I have already said must follow in Dr. Moore's case.

Action dismissed.

Solicitors, *Robert Scholes*, Manchester; *Grant, Bulcraig, & Co.*, for *Parker & Ayre*, Manchester; *Rylance & Sons*, Manchester.

K. B. Div. (Channell, J.) April 19.

THOMAS FIRTH & SONS (LIMITED) v. INLAND REVENUE COMMISSIONERS. (a.)

*Inland Revenue—Stamp—*Ad valorem *duty—Acknowledgment indorsed on instrument that all the debenture stock secured thereby had been redeemed, paid off, and satisfied—Whether such receipt was stampable as a discharge—Things which in themselves operate to end security—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 12, *Schedule I.*, voce *Mortgage, sub-head* 5.

The following acknowledgment was indorsed on an instrument presented to the Commissioners of Inland Revenue on behalf of the appellants for their opinion as to the stamp duty (if any) with which the instrument was chargeable: "We, the within-named Edward Firth, John Bradley Firth, and Samuel Roberts do hereby acknowledge that all the debenture stock secured by the within-written indenture and all interest thereon has been redeemed, paid off, and satisfied." By Schedule I. of the Stamp Act, 1891, voce "*Mortgage,*" *sub-head* 5, *a reconveyance, release, discharge, or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured, is liable to* ad valorem *stamp duty. The commissioners held that the instrument was chargeable under the above schedule.*

Held, allowing the appeal, that the word "discharge," as well as the other words, pointed to an instrument that put an end to a security, and did not include a receipt indorsed on a deed acknowledging that the capital sum and interest secured by the deed had been redeemed, paid off, and satisfied.

Case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891.

On the 31st of July, 1903, an instrument was presented on behalf of Thomas Firth & Sons (Limited), a company registered under the Companies Acts, 1862 to 1880, to the Commissioners of Inland Revenue under section 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The instrument was as follows: "Whereas the within-named Charles Firth died on the 1st of December, 1892, and the within-named Barnard

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Broomhead died on the 15th of December, 1893, and the within-named James Barber died on the 25th of December, 1902, we, the within-named Edward Firth, John Bradley Firth, and Samuel Roberts, do hereby acknowledge that all debenture stock secured by the within-written indenture, and all interest thereon, has been redeemed, paid off, and satisfied. As witness our hands this 30th day of June, 1903. (Signed) EDWARD FIRTH, JOHN BRADLEY FIRTH, and SAMUEL ROBERTS."

The instrument was indorsed on the indenture bearing date the 23rd of December, 1881, which in effect secured redeemable debenture stock amounting to £100,000. This debenture stock was redeemed and paid off in accordance with provisions in the deed and upon payment off the instrument referred to above was indorsed on it. The only then remaining trustees for the debenture stock holders were the three who signed the instrument.

The commissioners, being of opinion that the instrument was chargeable by reference to the head "Mortgage," sub-head 5, in the first schedule to the Stamp Act, 1891, as a discharge of a security by way of mortgage or of the benefit thereof or of the money thereby secured, assessed it as liable to the duty of £25—namely, 6d. per cent on £100,000, that being the total amount of the money at any time secured by the indenture, and the duty so assessed was duly paid. The appellants being dissatisfied, the commissioners stated this case, and the questions for the opinion of the court were (1) whether the instrument was liable to the duty of £25; (2) if not, to what duty (if any) it was liable.

Danckwerts, K.C., and *John Dixon*, for the appellants.—The instrument was a mere acknowledgment by the trustees that all the debenture stock secured by the deed of the 23rd of December, 1881, and all interest thereon had been redeemed, paid off, and satisfied. Such an acknowledgment was not a discharge within the meaning of that word in sub-head 5, Reconveyance, release, discharge, &c., under the head "Mortgage" in the first schedule to the Stamp Act, 1891, therefore the instrument was not liable to any duty. An *ad valorem* duty of 6d. on every £100 of the total amount of the money at any time secured was chargeable "on any re-conveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security as aforesaid or of the benefit thereof or of the money thereby secured," but as there was no conveyance in the receipt under discussion, it was clear that the document was not a reconveyance, and it was equally clear that the document was not a "surrender, re-surrender, warrant to vacate, or renunciation," and therefore, if liable to duty at all, was liable as a "release" or "discharge." But the operative words in the acknowledgment were "redeemed, paid off, and satisfied." The commissioners held that the receipt was chargeable as a "discharge." There was no authority to support that view: see *Munro* v. *Inland Revenue*, W. N. 1896, p. 149; Davidson's Conveyancing (4th ed.), vol. 2, p. 277, and (9th ed.), p. 72; 47 SOLICITORS' JOURNAL, 445, 450. These passages point to the fact that it had become a common practice to evidence the discharge of formal mortgages of equity of redemption and equitable mortgages solely by endorsing attested receipts, assuming, as would seem to be the case, that such a receipt was not a "release" within the meaning of the Stamp Act, 1870. Mr. Davidson says, at p. 303, And it would seem to be clear that a simple receipt even on the discharge of an equitable mortgage was not liable to an *ad valorem* duty as a release of the mortgage, the money being merely expressed to be received in discharge of all principal moneys, interest, and costs remaining due on the security": see also Key & Elph. (7th ed.), p. 252. The Stamp Act being *positivi juris*, importing nothing of principle or reason, must be construed strictly (*Morley* v. *Hall*, 2 Dowl. 494; and *Commissioners of Inland Revenue* v. *G. Angus & Co.*, 37 W. R. 509, 23 Q. B. D. 579), which latter case decided that where the language left the question in doubt the subject was to be entitled to the benefit of the doubt. Pollock, C.B., in *Gurr* v. *Scudds*, 3 W. R. 457, 11 Ex, 190, expressed the view that such statutes should be construed in favour of the subject, "because a tax cannot be imposed without clear and express words for that purpose."

Bowes v. *Foster*, 6 W. R. 257, 2 H. & N. 779, at p. 788, and *Attorney-General* v. *Carlton Bank*, 47 W. R. 650, [1899] 2 Q. B. 158, were also referred to.

S. A. T. Rowlatt (*Sir Edward Carson, S.G.*, with him), for the Crown.—The instrument here was a release and discharge of the security and the money thereby secured. The words "release" and "discharge" in the schedule were not technical terms, but included every document the tenor of which puts an end to the security or the right to receive the money secured thereby. The decision of the commissioners was therefore right and should be affirmed, as it came within the word "discharge" under "Mortgage," sub-head 5.

CHANNELL, J.—I think when this matter comes to be understood it is really very clear. These things which come under the various sub-sections beginning under "Mortgages" are all cases of operative instruments. You begin with mortgages, and these things which create either the security or the obligation, or whatever it is, are instruments creating it. Then you get to "Transfers" and things of that sort, all of which are operative instruments. Then comes sub-section 5, dealing with Reconveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation." We are saved discussing the last two, because we were told, and I have no doubt rightly, that they are Scotch terms. The other ones seem to me to be all—the only doubtful one is Discharge—really intended to describe instruments which have an operation as instruments in putting an end to something which is existing down to that time, created by the things which went before "of any such security as aforesaid, or of the benefit thereof or of the money thereby secured." They are things that put an end to the obligation created by the thing described under number 1.

This document is quite clearly, I think, not a document which has any force as an instrument putting an end either to any obligation or to any security or to anything else. It is evidence that the thing had gone, and the evidence that the thing had gone comes quite clearly under the heading "Receipt." I do not think that it follows that a thing might not be both a "receipt" and a "discharge," but what I do think is that these headings, sub-section 5 of the heading of "Mortgages, reconveyance, release, discharge, surrender, and re-surrender," all mean instruments which have some operation in putting an end to the obligation. The only possible doubtful one is "Discharge," and in reference to that I construe it in reference to the other documents with which it is found, and that means, not a document which is evidence of a previous discharge, but a document which does discharge the obligation. That being so, I think this does not come within it, and is only stampable as a receipt. In this case it does not want to be stamped as a receipt

because it is endorsed on the document. The appeal will therefore be allowed with costs, and the money paid as duty restored.

Solicitors for the appellants, *Johnson, Weatherall, & Sturt*, for *Broomhead, Wightman, & Moore*, Sheffield.

Solicitor for the commissioners, *The Solicitor of Inland Revenue.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) March 1.

ALTON URBAN DISTRICT COUNCIL (*Appellants*) v. SPICER (*Respondent*). (*a.*)

Local Government—Rating—General district rate—Proportion of assessment—Rating Act, 1874 (37 & 38 *Vict. c.* 54), *ss.* 3, 6—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211.

Where a right of sporting over land which is used as "arable, meadow, or pasture ground only, or as woodlands," is let apart from the land, the lessee of that right is not the "occupier" of such land within the meaning of section 211, *sub-section* 1 (b), *of the Public Health Act*, 1875, *so as to entitle him to be assessed in respect of the same to the general district rate in the proportion of one-fourth part only of the net annual value thereof; he is the occupier of a special hereditament—namely, the sporting right, and is liable, under section* 6 *of the Rating Act*, 1874, *to be assessed in respect thereof on the full rateable value of that hereditament.*

Case stated by the justices for the petty sessional division of Alton, in the county of Southampton.

The appellants preferred a complaint against the respondent before the justices in respect of his non-payment of a general district rate made by them.

At the hearing of the complaint the following facts were proved or admitted:

The respondent had for some years rented the shooting over certain lands, being arable, meadow, or pasture ground and woodlands, within the parish of Alton.

On the 26th of March, 1903, the appellants made a general district rate, which was good on the face of it, at 1s. 11d. in the pound, and the respondent was assessed to the rate in respect of his sporting rights at £5 7s. 4d., being 1s. 11d. in the pound on a rateable value of £56.

On the rate being duly demanded the respondent refused to pay the sum of £5 7s. 4d., but made a legal tender of £1 6s. 10d., which was refused by the appellants' collector in accordance with instructions received by him.

The justices were of opinion that the respondent was only assessable in the proportion of one-fourth of the net annual value of the sporting rights, and as he had made a legal tender of such one-fourth, they refused to make any order on the complaint which had been taken out by the appellants to recover the full amount of the rate.

The question for the opinion of the court was whether the justices had come to a right decision, and, if not, what should be done in the premises.

The Rating Act, 1874 (37 & 38 Vict. c. 54), s. 6, provides:

"2. Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof.

"3. Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof.

"4. For the purposes of this section, the person who, if the right of sporting . . . is let, is entitled to receive rent for the same, shall be deemed to be the owner of the right."

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, provides as follows:

"With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect:

"1. General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property, ascertained by the valuation list for the time being in force . . . subject to the following exceptions, regulations, and conditions, namely:

"(*b*) . . . The occupier of any land used as arable, meadow, or pasture ground only, or as woodlands . . . shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

Foote, K.C. (*S. H. Emanuel* with him), for the appellants.—The justices came to a wrong decision. The tenant of a right of shooting severed from the occupation of the land is not "the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands," within the meaning of section 211, sub-section 1 (*b*), of the Public Health Act, 1875. Section 6 of the Rating Act, 1874, provides that, for rating purposes, the lessee of a sporting right, when severed from the occupation of the land, may be rated as the occupier thereof. He is rateable at the full net annual value of the land of which he is lessee, and does not come within the exception contained in section 211, sub-section 1 (*b*), of the Public Health Act, 1875.

He cited *Eyton* v. *Overseers of Mold*, 29 W. R. 122, 6 Q. B. D. 13.

M. M. Macnaghten, for the respondent.—The justices came to a right conclusion. The Legislature can never have intended that while the owner or tenant of land used as arable or pasture ground or as woodlands shall be assessed in respect of such land in the proportion of one-fourth only of the net annual value, the person who is the lessee of the shooting over such land shall be assessed in respect of the full value. The lessee of the shooting cannot, of course, exercise his shooting right without going on to the land, but that does not make him more than the occupier of land used as arable, meadow, or pasture ground only, or as woodlands.

He referred to *Holywell Union* v. *Halkyn Drainage Co.*, [1895] A. C. 117, 43 W. R. Dig. 131.

Foote, K.C., was not called upon to reply.

Lord ALVERSTONE, L.C.J.—Prior to the Rating Act, 1874, sporting rights were not rateable as separate hereditaments, but where they existed they were allowed to be taken into consideration as showing that the land over which they were exercised had an enhanced rateable value. Then by section 3 of that Act it was provided that the Poor Rate Acts should extend, *inter alia*, "to rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land." There was thereby created a new rateable hereditament which, on the face of it, was independent of the ordinary occupation of the land. Then section 6 provides for two cases in which the right of

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

sporting is severed from the occupation of the land. Firstly, sub-section 1 provides that where any right of sporting "is severed from the occupation of the land, and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase." Then, secondly, sub-section 2 provides that "where any right of sporting, when severed from the occupation of the land is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof. Sub-section 3 then provides that "the owner of any right of sporting when severed from the occupation of the land, may be rated as the occupier thereof." It is therefore clear that a sporting right can be rated up to the full net annual value. But then we come to the Public Health Act, 1875, s. 211, sub-section 1 (*b*), of which provides that the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value. Now, counsel for the respondent could not contend that the owner of the sporting rights was not liable to be rated, but he did contend that the respondent was the occupier of land used as "arable, meadow, or pasture ground," because he had to go on to such land when exercising his sporting rights, and that he was therefore entitled to be rated in respect of his sporting right at only one-fourth of the net annual value. The answer to that contention is that the respondent is not the occupier of "arable, meadow, or pasture ground" within the meaning of the Act of 1875; he is the occupier of a special hereditament which has been made rateable by the Act of 1874—namely, the sporting right. I am, therefore, of opinion that the justices came to a wrong determination, and that the respondent is liable for the full amount of the rate.

This appeal must therefore be allowed.

WILLS, J.—I am of the same opinion. Where the sporting rights are severed from the occupation of the land, the lessee of the sporting rights is not the "occupier" of the land.

KENNEDY, J.—I agree.

Appeal allowed and judgment for the appellants.

Solicitors for appellants, *Church, Adams, & Prior*, for *C. & W. Trimmer*, Alton.

Solicitors for respondent, *Cunliffes & Davenport*, for *Bailey & White*, Winchester.

House of Lords.

From C. A. (England). } May 2.

In re CATERHAM URBAN COUNCIL AND GODSTONE RURAL COUNCIL. (*a*.)

Local government—Severance of part of rural district into urban district—Adjustment of property and liabilities—Highway expenses—Loss of income—Local Government Acts, 1888 (51 & 52 *Vict. c.* 41), *ss.* 57, 62; *and* 1894 (56 & 57 *Vict. c.* 73), *s.* 54.

By an order of a county council, made under section 57 *of the Local Government Act*, 1888, *part of a rural district was converted into an urban district, which was no longer liable for the maintenance of the highways in the rural district, but took over its own liabilities and property in its own separate area. The rural district council claimed an adjustment of the income, liabilities, and expenses, under section* 62 *of the Act, in respect of the maintenance of the highways, as the contributions formerly received from the urban district area exceeded the rates derived therefrom.*

Held, that the loss of profit from the contributions formerly received by the rural district council from the area comprised in the new urban district was not a matter for adjustment, for the section does not give compensation for such loss, and loss of income under this section referred to present income and not to that to be derived from rates which may hereafter be imposed.

Decision of the Court of Appeal (51 *W. R.* 353, [1903] 1 *K. B.* 554) *reversed.*

In re Rochdale Union and Haslingden Union, 47 *W. R.* 322, [1899] 1 *Q. B.* 540, *and* In re Buckinghamshire County Council and Hertfordshire County Council, [1899] 1 *Q. B.* 515, 47 *W. R. Dig.* 114, *overruled.*

Appeal from an order of the Court of Appeal (Vaughan Williams, Stirling, and Mathew, L.JJ.), affirming an order of Wright, J., upon an award of an arbitrator stated in the form of a special case, which is set out at length in the report of the case in the Court of Appeal (51 W. R. 353).

By an order made under section 57 of the Local Government Acts, 1888 and 1894, it was ordered that the parish of Caterham should cease to form part of the rural district of Godstone, and should be converted into an urban district, and the property and liabilities of the rural district council, so far as regarded the area of the new urban district, became vested in the urban district council, including the liability to maintain the highways. The respondents made a claim upon the appellants alleging that their income, liabilities, and expenses in respect of the maintenance and repair of highways were affected by the order, and that they were entitled to have the claim adjusted by arbitration under the provisions of section 62 of the Local Government Act, 1888.

The matter was referred to arbitration, and the respondents put forward a claim for the payment to them by the appellants of a sum of £36,000 or thereabouts, being the capitalized value at thirty years' purchase of an amount of £1,200 which was alleged to be the average yearly excess of contribution over expenditure which had been received by the respondents from the separated area before the separation.

Wright, J., held that the respondents were entitled to have their claim adjusted by arbitration under section 62 of the Local Government Act, 1888, upon the ground that he was bound by the decisions of *In re Rochdale Union and Haslingden Union* and *In re*

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Buckinghamshire County Council and Hertfordshire County Council.

Bray, K.C., and *Montague Shearman, K.C.*, for the appellants.—Section 62 of the Local Government Act, 1888, does not give compensation. Adjustment is not the same as compensation for a loss of ratepaying area against a newly-created Local Government area. The courts below followed the decisions in *In re Rochdale Union and Haslingden Union*, and in *In re Buckinghamshire County Council and Hertfordshire County Council*, which were wrongly decided.

C. A. Russell, K.C., and *George Humphreys*, for the respondents.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—I am of opinion in this case that the judgment of the Court of Appeal and of Wright, J., should be reversed; but in truth, though the question arises in this case and the consequence must follow, it is really the decision in the case of *In re Rochdale Union and Haslingden Union* which is here under appeal. There seems to have been some misapprehension about that decision. Lord Russell of Killowen commences his judgment by saying that he agrees with the judgment of Channell, J., "substantially," and entirely in the principle involved in it, but upon the point now in debate the judgment of Channell, J., and Ridley, J., who entirely agreed with him, was the other way. The language of the section now under construction does not seem to me to be appropriate to the compensation of one district for being placed in a less advantageous financial position than before the alteration in its boundaries. This is language which the Legislature has used elsewhere when what is now contended for was contemplated by the Legislature, but I do not think that section 62 ever contemplated "adjustment" as being applicable to such a state of things as has been brought about by a diminution of rateable area. Where two areas are being divided, and each becomes responsible for its own administration, and where previously they possessed property, it is obvious enough that they must have some mode of adjusting the division of the property which each possessed prior to such separation—the buildings, for example, the workhouses for the administration of the poor law—and, to quote the language of the section, "property, income, debts, liabilities, and expenses."

The only word within which the present claim can be embraced is the word "income." Now, it may be conceded that in a loose mode of speech the capacity for being rated for future liabilities might be so described, but it would not be accurate. And it is not with the word itself alone that one has to deal, but with the word associated, as it is here, with the words "property, debts, liabilities, and expenses." I cannot think that the Legislature intended so grave a departure from the general and very obvious meaning of the words that it has actually used. Where it did intend to allow compensation to be given—compensation, be it observed, not adjustment—it has shown that it can use appropriate and express words for the purpose, and the words "property and income from property" can well be satisfied by a division of property and income resulting from property, without importing the element of compensation for loss of income. Even if the word "income" itself were appropriately used, I think the word "adjustment," as distinguished from "compensation," means a division of existing assets, while "compensation" would quite rightly be interpreted to mean the loss of some right to obtain income by rating, or of some area which would furnish the right to get income. But it seems to me quite contrary to principle in the case of an alteration of boundaries applicable to a municipal body, which is to be for the future self-sufficing, to make the adjustment of its "property and income, debts and liabilities," a subject of compensating arrangements. Of course, if the Legislature has done it, it must be acquiesced in, but I entirely dissent from the idea of presuming that this has been done without express words. For these reasons it appears to me that the judgment appealed from ought to be reversed, and I so move your lordships.

Lord DAVEY.—The question to be determined in this appeal was thus stated by Vaughan Williams, L.J.: "It is said," he observes, "that by reason of the separation of the parish of Caterham from the Godstone Rural District, the council of that district will lose the profit which they formerly derived from the contributions of the parish of Caterham"; and the question, he added, was whether that apprehended loss was matter for adjustment pursuant to the provisions of section 62 of the Local Government Act, 1888. Counsel for the respondents disclaimed stating the question in that way. But I think that the Lord Justice accurately described the claim which is put forward by the respondents. What they are seeking is not an adjustment in the ordinary sense of that word of common property or liabilities, or of any reciprocal liabilities of Caterham and Godstone towards each other, but compensation for a loss which they apprehend they will suffer by the severance of Caterham from the Godstone Rural District. I do not assume that the arbitrator, if he should be required to proceed with the matter, would award to the respondents the full amount of the extravagant claim put forward by them (the respondents), and I refer to that claim only as showing the true nature of their demand.

The first observation that occurs to me is that section 62 says nothing about compensation for apprehended loss of profit or injury. Your lordships are familiar with Acts of Parliament which give a right to such compensation, and one would have expected that, if that was the meaning of the Act, it would have been expressed in plain terms. Local authorities are by the section in question authorized to make agreements for the purpose of adjusting "any property, income, debts, liabilities, and expenses." The *primâ facie* meaning of these words is to give powers or facilities for adjusting any matters which, by reason of the Act, or a scheme made under it, require adjustment. In the following words the expression is altered. The section goes on to say (reading it short) that any agreement authorized by the Act to be made "for the purpose of the adjustment of any property, debts, liabilities, or financial relations, may provide for the transfer or retention of any property, debts, or liabilities, or for the joint use of any property and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint user, or in respect of the salary, remuneration, or compensation payable to any officer or person."

I have troubled your lordships by reading the section at length, because the latter words in my opinion confirm the *primâ facie* meaning which I have attached to the earlier words. It must be admitted, I think, that the property, debts, or liabilities to be retained or transferred must mean existing property or debts, or a liability actually incurred, and the expression "financial relations" I think also refers to any reciprocal financial obligations which the undivided district and the severed portion may have

already incurred towards each other. I construe the words "income" and "expenses" in the same manner. I think that "income" means income presently enjoyed, or to which there is a present title, and does not include income which may hereafter be derived from the making of rates. There may be income derived from property which is held on trust for the district, or some income—such, for example, as a rent-charge or other annual payment applicable under some financial detriment arising from Acts directed or authorized by the Legislature, and, in my opinion, there is nothing in the Act which creates such a right. I am therefore of opinion that the appeal should be allowed. It follows from what I have said that I think the cases of *In re Rochdale Union and Haslingden Union*, and *In re Buckinghamshire County Council and Hertfordshire County Council* were wrongly decided and should be overruled.

Lord JAMES OF HEREFORD.—In this case I agree with the opinions already expressed that the judgment of the Court of Appeal should be reversed; for I concur in the view that the loss of a portion of a ratepaying area does not support a claim for an adjustment of "property, income, debts, liabilities, or expenses" within the meaning of section 62 of the Local Government Act, 1888. It seems to me that the separation of a portion of an area within which a rate has been levied cannot occasion a loss of "income" within the meaning of the section to the remaining portion of the area; nor can such change in the existence of the rateable area occasion any claim for adjustment under the word "liabilities."

Both of these words, "income" and "liabilities," must be read as referring to ascertained and existing income and liabilities, and cannot be held to include the mere liability to be rated if the order of division had not been made. It may be that the application of this view may in some cases confer on one portion of a divided area substantial advantage at the expense of another portion. But if such gain or loss would amount to injustice, it may be that the remedy is to be found by objecting to the order being made by the county council under section 57 of the Act, or to its confirmation by the Local Government Board.

Lord ROBERTSON.—I am very clearly of the same opinion. I do not think that the claim of the respondents comes within section 62; and when I say so I mean not merely that the word "adjust" and the other phrases used are not appropriate to cover it, but that the claim is in its nature and substance altogether heterogeneous to the things contemplated, and is outside the scheme of setting up new authorities as stated in the Act.

It must be remembered that when, under section 62, Caterham and Godstone proceed to "adjust" (whatever that means), they meet as separate and self-contained rating authorities, Caterham having been, by deliberate statutory proceedings, vested with the full and exclusive power of rating, for its own use, within the boundaries assigned to it, and Godstone, while retaining its old name, having a different and smaller jurisdiction compared to that which formerly existed. The direct and necessary result of setting up Caterham as an urban district is to establish not merely one but two new rating units—namely, Caterham and the lesser Godstone. The rating in each is necessarily on the new basis of the new area; and it would be merely an accident if the rates in the two areas were the same after as before the separation.

Now, the assumption, and what I must venture to call the fallacy, of the judgments under review is that the Legislature intended that the two new bodies should set about what Bruce, J., called "restoring the true balance"—that is to say, the former balance of rates. I see no warrant for any such assumption. On the contrary, I should suppose that in some cases at least one of the reasons why a new urban district is set up is because the rating is unfair, and would be made more equitable by dividing the rating area into two. The inhabitants of some proposed new district (I am not for the moment speaking of Caterham) may very well say that they, having grown into a self-contained community, are made to pay for things in which they have no interest, and because of their large valuation are paying more than the people who are interested in them. All these considerations and the like, *pro* and *con*, are for the county council and the Local Government Board.

But the *Rochdale case* and the *Bucks case* depend upon the view that in the matter of rates the *status quo ante* the order is to be treated as the standard of right after the order, and that any detriment on the one side and advantage on the other, caused by the independence of the new district, are to be redressed by adjustment. I see no trace of an intention thus to stereotype by compensation the results of a system of rating which, *ex hypothesi*, has ceased. Of course it is quite conceivable that the Legislature might have made it a condition of the setting up of a new rating body that it should purchase its independence, and might have taken the financial position in the year of independence as fixing the price. But this is an idea unexpressed in the statute, and remote from the simple one expressed in section 62, which primarily at least deals with extant things and extant liabilities, which, belonging to the undivided community, must perforce be divided now that the community is broken up and the partners are taking with them what belongs to them. And the difficulty of applying the words of section 62 to a claim of compensation becomes, as I think, an impossibility when the nature of the claim is clearly realized.

I have read with care all the judgments in the previous cases. In the *Rochdale case* and in the *Bucks case* the principle laid down is that which I have already referred to, that the "true balance," meaning thereby the existing balance of the date of separation, must be "restored." This is most clearly shown in Bruce, J.'s, judgment in the *Bucks case*, and in that of Smith, L.J., in the *Rochdale case*. It is significant that all subsequent judicial opinions have been based on the authority of these cases, and that in none has this principle been independently reasserted.

Order of Court of Appeal and order of Wright, J., reversed, with costs here and below.

Solicitors, *F. B. Winter; Cooper, Turner, & Evans*, for *Evelyn A. Head*, East Grinstead.

Court of Appeal.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) — May 13.

YEOMAN (*Suppliant*) *v.* THE KING. (*a.*)

Ship—Charter-party—Demurrage—Cargo to be discharged at the average rate of not less than 210 tons per working day—Fraction of a day.

Under a charter-party the cargo of 2,367 tons on board a ship was to be discharged at the average rate of not less

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

than 210 tons per working day, weather permitting; the time to commence in accordance with the custom of the port; Sundays and all holidays and time lost by any cause whatever beyond the control of the consignee of the cargo not to count as discharging time. It was also provided that demurrage was "to be paid at the rate of 4d. per net registered ton per day and pro rata *employed beyond the time allowed for discharging." The time the cargo would take to discharge would be 11¼ days. The discharge took 12¾ days, and the charterers contended that as they had rightfully broken into the twelfth day they were entitled to treat the whole of that day as a lay day, and paid demurrage calculated on that basis.*

Held, that fractions of a day must be taken into account, and that the shipowners were entitled to be paid demurrage after 11¼ days.

Appeal by the Crown from a decision of Bigham, J., given in the Commercial Court on the hearing of a petition of right.

The suppliant was a shipowner of West Hartlepool, and he claimed demurrage in respect of the detention of a vessel, the steamship *Haslingden*, at Bermuda, to which port the ship had carried a cargo of 2,367 tons of patent fuel from Cardiff for the Admiralty. The question turned upon the construction of a code charter-party in general use in the service which so far as material provided by:

Clause 6.—That "the cargo shall be discharged at the average rate of not less than 210 tons per working day, weather permitting; the time to commence in accordance with the custom of the port; Sundays and all holidays, and time lost through strikes or locks-out of workmen, accident, frosts, floods, rains, winds, rollers, or any cause whatsoever beyond the control of the consignees of the cargo not to count as discharging time."

Clause 7.—"Demurrage to be paid at the rate of 4d. per net registered ton per day and *pro rata* employed beyond the time allowed for discharging."

It was admitted that the customary working hours at the port of Bermuda were from 6 a.m. to 6 p.m., and that the cargo should have been discharged in 11¼ working days. The time having been exceeded, the question arose as to what time did demurrage begin to run. The suppliant contended it began immediately on the expiration of the 11¼ working days after the unloading began, which was at 6 a.m. on Monday, the 15th of July, 1901, and was not completed until 3 p.m. on Monday, the 29th of July. On the other hand, the Admiralty said that as they were entitled to part of the working day of Saturday (the 27th of July) in discharging, they were entitled to treat the whole of that day as a lay day, and that demurrage did not begin to run until the morning of the next following working day. They accordingly paid the shipowner demurrage calculated on that basis. The suppliant claimed a further sum for the demurrage from 9 a.m. on Saturday (the 27th of July), the hour at which it was admitted, for the purposes of the present case, that the 11¼ days expired, until 6 p.m. on that day.

Bigham, J., found in favour of the suppliant on the authority of an unreported decision of a Divisional Court in an unreported case of *Hacquoil & Co.* v. *Tapson & Co.*

The Crown appealed.

R. B. D. Acland, K.C. (*Sir Robert Finlay, A.G.*, with him), relied on *Commercial Steamship Co.* v. *Boulton*, 23 W. R. 854, 10 L. R. Q. B. 346, where it was held that in the case of demurrage a fraction of a day counted as a day. In that case the delay arose in loading the vessels and the decision was against the charterers. But as no words appeared in the charter-party showing a contrary intention, on the reasoning of that case the charterers here were entitled to the whole of the day because they were admitted entitled to a part of it. That was also to be gathered from the expression "the cargo shall be discharged at the average rate of not less than 210 tons per working day," which meant one day with another, and did not mean that during the different hours of any particular day it should be discharged at that average.

Scrutton, K.C., and *Adair Roche*, for the suppliant, were not heard.

COLLINS, M.R.—It seems to me clear that our decision in this case should be against the appellant. By the charter-party the cargo was to be discharged at the average rate specified per working day, weather permitting; the time to commence in accordance with the custom of the port; Sundays and holidays and time lost from any cause beyond the control of the consignee of the cargo not to count as discharging time. Here it is admitted that the lay days began at 6 a.m. on Monday, the 15th of July. That being the starting point, it is easy to calculate how many days were allowed for discharging the cargo, which at 210 tons per working day would work out at 11¼ days. In my opinion the charterers are entitled to such time for discharging as, according to the number of tons on board, works out at an average rate of discharge of 210 tons per day—that is, 11¼ days and no more. The charterers contended that because the time allowed for discharge broke into part of the Saturday they were entitled to the whole of that day. I see no reason, either in common sense or business, or on the construction of the charter-party, for allowing the charterers more time than that which, worked out is the way I have mentioned, ended at 9 a.m. on the Saturday. That is the whole point. The charterers have failed in their contention that, being entitled to take part of a day, the whole of that broken day counted in their favour, and therefore the appeal must be dismissed.

ROMER, and MATHEW, L.JJ., gave judgment to the same effect.

Appeal dismissed.

Solicitor for the Crown, *The Solicitor to the Treasury.*

Solicitors for the suppliant, *Botterell & Roche.*

From K. B. D. (In Bkcy.).
(Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — April 29.

In re ROWE.
Ex parte DERENBURG & CO. (*a.*)

Bankruptcy—Proof—Withdrawal—Substitution of fresh proof—Voluntary payment by third party for loss incurred—Right of proof for the whole debt.

A creditor who has received a voluntary payment from a stranger in consideration of the fact that the creditor has sustained a loss by the acts of the bankrupt, even although such payment only represents a part of the debt due to the creditor, and the creditor gives the stranger credit for it in proving his debt, nevertheless is entitled to enter an amended proof, claiming the whole amount of the debt, as against the trustee in bankruptcy.

Decision of Buckley, J. (ante, *p.* 336, *W. N.* 1904, *p.* 64), *affirmed.*

This was an appeal from a decision of Buckley, J. (reported *ante*, p. 336, W. N. 1904, p. 64).

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

The facts were shortly as follows: The case came before Buckley, J., on an appeal by creditors from the rejection of their proof by the trustees in bankruptcy.

The creditors, Messrs. Derenburg & Co., were a firm of stockbrokers, who had had large dealings with the bankrupt Rowe, and in January, 1903, a receiving order was made against him. At this date Rowe owed Derenburg & Co. a sum of about £20,368, on the security of certain share certificates, which were subsequently discovered to have been forged by him. Rowe had been a partner in the firm of Bewick & Moreing, and that firm, although in no way liable for his criminal act, sent Derenburg & Co. a cheque for £6,500 on the 3rd day of June, accompanied by a letter in the following terms: "Although you admit we are not liable, we have pleasure in sending you £6,500. This, we understand, will cover all the losses sustained, except those for which you hold an insurance policy." This was quite a voluntary payment on the part of Messrs. Bewick & Moreing, and Derenburg & Co. accepted it on this footing.

On the 3rd day of July Derenburg & Co. sent in a proof for £13,868 against Rowe's estate, giving credit for the £6,500 which they had received from Bewick & Moreing. Some correspondence with the trustee took place with reference to this proof, and it appeared that it was not formally admitted until the 1st of December. In the meantime, Derenburg & Co., having been advised that Bewick & Moreing would find a diffulty in proving for the £6,500, and that they themselves were entitled to prove for the whole amount of their debt, without giving credit for that sum, on the 6th of November sent in a fresh proof for £20,368, and asked that it should be substituted for the earlier proof for £13,868. On the 7th of November the trustee wrote refusing to consider this new proof, and later rejected it. On the 1st of January, 1904, the trustee filed the earlier proof, noting that he had admitted it in full upon the 1st of December, 1903. The later proof was rejected on two grounds—firstly, that the creditors were not entitled to withdraw the first proof, and substitute another without leave of the court, and, secondly, that they were bound to give credit for the £6,500. Derenburg & Co., having appealed, it was held by Buckley, J., that they were entitled to prove for the whole of the debt.

The trustee appealed.

Gore-Browne, K.C., Muir Mackenzie, and *Francke*, for the appellant trustee.—The second point before Buckley, J., was whether Derenburg & Co. were under an obligation to give credit for the £6,500 paid to them by the firm of which the bankrupt had been a member. Payment by a stranger satisfies the debt [VAUGHAN WILLIAMS, L.J.—You are not basing it on any principle of bankruptcy administration, but on general knowledge?] Yes. Where a creditor has in fact received payment from a stranger, until assented to by the debtor, he can sue debtor.

They cited *Belshaw* v. *Bush*, 11 C. B. 191, 17 Jur. 37; *Jones* v. *Broadhurst*, 9 C. B. 173; *Walter* v. *James*, 19 W. R. 472, L. R. 6 Exch. 124. [VAUGHAN WILLIAMS, L.J., referred to Leake on Contracts (4th ed.), and *Cook* v. *Lister*, 11 W. R. 369, 13 C. B. N. S. 543.]

H. Reed, K.C., and *F. C. Willis*, for the respondents.

They referred to *Simpson* v. *Eggington*, 10 Exch. Reps. 845, 4 W. R. C. L. Dig. 185. [*Gore-Browne, K.C.*, mentioned *Kemp* v. *Balls*, 10 Exch. Reps. 607, 3 W. R. C. L. Dig. 146.]

Gore-Browne, K.C., replied.

VAUGHAN WILLIAMS, L.J.—In my opinion the judgment of Buckley, J., should be affirmed. He asks what are the facts of the case, and says, I think, quite justly, that if you take the facts of the case as they are presented here, the question before the court in the cases of *Cook* v. *Lister*, 11 W. R. 369, 13 C. B. N. S. 543, and *Belshaw* v. *Bush*, 11 C. B. 191, does not arise here at all. The learned judge said in the course of his judgment: "As to the second point, I do not think that this was the case of a stranger offering part of a debt; the payment in question was not tendered or accepted as part of the debt; it was made in consideration of the fact that the creditors had sustained loss by the acts of a person for whom Bewick & Moreing considered themselves to some extent morally responsible." I think that that conclusion of fact taken by Buckley, J., was perfectly correct, and therefore I do not think any question of law arises here at all, and as he points out, it was a payment with which the debtor had nothing to do. It was purely a voluntary gift made by Bewick & Moreing to mitigate for a loss for which they were not in any way liable. In my opinion the appeal fails.

STIRLING and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors, *Morley, Shirreff, & Co.; C. E. Dunn.*

High Court of Justice.

Chan. Div. Buckley, J. — June 21.

In re CLIFTON'S PATENT. (*a.*)

Patent—Revocation—Petition for revocation—Practice—Court or chambers—Consent.

An order for the revocation of letters patent for an invention cannot be obtained upon summons in chambers, even where the respondent consents to the revocation.

In this case a petition had been presented for the revocation of letters patent for improvements in circular saws, granted to H. C. Clifton, under section 26 of the Patents, Designs, and Trade-Marks Act, 1883.

In June, 1904, the petitioner took out a summons before the judge in chambers, asking for an order for revocation of the letters patent, to which the respondent was prepared to consent.

This course was adopted in reliance upon the observations of Joyce, J., in *In re Scott's Patent*, 20 Rep. Pat. Cas. 604.

His lordship, however, refused to hear the summons, and the petition came on in court.

J. W. Gordon, for both the petitioner and the respondent, asked for an order upon the petition by consent.

BUCKLEY, J.—A summons was issued in this case to obtain judgment for revocation in chambers without bringing the matter into court. That process was adopted in reliance upon something which Joyce, J., was supposed to have decided in *In re Scott's Patent*. I have taken the opportunity of mentioning the matter to Joyce, J., and he has informed me that he had no intention of deciding in that case that it was proper to obtain an order for revocation in chambers. Under these circumstances I feel myself free to do what in my judgment seems right. A petition pre-

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

sented under the statutory jurisdiction for the revocation of a patent is, I think, a matter which ought to be dealt with in court. I do not forget the fact that in other matters having nothing to do with letters patent orders have to be obtained upon petition and not in chambers where the amount involved exceeds a specified sum. *Primâ facie* a petition is a matter to be adjudicated upon in court; and where the relief sought is the revocation of a patent, I think it is expedient that relief should be given in open court, and not in chambers. For this reason I refused to make the order for revocation on summons, and this petition is now brought on to be dealt with in court. I now pronounce judgment for revocation by consent.

Solicitors, *Baker, Baker, & Co.; Wilson, Bristows, & Carpmael.*

Chan. Div.
Warrington, J. } May 4, 5.

BOWDEN'S PATENTS SYNDICATE (LIMITED) *v.* HERBERT SMITH & CO. (*a.*)

Patent—Assignment of application for—Assignee's right of action—Practice—Parties—Leave to amend.

The assignee of the application for a patent is only an equitable assignee of the patent. He cannot sue for infringement of the patent unless he joins the legal owner either as plaintiff or defendant.

Leave to amend by adding the legal owner granted.

On the 14th of June, 1897, E. M. Bowden applied for letters patent in respect of a certain invention. By a deed dated the 17th of December, 1897, he assigned to the plaintiffs, E. M. Bowden's Patents Syndicate (Limited), "all that the said invention and also all that and those the said letters patent and other protection" relating thereto, "and the sole and exclusive benefit thereof and of all extensions and improvements thereof, and also all rights, powers, emoluments, and advantages whatsoever under or in respect of the said letters patent."

On the 28th of July, 1898, the patent was issued to E. M. Bowden, and dated the 14th of June, 1897.

On the 2nd of July, 1903, the plaintiffs commenced this action against the defendants for infringement of the patent of which E. M. Bowden alone at that date was the registered owner.

By a deed dated the 13th of October, 1903, E. M. Bowden as beneficial owner thereby assigned absolutely to the plaintiffs all the thereinbefore recited inventions and the letters patent in respect thereof, and the full benefit thereof, and all rights, powers, privileges, and emoluments connected therewith.

Upon the hearing of the action the question arose whether the plaintiffs could maintain the action without joining E. M. Bowden (who had died since the 13th of October, 1903) as plaintiff or defendant.

Moulton, K.C., T. Terrell, K.C., and *E. F. Lever,* for the plaintiffs.—The deed of the 17th of December, 1897, is an assignment of the application. It passes all the interest of E. M. Bowden at that time and to an assignment of the provisional protection. The assignee got a legal title. He had an assignment of whatever E. M. Bowden had, and afterwards got a grant from the Crown to Bowden and his assignees dated from the date of the application. [WARRINGTON, J., referred to *Chollet* v. *Hoffman,* 5 W. R. 573, 26 L. J. Q. B. 249; and Frost's Patent Law (2nd ed.), p. 365.]

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

A. J. Walter and *F. C. Sinclair,* for the defendants.—The deed of the 17th of December, 1897, is not an assignment, but an agreement to assign. An equitable assignee has no right to sue in his own name.

Other cases referred to were *Actien Gesellschaft fur Cartonnagen Industrie* v. *Temler,* 16 R. P. C. 447; *Renard* v. *Levinstein,* 13 W. R. 229, 382, 2 H. & M. 628; and *Heap* v. *Hartley,* 38 W. R. 136, 42 Ch. D. 461.

WARRINGTON, J.—The plaintiffs in their statement of claim allege that they are the registered assignees—I call particular attention to that—of these letters patent. In the first place, were the plaintiffs at the date of the issue of the writ legal assignees of this patent or not? If they were, then the question, which, judging from a passage in Mr. Frost's book, is undecided, would arise—namely, whether they are entitled to sue before registration? If they were not the legal assignees, the question does not arise.

The first question I have to decide, therefore, is, were the plaintiffs at the date of the writ legal assignees of the patent? Counsel for the plaintiffs contended that the assignment was an assignment of the rights granted or acquired by the application for the patent; that amongst those rights was a right to have the patent when granted dated back to a date anterior to the assignment, and that, when granted, the patent itself passed by the assignment of the protection. In my opinion that is not the true view of this deed. Although the words of the assignment are "an assignment of the protection," whatever that may mean, the deed is really an assignment of such beneficial rights as the fact of the protection, when perfected by the granting of the letters patent, may confer on the person who has made the application. I thing it was really in law nothing more than a grant of a right to have that patent assigned to the assignee. I cannot satisfy myself that this amounts to an assignment of the patent, and that it would have been competent for the assignee to have it entered on the register as such an assignment. I hold, therefore, that the plaintiffs at the date of the commencement of the action were the equitable assignees of the patent.

Are they entitled to protection without joining the person who is registered owner of the patent? No authority directly in point has been cited to me on either side. One case has been referred to in which the plaintiffs were equitable assignees—*Actien Gesellschaft für Cartonnagen Industrie* v. *Levenstein.* But it was an application for an interlocutory injunction; and I can quite understand that, in such a case, even if it had been necessary ultimately to amend the writ, it may have been that an application for an interlocutory injunction would have been entertained, because it very often happens that it is necessary to make an order at once, possibly without waiting for amendment. But, treating that case cited as an authority, it is enough for me to say that there is no authority at all upon this point, because the point does not seem to have been raised or discussed. The decision was on a different point altogether.

Now, what is the general rule of the court with regard to an action brought by an equitable owner of property? The common case with which we are most familiar is an action relating to some debt in respect of which the provisions of the Judicature Acts, which allow an assignee to bring an action in his own name without joining the assignor, have not been complied with. In that case, the well-accepted practice of this court is that the legal owner of the property in question must be a party to the action, either plaintiff or defendant. He is the proper person

to bring the action. If he does not do so, the course which the plaintiff adopts is that of proving that fact and making him a defendant. Applying that to the present case, I come to the conclusion that it is necessary, in order to maintain this action to have the legal owner before the court.

Now E. M. Bowden is dead, and I understand at present his will has not been proved. The present legal owners are the assignees under that deed of October, 1903; but the legal owners at the date of the issue of the writ would be either E. M. Bowden, if he were alive, or his executors. Therefore, it is obvious that the matter must stand over to add the executors as plaintiffs in the action.

I have been asked to allow the amendment, and I propose to do so. I shall allow the plaintiffs to amend their writ and statement of claim by adding the executors as plaintiffs, by making the necessary allegations in the statement of claim on the terms of allowing the defendants to amend their defence. The costs thrown away by reason of the necessity of making the amendment ought to be defendants in any event.

Solicitors for the plaintiffs, *Alfred Withers.*

Solicitors for the defendants, *Phillips & Boyle.*

K. B. Div. (Walton, J.) May 31.

CHESHIRE *v.* BAILEY. (*a.*)

Master and servant—Contract to supply carriage and driver to commercial traveller—Goods left in carriage—Obligation to take care of carriage during temporary absence of traveller—Larceny by coachman—Liability of jobmaster for loss.

The plaintiff, a wholesale jeweller, entered into a contract with the defendant, a jobmaster, for the hire of a brougham and driver for the use of the plaintiff's traveller, and the brougham was fitted up for the purpose of such use. The traveller left the brougham in the street for the purpose of getting his lunch, and while he was away the contents of the carriage were stolen, with the connivance of the coachman.

Held, that the defendant was liable, because there was an obligation on him, by virtue of the contract, to provide a careful and trustworthy driver who would safeguard the contents of the brougham during intervals when the traveller would be necessarily absent, and that the defendant was not the less liable because the breach of contract was occasioned by a criminal act on the part of the defendant's servant.

Abrahams *v.* Bullock, 50 *W. R.* 626, *followed.*

Action tried before Walton, J., sitting without a jury.

The plaintiff was a wholesale jeweller and silversmith carrying on business at Birmingham and the defendant was a London jobmaster. The action was brought to recover damages for the loss of goods owing to the negligence of the defendant or his servant. The defendant denied liability.

The plaintiff's case was that in October, 1902, his London traveller, Mr. Gray, hired from the defendant a commercial brougham, horse, and coachman, for use in his business, at the rate of £3 5s. a week of five days, Monday and Friday inclusive. At the interview when this agreement was entered into Mr. Gray in his evidence stated that he had told the defendant the use to which the brougham was to be put, and explained to the defendant the necessity of supplying a trustworthy driver. From October, 1902, until August, 1903, Mr. Gray continued to use the brougham, and during that time several different coachmen were supplied by the defendant. Ultimately, in May, 1903, a coachman named Brown was sent, and on the 23rd of August following he came to take out Mr. Gray. The brougham on that day carried samples to the value of about £1,000. The traveller visited certain customers, and at mid-day went to lunch, leaving the carriage, as usual, in the coachman's care. When he came back from lunch he found both the brougham and the man had disappeared. Eventually Brown confessed to having been a party, with two other men, to stealing the brougham and its contents, and upon his trial he pleaded "Guilty" and was convicted on the 19th of October, 1903. A portion of the goods, amounting in value to about £300, was subsequently recovered, and this action was then brought claiming the balance.

Evidence having been given by Mr. Gray,

Sims Williams (with him *C. A. Russell, K.C.*), on behalf of the plaintiff, argued that the defendant, knowing the purpose for which the brougham was to be used, was liable, as under the contract there was an implied undertaking on his part to supply a trustworthy driver; and *Abrahams* v. *Bullock*, 50 W. R. 626, was relied on.

English Harrison, K.C., and *C. Thorn Drury*, for the defendant.—The defendant can only be held liable if negligence is proved against his servant in the course of executing those duties which the defendant undertook by supplying a driver should be performed by the man he supplied. The commission of a felony is not an act of negligence, and consequently there was no breach of contract by the defendant. The evidence is to the effect that Brown had always borne a good character until the time he was convicted.

Sims Williams, in reply, cited *Ellis* v. *Turner*, 8 T. R. 531; *Hamlyn* v. *Houston & Co.*, 51 W. R. 99; and *Robinson* v. *Dunmore*, 2 Bos. & P. 416. There being here an express contract by the defendant to supply a careful and trustworthy driver, the case was one of contract and not tort. The defendant's duty was to safeguard the plaintiff's goods against all comers and he could not escape by saying that his servant's duties being those of a coachman merely, the man having turned out to be thief he was not liable for his acts. The defendant was liable for breach of contract.

WALTON, J.—In effect, the cause of action relied on here is that there was a breach of a contract under which the defendant agreed that the driver should use reasonable and ordinary care in safeguarding the goods carried by the plaintiff's traveller on his rounds in the brougham supplied him for that purpose by the defendant. Therefore the first question I am called upon to decide is the nature of the contract. There was some controversy on this point, but on the whole the terms of the contract are not in doubt. At any rate the defendant was to supply a brougham in which the plaintiff's traveller was to go his rounds. It is not very clear whether the defendant ever knew before the goods were stolen that the samples to be carried about in the brougham were articles of considerable value. As a finding of fact I have come to the conclusion that the defendant was not told at the time of hiring that the traveller was in the service of a silversmith, but that he knew that samples were to be carried in the brougham, as it was to be fitted up with shelves and a lock and key, as is usual in a case of a carriage used for this purpose. The defendant might have inquired into the nature of

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the goods to be carried, and might have insisted on limiting his liability or on charging a special price for the hire, but he did not do so. Therefore I think the samples such as were carried might fairly be taken to have been within the contemplation of the parties. On that assumption the decision in *Abrahams* v. *Bullock* directly applies to the present case, and therefore the contract, as was said in that case by Collins, M.R., "involved an obligation upon the defendant that the driver he supplied should use ordinary care not merely in driving, but in looking after the carriage when the traveller was away." It is clear from other passages in that judgment that that obligation embraced the obligation of taking reasonable care to safeguard the goods in the brougham. On that authority I am bound to hold on the facts in the present case that there was a contract by the defendant that the coachman Brown should use ordinary and reasonable care to safeguard the goods in the brougham, in the intervals of driving when the traveller was not in the brougham himself, but was engaged in calling upon customers or in other business, or when he was taking his lunch in the middle of the day. That being the contract, did the coachman use reasonable care? It is plain that he did not. On the contrary, he wilfully allowed the goods to be stolen, while he himself, with the hope of avoiding detection, said he went off to get a drink. There having thus been a failure on his part to use reasonable care, the defendant, whose servant he was, is liable for the consequent loss that the plaintiff suffered. Totally different questions arise in cases where the question is that of a master's liability to a stranger for something done by the servant. In such cases no doubt the fact that the act of the servant was a criminal act might have an important bearing upon the question whether the servant was acting within the scope of his authority. Here there was an affirmative contract by the defendant that his servant should do certain things, and that he should use reasonable care. It cannot be said that his failure rendered the master less liable because the wrongful act of the servant amounted to a criminal act. I hold, therefore, that the defendant is liable, and I give judgment for the plaintiff for the amount of the damages, to be ascertained.

Judgment for the plaintiff.

Solicitors for the plaintiff, *G. F. H. Matthews & Co.*

Solicitors for the defendant, *H. C. Turner & Co.*

K. B. Div. (Walton, J.) March 3; April 18.

TIVOLI, MANCHESTER (LIMITED) v. COLLEY AND OTHERS. (*a*.)

Restraint of trade—Music-hall artist—Covenant not to sing at any town within twenty miles of Manchester—Restraint to continue for six months after close of engagement—Reasonable restraint.

By an agreement in writing the defendant agreed to appear at the plaintiffs' theatre at Manchester at a salary of £60 per week. The agreement contained the following clause: "Prior to the commencement of this engagement and during its continuance, or within six months afterwards, no artist shall perform at any place of entertainment within twenty miles of Manchester . . . without the written consent of the director . . ." The defendant having been billed to appear at a theatre at Salford, in violation of this agreement and after leave to appear there had been refused her, the plaintiffs brought this action, claiming an injunction.

Held, on the evidence, that the restraint was reasonable, and therefore that the injunction claimed should be granted.

Nordenfelt *v.* Maxim-Nordenfelt Guns and Ammunition Co., [1894] *A. C.* 535, *followed.*

The question raised by this action was whether a clause in an agreement entered into on the 22nd of April, 1903, between the plaintiffs and Mme. Colley, by which the latter undertook to appear at the plaintiffs' theatre at a salary of £60 per week, and not to appear at any other place of entertainment within twenty miles of Manchester during the continuance of the engagement or for six months afterwards without the written consent of the director of the Tivoli, Manchester (Limited), was capable of being enforced.

The evidence given at the trial was substantially that the date on which Mme. Colley was under the agreement to appear at the Tivoli was the 30th of May, 1904. In spite of having been refused leave to appear at the Regent-street Theatre, Salford, which was within the limit, Mme. Colley was advertised to appear there within six months after the 30th of May last, and the action was thereupon commenced.

For the plaintiffs evidence was given that the restriction was a very valuable one to Manchester managers, as their audiences came from such towns as Bolton, Salford, and Oldham.

McCall, K.C., and *Morton Smith*, for the plaintiffs, relied on *Haynes* v. *Doman*, [1899] 2 Ch. 13, 47 W. R. Dig. 174; *Underwood* v. *Barker*, 47 W. R. 347, [1899] 1 Ch. 300; and *Mills* v. *Dunham*, 39 W. R. 289, [1891] 1 Ch. 576.

Robert Wallace, K.C., and *R. W. Turner*, for the defendants.

The facts and argument sufficiently appear from the judgment.

Cur. adv. vult.

WALTON, J.—The plaintiff company is the owner of a music-hall at Manchester. The defendant Mme. Colley is a professional singer, and the defendant Thomas Barrasford is the manager or director of the Regent-street Theatre and Assembly Rooms at Salford, which belong to the defendants the Royal Theatre and Assembly Rooms (Limited). In this action, which was commenced on the 13th of February, 1904, the plaintiffs claimed an injunction to restrain the defendant Mme. Colley from performing at the Regent-street Theatre, Salford, or at any place of entertainment within twenty miles of Manchester, other than the Tivoli Music Hall, Manchester, before the 30th of November, 1904, and to restrain the other defendants from advertising that Mme. Colley would appear at the Regent-street Theatre before that date. In the alternative damages are claimed against Mme. Colley. The defendants who joined in their defence, raised one point only at the trial—namely, that the contracts with Mme. Colley upon which the plaintiffs relied were in restraint of trade and against public policy and therefore void. On the 21st and 22nd of April, 1903, the defendant Mme. Colley accepted a series of engagements to appear at the Tivoli Music Hall. There were six contracts, one dated the 21st of April and the other five dated the 22nd of April, 1903. Each contract was for one week's engagement, during which Mme. Colley was to appear every night and at one matinee, and was to receive a salary of £60 for each week's performances. The engagement was for six separate weeks, commencing respectively on

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the 22nd of June, 1903, the 28th of December, 1903, the 30th of May, 1904, the 2nd of January, 1905, the 26th of June, 1905, and the 15th of December, 1905. The clauses and conditions of the various contracts were identical and included in a stipulation in the following terms: "Prior to the commencement of the engagement and during its continuance or within six months afterwards no artist shall perform at any other place of entertainment within twenty miles of Manchester, neither shall any artist during the engagement perform at any occasional concert, tour, club, institute, or any place of amusement within that area, without the written consent of the director of the Tivoli, Manchester (Limited). It was proved before me and is indeed a matter of common knowledge that the district within twenty miles round Manchester is very populous, is ready and conveniently accessible to Manchester and contains many smaller towns of which Manchester is the head and centre. The public entertainments of Manchester are frequented by considerable numbers of people residing in these towns and in this district. There was evidence before me which I accept that Mme. Colley's performance at the Tivoli would be much more successful and much more valuable to the plaintiffs if during and for a reasonable time before and after the period of her engagement she did not appear at any other place of entertainment within the Manchester district, which may be fairly described as the district within twenty miles round that city. Upon these facts I have to decide whether the restraint imposed upon Mme. Colley by her contract is enforceable or is against public policy and void. In determining this question I propose to apply the test or rule laid down by Lord Macnaghten in *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*, [1894] A. C., at p. 565, where he says: "The true view at the present time I think is this: the public have an interest in every person carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, all restraint of trade of themselves if there is nothing more are contrary to public policy and therefore void. That is the general rule. But there are exceptions. Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification and indeed it is the only justification, if the restriction is reasonable—reasonable that is in reference to the interest of the parties concerned and reasonable in reference to the interest of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed. While at the same time it is in no way injurious to the public." The same rule is applied by the Court of Common Pleas in *Horner* v. *Graves*, 7 Bing. 735, where Tindal C.J., at p. 743 said: "We do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favour of whom it is given and not so large as to interfere with the interest of the public. Whatever restraint is larger than the protection of the party can be of no benefit to either, it can only be oppressive, and if oppressive it is in the eye of the law unreasonable." There are, therefore, two questions to consider—first, whether the restraint was reasonable in reference to the interests of the parties concerned; and secondly, even though reasonable in their interest, whether it was injurious to the public. If the restraint was not reasonable in the interest, or as it is sometimes expressed, for the protection of the interests of the parties concerned, it is against public policy and void. And there may, as I understand the law, be cases in which even though the restraint is not unreasonable in the interest of the parties concerned, it may of itself be of such a character as to be injurious to the public, and in such cases, again, the restraint is void. I do not think it is necessary in the present case to say more upon the second of these questions than that, if the restraint was not unreasonable in the interest of the parties, I am satisfied that there was nothing in the particular circumstances of this case to make it injurious to the public. The only question, therefore, is whether the restraint was, in the language of Lord Macnaghten, reasonable in reference to the interest of the parties concerned. These interests appear to me perfectly plain. It was in the interest of the plaintiffs that they should get value for the price which they were paying; that the performance of Mme. Colley at the Tivoli should not be cheapened and depreciated by her appearance elsewhere within the Manchester district during and for some reasonable time before and after her engagements and the Tivoli. On the other hand, it was in the interest of Mme. Colley that she should secure this engagement at the Tivoli extending over the period in question at the salary of £60 a week. Whether having regard to the restraint the salary was adequate or not I am not called upon to decide. It was a matter of bargain between the parties and between parties who were quite competent to look after their own interest. But I am satisfied the restraint was an element in the bargain present to the minds of both contracting parties, and I think that Mme. Colley would not have secured her engagement if she had not consented to the restraint. In my judgment restraint did not exceed what the plaintiffs might reasonably require for the protection of their interests under the contract.

For these reasons I think the plaintiffs are entitled to the injunction which they claim, and I therefore enter judgment for them accordingly with costs.

Solicitor for the plaintiffs, *G. B. Wyatt Digby.*

Solicitors for the defendants, *Amery Parkes & Powell.*

IN BANKRUPTCY.

K. B. Div. (Bigham, J.) — June 6.

In re GREAVES.

Ex parte THE OFFICIAL RECEIVER. (*a.*)

Bankruptcy—Practice—Partnership—Consolidation of proceedings in bankruptcy with administration of the estate of a deceased debtor in bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 106, 112, 125.

The court has power to consolidate proceedings in the bankruptcy of one partner with the administration of the estate of a deceased partner under section 125 *of the Bankruptcy Act*, 1883.

Ex parte application on behalf of the official receiver for the consolidation of the proceedings under the bankruptcy of C. Greaves with the proceedings under the administration in bankruptcy of the estate of his deceased partner W. Greaves.

C. Greaves and W. Greaves traded in partnership as stock brokers. W. Greaves died early in 1904 and his mother took out letters of administration of his estate. C. Greaves shortly afterwards became bankrupt, and after his bankruptcy a creditor of W. Greaves obtained an order for the administration of the deceased's estate in bankruptcy under section 125 of the Bankruptcy Act, 1883. As most of the

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

creditors were creditors of the firm in respect of business transactions it was desired to consolidate the proceedings under one trustee.

Muir Mackenzie, for the application.—By section 106, where two or more bankruptcy petitions are presented against joint debtors, the court may consolidate the proceedings, and by section 112 it is enacted that where two parties were made bankrupt on separate petitions the same trustee shall be appointed for both, and that was held to apply even to parties who had dissolved partnership prior to the presentation of the petitions: *In re Abbott, Ex parte The Official Receiver*, [1894] 1 Q. B. 442. There is no precedent for the consolidation of proceedings in an ordinary bankruptcy with the administration of a deceased debtor's estate under section 125, but sub-section 1 of that section does specify that the order thereunder shall be "for the administration of the estate of the deceased debtor according to the law of bankruptcy."

BIGHAM, J.—I think that the official receiver is entitled to the order asked for. Sub-section 5 of section 125 enacts that: "Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the court, and he shall forthwith proceed to realise and distribute the same in accordance with the provisions of this Act."

If that be read in conjunction with section 106, which gives power to consolidate proceedings, and section 112, which directs that the estates of bankrupt partners shall be administered by the same trustee, then it seems to me to appear that the court has power to make this order.

Solicitor for the official receiver, *G. Tilling*.

Prob. Div. & Adm. Div. } Feb. 2, 9.
Admiralty. }

"THE NORMANDY." (*a*.)

Ship — Collision — Damage to pier — County Courts Admiralty Jurisdiction Acts, 1868 *and* 1869—*Prohibition.*

The Court held that damage done by a ship to a pier is not "damage by collision" within the meaning of section 3, *sub-section* 3, *of the County Courts Admiralty Jurisdiction Act*, 1868, *and that, therefore, a county court had no admiralty jurisdiction in respect of such damage.*

This was a motion in which the owners of the steamship *Normandy* claimed a writ of prohibition against the county court judge of Barnstable to restrain certain proceedings brought before him by the owner of a pier at Ilfracombe in respect of which pier damage to the extent of £200 was claimed against the owners of the steamship *Normandy*. The facts sufficiently appear from the judgment delivered by the court.

Dawson Miller, for the owners of *The Normandy*.

Chitty and *Stuart Moore*, for the respondents.

GORELL BARNES, J., in delivering the judgment of the court, said: In this case a motion was made for a writ of prohibition to the judge of the county court of Barnstable, to restrain proceedings in a suit by the plaintiff, Mr. Reginald Joseph Weld, of Lulworth Castle, Dorset, who, being a person of unsound mind, is suing by his committee. The defendants are the owners of the steamship *Normandy*, of Liverpool. The circumstances which have given rise to the motion are stated in the affidavit of Mr. Wm. Jones, who says that the summons in the above-mentioned action is a summons *in rem*, and by it the plaintiff claims against the said steamship *Normandy* £200 in respect of the damage alleged to have been caused by the said steamship *Normandy* to the plaintiff's pier at Ilfracombe, in the county of Devon. He also says that no part of the pier is afloat. The suit was brought under sub-section 3 of section 3 of the County Courts Admiralty Jurisdiction Act, 1868, which provides that any county court having Admiralty jurisdiction shall have jurisdiction to try and determine causes "as to any claim or damage to cargo, or damage by collision," in cases in which the amount claimed does not exceed £300. The motion was ably argued before us on Tuesday, the 2nd inst., when it was contended by counsel for the applicants that the damage was not caused by collision within the meaning of the sub-section, and the authorities were quoted. On the other hand, counsel for the respondents contended that the sub-section included claims such as that made by the respondents, and that the authorities cited by counsel for the applicants were distinguishable from the case of *The Zota*. The simple question is whether the words "damage by collision" in the sub-section include damage done to a pier by a ship striking against it. The principal cases relied on by the defendants, the applicants, were *Everard v. Kendall*, 18 W. R. 892, 5 C. P. 428, and *Robson v. Owners of The Kate*, 36 W. R. 910, 21 Q. B. D. 13. In the former case it was "held on motion for writ of prohibition to the judge of the county court, that the Admiralty jurisdiction of the county court in the cases of collision was not more extensive than that of the High Court of Admiralty, and as the Court of Admiralty had no jurisdiction over such a collision, that the county court had no such Admiralty jurisdiction." The head-note shows that the action was for damage for collision between two barges propelled by oars only. In the course of his judgment, Montague Smith, J., said: "What is the meaning of 'damage by collision'? We have nothing to guide us as to what damage by collision is within the Act, except the general scope and object of the Act. In common understanding, and as understood in the Court of Admiralty, damage by collision is damage sustained by a ship from another ship coming in contact with it." Then he goes on: "What, then, is the meaning of ship?" and proceeds to discuss that question. The late master of the Rolls, then Brett, J., said: "That drives us back to the Act of 1868, which gives the county court power to try in a particular way questions of salvage, claims for towage, necessaries supplied to ships, and wages, and claims for damage to cargo or damage by collision. Damage by what collisions? Looking at sections 7 and 22 of the Act of 1868, it seems to me that it means a collision between two vessels—such vessels as were formerly dealt with by the Admiralty Court." These *dicta* are favourable to the defendants' contention in this case, but the case is not conclusive in their favour, because the basis of the decision appears to have been that it was not the intention of the Legislature to give Admiralty jurisdiction over Admiralty cases other than those over which the Admiralty Court had jurisdiction, and that the Admiralty Court had no jurisdiction over such collisions. It did not decide that the county courts had, within their limits, jurisdiction in all cases in which the Admiralty Court had jurisdiction. In *Robson v. Owners of The Kate* it was held that "damage occasioned to an object on

(*a*.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

the bank of a river by contact with a sailing gear of a vessel afloat in the river is not 'damage by collision' within section 3, sub-section 3, of the County Courts Admiralty Jurisdiction Act, 1868, and a county court has not Admiralty jurisdiction in respect of such damage." Wills, J., in the course of his judgment, said: "It is not necessary to define the word 'collision.' The words 'damage by collision' used in an Act the object of which is to confer an 'Admiralty' jurisdiction, cannot be construed as including damage which has taken place on land, outside the ebb and flow of the tide, and which would certainly not have fallen within the original jurisdiction of the Court of Admiralty in respect to collision. The statute does not, as it appears to me, either in terms or by inference, extend the jurisdiction of the county court to the damage of which the applicant complains. Grantham, J., said: "In *Everard* v. *Kendall*, which was a proceeding by way of prohibition under this Act, Montague Smith, J., is reported to have said"—then he uses the passage I have read from the judgment of Montague Smith, J., and proceeds—"I think the preceding words, 'damage to cargo,' which obviously refer to damage to cargo while on board a ship, tend to show that the intention of the Legislature was to confine the newly-conferred jurisdiction to cases of collision between ships." The reason given by the latter judge for his decision is applicable to the present case. The case mainly relied upon by the plaintiffs was *The Zeta*, [1893] A. C. 468. The head-note to that case is as follows: "The County Courts Admiralty Jurisdiction Amendment Act, 1869, s. 4, provides that the jurisdiction given by section 3 of the County Courts Admiralty Jurisdiction Act, 1868, to county courts having Admiralty jurisdiction shall extend to all claims not exceeding £300 for damage to ships, whether by collision or otherwise. Held, reversing the decision of the Court of Appeal ([1892] P. 285), and restoring the decision of Sir Charles Butt ([1891] P. 215), that this jurisdiction includes a claim for damage to a ship by collision with an object which is not a ship, *e.g.*, a pierhead. *Semble*, that when those Acts were passed the Admiralty Court had jurisdiction over such a claim." That case turned upon section 4 of the County Courts Admiralty Jurisdiction Act Amendment Act, 1869, which clearly gave the county courts Admiralty jurisdiction in cases of damage to ships, whether by collision or otherwise. Reference has been made by counsel for the respondents to cases in which the word collision was used otherwise than with respect to collision between ships. But it seems to me that the true meaning of the word collision is not mere striking against, but striking together. Reference has also been made to sections 418 and 419 of the Merchant Shipping Act, 1894, and if the question had been free from authority I would still, having regard to the object of the Act of 1868, and the general scope and ordinarily understood meaning of the words "damage by collision" in the Admiralty Court, come to the conclusion that the word "collision" referred only to collision between ships. I am of opinion, therefore, that the writ of prohibition must go, and that the applicants must have the costs of this motion against the respondents.

Solicitors for plaintiffs (respondents), *Ffinch & Thanter*, Barnstable.

Solicitors for defendants, *Botterell & Roche*, for *John R. Richards*, Swansea.

Court of Appeal.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) } Jan. 26, 27, 28, 29; March 15.

CROSFIELD & SONS (LIMITED) AND OTHERS *v.* MANCHESTER SHIP CANAL CO. (*a.*)

Arbitration—Canal company—Corporation and traders—As co-plaintiffs and in individual capacity—Agreement—Breach—Waiver—Jurisdiction—Practice—Ouster of jurisdiction of court—Private Act—Scheduled agreement—Manchester Ship Canal Acts, 1885 (48 & 49 *Vict. c. clxxxviii.*), *s.* 88, *sub-sections* 14 *and* 22; *s.* 202; *and* 1896 (59 & 60 *Vict. c. clxxxii.*), *s.* 43.

If a private Act of Parliament contains a special arbitration clause referring all disputes to arbitration, or if such an arbitration clause is embodied in an agreement, which agreement is scheduled to and confirmed by such a private Act, then it may absolutely oust the jurisdiction of the court, not only where express language is used, constituting, e.g., an engineer the proper tribunal for the determination of such disputes, but also where it is shown by necessary implication that arbitration should be resorted to, provided that in both cases it is for the good of the public as a whole, and not for the benefit of private individuals only.

Per Vaughan Williams, L.J.—*No deficiency in pleading and no waiver by litigants could in such cases give the court jurisdiction.*

By a private Act of Parliament, the Manchester Ship Canal Act, 1885 (48 & 49 *Vict. c. clxxxviii.*), *after enacting by section* 88 *that it was "for the protection of the Corporation of W., and of traders, manufacturers, and others carrying on business at or near W.," and that "the following provisions, unless otherwise or between the corporation and the company," should have effect, further contained numerous sub-sections conferring obligations on the canal company to dredge and keep dredged the bed and banks of the River M. between certain limits. By sub-section* 22 *it was provided that if any difference shall arise "between the company and the corporation" as to the true meaning or anything to be done under the section, an arbitrator shall determine it, and also by section* 202, *if any question should arise "between the company and any person." Later another Act was passed, the Manchester Ship Canal Act*, 1896 (59 & 60 *Vict. c. clxxxii.*), *to which an agreement, dated the 9th of April*, 1896, *and made between the traders and manufacturers of W., the Corporation of W. and the canal company, was scheduled, and the Act substantially confirmed it. The agreement was come to on account of various disputes that had arisen owing to the canal company having failed to fulfil their obligations as to dredging the River M. Up to the date of this agreement the traders of W. had used the canal free of tolls, as provided by the provisions of a previous agreement. The obligation on the canal company as to dredging was slightly modified by this agreement, but by clause* 10 *in it it was enacted that if any difference should arise as to its meaning such difference was to be determined by an engineer to be appointed (unless otherwise agreed on) on the application of the company or the corporation by a person therein named, whose decision was to be final. The defendants, as the plaintiffs alleged, failed to fulfil their obligations, either under this agreement or under the Act of* 1885, *and the traders claimed free navigation, and paid tolls for the use of the canal under protest. An action was ultimately brought against the canal company, the plaintiffs suing both as co-plaintiffs and in an indi-*

(*a.*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

vidual capacity. At the trial a preliminary objection was taken by the defendants that the jurisdiction of the court was ousted by reason of sub-section 22 *of section* 88, *and clause* 10 *of the agreement of the 9th of April,* 1896, *having provided that such disputes should be referred to arbitration, as therein mentioned. The plaintiffs suing as traders in their individual capacity claimed a return of the tolls, as they alleged, wrongfully demanded.*

Held (*reversing* Byrne, J., *on the preliminary point*), *that, with respect to the corporation, the jurisdiction of the court was absolutely ousted, either by sub-section* 22 *of section* 88 *of the Act of* 1885, *or clause* 10 *of the agreement of* 1896.

Held, further (*by* Vaughan Williams *and* Stirling, L.JJ., Cozens-Hardy, L.J., *dissenting*), *that, as regards the action brought by the traders, the jurisdiction of the court was also ousted until the arbitrator should have given his decision.*

Per Stirling, L.J. (dissentiente Vaughan Williams, L.J.).—*Section* 202 *of the Act of* 1885 *applied.*

Per Cozens-Hardy, L.J.—*Neither of the two arbitration clauses affected the traders. It seemed wrong to postpone the adjudication upon the claims of the traders until after an award in a reference to which they would not be parties. The traders could properly sue.*

It is the modern practice to plead ouster of jurisdiction (per Vaughan Williams, L.J., *referring to* Mayor of Folkestone *v.* Ladd, [1893] 3 *Ch.* 22).

Caledonian Railway Co. *v.* Greenock and Wemyss Bay Railway Co., *L. R.* 2 *Sc. and Div. Apps. Cas.* 347, 22 *W. R. Dig.* 13, *discussed and followed.*

The observations in London, Chatham, and Dover Railway Co. *v.* South-Eastern Railway Co., 37 *W. R.* 65, 40 *Ch. D.* 100, *of* Cotton *and* Bowen, L.JJ., *dissented from.*

Decision of Byrne, J., *reversed.*

This was an appeal by the defendant company from a decision of Byrne, J., dated the 7th of April, 1903.

The plaintiffs were Joseph Crosfield & Sons (Limited), James Fairclough & Sons (Limited), and Monks, Hall, & Co. (Limited), traders and manufacturers in or near Warrington, and the mayor, aldermen and burgesses of the borough of Warrington.

The defendants were the Manchester Ship Canal Co., and the object of the action was to compel the defendants to carry out their obligations concerning the dredging of the River Mersey where it flowed through the borough of Warrington. The plaintiff traders sued for themselves and all the other traders and manufacturers of Warrington, but later in their individual capacity.

By the Manchester Ship Canal Act, 1885 (48 & 49 Vict. c. clxxxviii.), the defendant company were incorporated for the purpose of constructing a canal between Manchester and Liverpool. The canal constructed by the defendant company under the statute occupies the bed of the River Irwell from Manchester to its junction with the Mersey, and thence occupies the bed of the River Mersey to a place called Rixton, from which the canal runs roughly parallel with the river past Warrington. On the canal there were several locks, at Eastham, Latchford, within the boundary of the borough of Warrington, and above that the Irlam locks.

Prior to the opening of the canal, the traders of Warrington depended very largely upon the Mersey for the carriage by water of their goods. The defendant company were also authorized by their statute to do away with and absorb into the ship canal the whole of the old Runcorn Latchford Canal. Section 88 of the company's special Act of 1885 (48 & 49 Vict. c. clxxxviii.) runs, "For the protection of the corporation of Warrington (in this section referred to as 'the corporation') and of traders, manufacturers, and others carrying on business at or near Warrington, the following provisions unless otherwise agreed on between the corporation and the company shall have effect, that is to say—(by sub-section 14)—The company shall before the canal be opened for traffic at their own cost dredge the bed and banks of the River Mersey, and for ever after maintain the same dredged so that at all times there shall be a depth of eight feet of water at low water of spring tides between the western boundary of the works of Monks, Hall, & Co. at or near Bank Quay and the eastern boundary of the borough of Warrington near the commencement of the Latchford Canal."

By sub-section 2, the traders of Warrington would have the right to use the ship canal from Warrington downwards at certain specified rates of toll. In the year 1893 the dredging of the reach of the river was begun, and as it appeared that such dredging could not be completed before the day fixed for the opening of the canal for traffic in accordance with sub-section 14, negotiations were entered into between the corporation of Warrington and the canal company with a view to permitting the opening of the canal in the beginning of 1894, and before the company had complied with their obligations under the above-mentioned sub-section. These negotiations resulted in an agreement of the 12th of December, 1893, when it was agreed that the defendants should be at liberty to open the canal for traffic on the 1st of January, 1894, and that they were to complete the dredging on or before the 1st of July, 1894, and in default were to pay the corporation £50 per day for liquidated damages. Further, that between the 1st of December, 1893, and the completion of the dredging the traders specified in the schedule—*i.e.*, those carrying on business in or near Warrington, should have the right to navigation by certain specified vessels on the ship canal from Warrington down to Runcorn, or in certain cases down as far as Eastham, free of tolls.

The defendant company, however, failed to carry out their obligations with respect to this dredging, and did not dredge the river to a proper depth by the 1st of July, 1894; frequent complaints were made, and the liquidated damages reached a very large amount.

Negotiations of one sort and another went on during the year 1895 which ultimately resulted in another agreement of the 9th of April, 1896, and this agreement formed the basis of the action.

Up to the date of this agreement the traders and manufacturers had been using the canal free of tolls within the limits referred to as provided by section 4 of the agreement of the 12th of December, 1893.

The agreement of the 9th of April, 1896, was substantially scheduled and confirmed by the Manchester Ship Canal Act, 1896 (59 & 60 Vict. c. clxxxii.), hereinafter referred to. By clause 1 of this last mentioned agreement it was agreed that sub-section 14 of section 88 of the Act of 1885 should, for the purposes of the agreement, be read and have the effect as if the same were in the words following, that is to say, (*a*) "That the company shall forthwith at their own cost dredge the bed and banks of the River Mersey (. . .) and for ever after maintain the same dredged so that at all times there shall be a depth of eight feet of water at low water of spring tides in the said channel between the western boundary of the works of Monks, Hall, & Co. (Limited), at or near Bank Quay, and Howley Lock." (*b*) "The company shall not be bound to dredge the bed or banks of the River Mersey defined as aforesaid or to maintain the depth of eight feet of water in the said channel between Howley Lock and the eastern

boundary of the borough of Warrington, near the commencement of the Latchford Canal, unless and until the locks at Howley and Twenty-steps Bridge respectively or either of them (. . .) are at any time hereafter enlarged by the company or with their consent from their present dimensions respectively so as to enable vessels of increased size to get to Howley, in which event the company shall in like manner be bound at their own cost to dredge the bed and banks of the River Mersey defined as aforesaid and to maintain the depth of eight feet of water in the said channel for the entire distance between the said western boundary of the works of Monks, Hall, & Co. (Limited) and the eastern boundary of the borough of Warrington."

The provisions as to tolls contained in sub-section 2 of section 88 of the Act of 1885 were modified. By sub-section (*e*) of clause 2 it was also provided that the rights and privileges given to the traders and manufacturers of Warrington as to free passage under section 4 of the agreement of the 12th of December, 1893, were forthwith to cease. Clause 4 was to the effect that the company bound themselves effectually to execute and complete at their own cost the several dredging and other works prescribed by this agreement. The penalties or liquidated damages payable to the corporation were waived and released. Clause 6 was as follows: "If and whenever the company shall fail to maintain the channel referred to . . . and navigation is thereby obstructed, then and in each such case the traders and manufacturers carrying on business at Warrington shall have the right of navigation in respect of vessels passing through the Walton Lock of the portion of the Manchester Ship Canal extending from Eastham to Walton Lock, of the Walton Lock, and of the portion of the River Mersey within the limits described in clause 1 (*a*) of this agreement, free of all tolls and dues, until the aforesaid channel shall have been made and completed to the reasonable satisfaction of the surveyor for the time being of the corporation. Provided always that no such trader or manufacturer as aforesaid shall be entitled to the right of navigation referred to in this clause if the company immediately on the receipt of a written notice from the surveyor for the time being of the corporation, certifying the fact of such obstruction and its position and extent, commence to dredge and continue to dredge the aforesaid channel to the reasonable satisfaction of the surveyor for the time being of the corporation."

By section 7 it was provided that, notwithstanding anything thereinbefore contained, if the company failed within six months after written notice from the corporation to fulfil the provisions of the agreement, then in such case the rights and privileges of the corporation and the traders and manufacturers under the Act of 1885 (except sub-section 6 of section 88) should forthwith revive, notwithstanding this agreement, or that of the 12th of December, 1893.

By section 8 the corporation were given an option themselves to carry out the dredging if the company failed to do so within six months after receiving written notice from the corporation, and the corporation could charge the costs so incurred to the company.

Section 9 was as follows: "Save as hereinbefore expressly mentioned nothing in this agreement contained shall affect, lessen, or take away any rights, powers, and privileges enjoyed by and conferred upon the corporation and the manufacturers and traders of Warrington under or by virtue of any Act relating to the company or otherwise, and save as aforesaid such rights, powers, and privileges are hereby reserved accordingly."

Further powers were given to the defendant company by the Manchester Ship Canal Act of 1896 (59 & 60 Vict. c. clxxxii.), and the agreement of the 9th of April, 1896, was scheduled to the said Act, section 43 of which runs as follows: "The terms of agreement set forth in the schedule to this Act are hereby confirmed and made binding upon the mayor, aldermen, and burgesses of the borough of Warrington and the company, as if the same were contained in an agreement duly entered into by those parties, and confirmed by Act of Parliament, and the agreement dated the 9th of April, 1896, and made between the same parties is hereby declared to be null and void so far only as the same differs from the terms of the agreement hereby confirmed."

The plaintiffs alleged that the defendant company had never made or maintained the channel of the River Mersey between the points referred to in clause 1 of the agreement of the 9th of April, 1896, for the minimum width and depth therein provided. In the early part of the year 1887 the defendant company claimed payment of dues from the traders and manufacturers of Warrington, alleging that from the date of the said agreement of 1896 the traders were not entitled to free navigation, against which the traders protested. Notices from time to time were sent to the defendants calling attention to the fact that they had failed to make and maintain the channel as provided by the agreements and statutes hereinbefore referred to, or to take the proper and necessary steps for making and maintaining the same, and that the dredgers used were totally inadequate for the purpose. The plaintiffs contended that, notwithstanding the notices and complaints, the defendant company had never made or maintained at any time the channel in the River Mersey as provided by the statutes and agreements, and that they had, however, insisted on payment from the traders and manufacturers of Warrington using the canal, of dues and tolls, notwithstanding the fact that they had failed to comply with their obligations, and that by reason of the acts and defaults of the defendant company the traders of Warrington had suffered considerable loss and damage. The defendant company denied not having at their own cost executed and completed the dredging and other works prescribed by the agreements, and asserted that it was not the fact that from the date of the agreement of 1896 there had never been a channel of the width and depth therein provided, or that the navigation had been obstructed, and they further stated that the dredging of the channel had been made much more difficult by reason of the plaintiffs improperly and unlawfully discharging lime and other manufacturers' refuse into the river, and thus seriously impeding the defendants in the discharge of their duty. Further, that they had duly complied with all the notices which the plaintiffs were entitled to give. The hearing of the case in the court below occupied nineteen days.

Byrne, J., held that the plaintiffs in their representative capacity were entitled to the relief they claimed in respect of the company having failed in their duty to dredge the river to a sufficient depth as provided by sub-section 14 of section 88 of the Act of 1885, that since 1896 the defendants had never commenced or continued to dredge the river to the reasonable satisfaction of the corporation's surveyor, and that the plaintiffs as individuals were entitled to recover back the tolls wrongfully demanded and paid under protest, and he directed an inquiry as to the same and as to damages. A preliminary objection was raised before his lordship by the defendants that by sub-section 22 of section 88 of the Act of 1885, and by clause 10 of the agreement scheduled to the Act of 1896, the matter should have been referred to arbitra-

tion by an engineer as therein mentioned, and that these provisions for arbitration forming part of a statutory enactment ousted the jurisdiction of the court, and whatever the court might do was a nullity. The learned judge overruled this objection, holding that it was one which could be waived, and that it was too late to raise the objection for the first time at the trial, and it must be considered to be waived.

The defendant company appealed.

On the appeal this preliminary objection as to the ouster of the jurisdiction of the court, by reason of sub-section 22 of section 88 of the Manchester Ship Canal Act, 1885, and the agreement scheduled to the Act of 1896, having provided that such disputes should be referred to arbitration, was taken by counsel for the appellant company.

Sub-section 22 of section 88 of the Act of 1885 is as follows: "If any difference shall arise between the company and the corporation as to the true intent and meaning of this section, or as to anything to be done or not to be done thereunder, such difference shall be determined by an engineer to be appointed (unless otherwise agreed on) on the application of the company or corporation by the Board of Trade, whose decision shall be final and binding on both parties, and the costs of the reference shall be borne as he shall direct."

J. F. Moulton, K.C., C. A. Cripps, K.C., W. Pickford, K.C., O. Leigh-Clare, and *A. T. Lawrence,* for the appellants on preliminary objection as to jurisdiction.—In dredging canal, the obligation of the defendants has to be determined in reference to what is called a "datum line." The question under sub-section 14 of section 88 is whether this datum line is to be a fixed datum line, or a datum line which varies from time to time. The channel cannot be dredged without a fixed datum line. Sub-section 22 of section 88 is a statutory substitution of an engineer for the purpose of arbitration instead of the court. It was said the whole question depended on the clause "unless otherwise agreed on between the corporation and the company." It is inconceivable how this was arrived at. The learned judge said that the defendants had waived their rights, but the question of jurisdiction cannot be waived. [They referred to section 202 of the Act of 1885, which runs: "If any question arise between the company and any person touching anything to be done or not to be done, or any money to be paid under the provisions of this Act, then, unless by this Act expressly provided, such question shall be determined by arbitration in manner provided by the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).] Then paragraph 10 of the agreement scheduled to the Act of 1896 is as follows: "If any difference shall arise between the company and the corporation as to the true intent and meaning of this agreement, or as to anything to be done or not to be done thereunder, such difference shall be determined by an engineer to be appointed (unless otherwise agreed on) on the application of the company or the corporation by the president for the time being of the Institution of Civil Engineers, whose decision shall be final and binding on both parties, and the cost of the reference shall be borne as he shall direct." This is a very wide arbitration clause. [VAUGHAN WILLIAMS, L.J.—In this particular case, the agreement being embodied in the statute, is a statutory condition precedent.—Yes. And therefore you must properly say that it goes to jurisdiction.] On the point of jurisdiction, the learned judge was under a misapprehension. A question of pleading of this kind has nothing to do with "otherwise agreeing" by the parties. The defendants rely on the whole of section 88, and that includes the arbitration clause. There is no "unless otherwise agreed" in section 43 of the Act of 1896. The learned judge was wrong in addicting an amendment that the traders could sue in their individual capacity, because if this were a mere statutory enactment, which the parties could waive *inter partes*, the traders have no right to sue whatever. They have only a right to sue because it is under a public enactment. If there is any difference, it can only be determined by arbitration. It is a case of plea to the jurisdiction.

They referred to *Mayor, &c., of London* v. *Cox and Others*, 16 W. R. 44, 2 Eng. & Ir. App. 239; *Davis* v. *Taff Vale Railway Co.*, 42 W. R. 215, 44 W. R. 172. [1895] A. C. 542; *Duke of Bedford* v. *St. Paul, Covent Garden*, 30 W. R. 411; the Manchester Ship Canal Act, 1885 (48 & 49 Vict. c. clxxxviii.), s. 88, sub-sections 14 and 22, and s. 202.

W. R. Bousfield, K.C., T. R. Hughes, K.C., and *F. Thompson,* for the respondents.—No suggestion whatever came from the defendant company, that this was a matter which ought to be referred to arbitration. There are two classes of cases where the court has power to stay. The first is where the court has possibly no jurisdiction at all. [VAUGHAN WILLIAMS, L.J.—If the court has power to stay, that necessarily presupposes the jurisdiction.] Quite so; there is also a second class of cases, *e.g.*, where the court has a discretion to exercise under, first, the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and next, the Arbitration Act of 1889 (52 & 53 Vict. c. 49), and also the case where the parties have themselves agreed to refer the matter to arbitration. In this latter case the party has no right whatever to go to the tribunal; the court has a discretion, and will consider the matter if he comes *sub modo* at the proper time in the proper way, and then may refer at its discretion the matter to an arbitrator. [VAUGHAN WILLIAMS, L.J.—The jurisdiction of the court is also excluded if the parties agree that the consideration shall be something to be determined by A. B.; until he had done so the action could not be brought.] Perhaps that might very well be; there was also the case in old times, where the court, if its jurisdiction was not excluded, would nevertheless give effect to it where the parties had agreed to refer the matter to arbitration, coupled with a covenant not to sue. The words in section 88, "If any difference shall arise as to the true intent and meaning of this section . . . such difference shall be determined by an engineer to be appointed," does not mean that there is any ouster of the jurisdiction of the court, but the court has the right to use its discretion. The defendants say this is not an agreement, it is an enactment, and the parties cannot waive. There is no authority for such a proposition. [VAUGHAN WILLIAMS, L.J.—Do you suggest that we should treat this agreement as for all purposes a private agreement *inter partes?*] Not for all purposes: *Caledonion Railway Co.* v. *Greenock and Wemyss Bay Railway Co.*, L. R. 2 Sc. and Div. App. Cas. 347, 22 W. R. Dig. 13; *London, Chatham, and Dover Railway Co.* v. *South-Eastern Railway Co.*, 37 W. R. 65, 40 Ch. D. 100, 37 W. R. Dig. 95. The parties ought not to come to the court, and then, having got the judgment of the court, say that that evidence ought not to have been entertained. No distinction is drawn here between the parties and an agreement which is scheduled to an Act of Parliament and confirmed by an Act of Parliament. [VAUGHAN WILLIAMS, L.J.—If that is part of your contention, I do not think it will succeed. If you go that length, I think the authorities are against you.] For many purposes, it is so: *Manchester Ship Canal* v. *Manchester Racecourse Co.*, [1900] 2 Ch. D. 352, 46

W. R. Dig. 49, 49 W. R. 418, [1901] 2 Ch. D. 37, 49 W. R. Dig. 40. [VAUGHAN WILLIAMS, L.J., referred to *London and North-Western* and *Great Western Joint Railway Co.* v. *Billington (Limited)*, [1899] A. C. 79, 47 W. R. Dig. 173.] [COZENS-HARDY, L.J., mentioned *Midland Railway Co.* v. *Loseby & Carnley*, 47 W. R. 656, [1899] A. C. 133, 47 W. R. Dig. 172 The word "shall" in "this shall go to arbitration" does not mean that the jurisdiction of the court is excluded; all the cases show that there must be something more than the mere common form words in order to get at that conclusion, nor do these words in an Act of Parliament at all effect the same purpose: *Countess of Rothes* v. *The Kirkcaldy and Dysart Waterworks Commissioners*, 7 App. Cas. 694. The appellants say that if any question arises, not upon the original section, but upon the agreement, it shall be referred to the president for the time being of the Institution of Civil Engineers, but this arbitration clause 10 is not in substitution for sub-section 22 of the original Act, because sub-section 22 deals with any difference arising under the section, and clause 10 only deals with the agreement. Each of the sections on which the appellants rely is only intended to deal with a very small and definite matter, and is not intended to exclude the jurisdiction of any other tribunal. Sub-section 22 of section 88 is for the benefit of the parties to point out the best tribunal to deal with the majority of the matters arising under the section, and does not exclude the jurisdiction of the court. [VAUGHAN WILLIAMS, L.J.—You say it is incredible that the Legislature should have intended to exclude the jurisdiction of the courts in relation to the matters which you have been detailing.] No; the intention of the Legislature does not exclude, it is the provision of one tribunal and not the exclusion of the other. The appellants further contend that the traders are excluded under section 202, but the purport of it is to deal with the period of construction, it is not intended to deal with the permanent right of the parties afterwards arising. Although the appellants have not really argued under section 202, yet that section has nothing whatever to do with the right of a trader to bring an action for damages for breach of the main obligations in the Act, or bringing an action on behalf of their class to have the Act construed. Section 88 is expressed to be for the protection of the Corporation of Warrington, and of the traders, manufacturers, and others carrying on business at or near Warrington, therefore they have a direct right to enforce the provisions of the section: *Heron* v. *The Rathmines and Rathgar Improvement Commissioners*, 27 L. R. Ir. 179, 39 W. R. Dig. 233, [1892] A. C. 498, 41 W. R. Dig. 246. [STIRLING, L.J.—*Ellis and Others* v. *Duke of Bedford*, 47 W. R. 385, [1899] 1 Ch. 494.] As regards a representative action, this case is clearly in our favour.

They also cited the following cases: *Watford and Rickmansworth Railway Co.* v. *London and North-Western Railway Co.*, 17 W. R. 814. L. R. 8 Eq. 231, 17 W. R. Ch. Dig. 1, 141, 142; *Ford's Hotel Co* v. *Bartlett*, 44 W. R. 241, [1896] A. C. 1. 44 W. R. Dig. 10; and *London and North-Western Railway Co.* v. *Donellan & Billington*, [1898] 2 Q. B. 7, 46 W. R. Dig. 147.

Cripps, K.C., in reply.—The respondents have cited a great many cases. Section 88 of the Act of 1885 is a statutory enactment, and the question in the *Caledonian case* does not arise at all in regard to this section, and Byrne, J., rightly said it does not arise here. [He cited *Atkinson* v. *The Newcastle and Gateshead Waterworks Co.*, 25 W. R. 794, L. R. 2 Exch. D. 441, at p. 448; 25 W. R. Dig. 287, and *Johnstone and Toronto Type Foundry Co.* v. *Consumers Gas Co. of Toronto*, [1898] App. Cas. 447; 46 W. R. Dig. 21.] These cases show that the respondents put the legal rights of the corporation or traders, much too high. VAUGHAN WILLIAMS, L.J., referred to *Groves* v. *Lord Wimborne*, 47 W. R. 87, [1898] 2 Q. B. 402, 47 W. R. Dig. 61.] The only statutory duty under section 88 which the respondents say we have not carried out is that we have not dredged the canal, and by sub-section 22 it is absolutely in terms made obligatory that the matter shall be determined by arbitration. [STIRLING, L.J.—What sort of arbitrator do you say this is to go to?] The arbitrator named in the special provision. [VAUGHAN WILLIAMS, L.J.—Would you mind telling me, have the decisions under the Friendly Societies Acts and the Building Societies Acts any bearing on this?] My recollection is that where the arbitration is constituted in the form of a legislative enactment that is so. [VAUGHAN WILLIAMS, L.J., mentioned *Crisp* v. *Bunbury*, 8 Bing. 394.] It is a question of statutory enactment. [VAUGHAN WILLIAMS, L.J.—I am afraid we must take time to dispose of this matter.]

Cur. adv. vult.

March 15.—VAUGHAN WILLIAMS, L.J., read his judgment as follows: This is an appeal by the defendants, the Manchester Ship Canal Co., in an action brought against them in which the plaintiffs are the Corporation of Warrington and certain traders of Warrington as representing the traders of Warrington generally, and also in their individual capacity. The object of the action is to enforce rights which they claim respectively to have against the ship canal company under a clause of an Act of Parliament, or under that clause as modified by an agreement affirmed by a subsequent Act of Parliament, or under that agreement. The trader plaintiffs, in their individual capacities, although they include a claim for damages for the breach by the ship canal company of dredging obligations cast on them by the statute or by the agreement, in substance claim the return of tolls which were paid by the traders on the demand of the ship canal company for the user of the canal, which user was necessitated by failure of the canal company to perform duties alleged by the plaintiffs to have been cast on the canal company in respect of maintaining the channel of the River Mersey at a certain depth. The failure by the canal company to perform these duties would entitle the traders under the sixth section of the agreement scheduled to the Act of 1896 to navigate a portion of the canal, free of all tolls and dues, during such time as the said channel should be obstructed. The plaintiffs generally ask for declarations of rights. When the case came on for hearing, the defendant company took a preliminary objection, which was this: that, having regard to the arbitration provisions contained as well in the original Act of Parliament as in the agreement affirmed by the subsequent Act, the jurisdiction of the court is absolutely ousted, in the sense that the court could not, even with the assent of all parties, entertain the action or dispose of a particular matter in difference essential to the maintenance of the action. I will observe here that the action really embodies three actions, and that it may be that the ousting of the jurisdiction may be effective as to one or more of the claims, although not effective as to all three actions or all the claims. This, however, would seem an unfortunate result, for it is obvious that it is desirable that all these cases relating to the same obligations of the canal company should be disposed of by the same tribunal. The preliminary objection so far as it is based on the original Act of the Manchester Ship Canal—the Act of 1885 (48 & 49 Vict. c. clxxxviii.), depend primarily on section 88

of that Act. The section begins with these words: "For the protection of the Corporation of Warrington and of traders, manufacturers, and others carrying on business at or near Warrington, the following provisions, unless otherwise, agreed on between the corporation and the company, shall have effect." Then follow numerous provisions, the fourteenth of which deals with the obligations of the canal company in respect of the dredging of the channel of the River Mersey and the maintenance of the dredging, so that at all times there should be a depth of eight feet of water at low water of spring tides between a certain point, and the eastern boundary of the borough of Warrington, the object of this provision being, of course, the maintenance of the channel of the Mersey which might be affected by the construction of the canal, and its maintenance in such a condition that the channel of the Mersey might continue a navigable way convenient to the borough of Warrington and its traders. Then section 22 says: [His lordship read the section referred to above.] The words "unless otherwise agreed on," in that section, refer, I assume, simply to the appointment of the arbitrator, who may be an agreed arbitrator or one appointed by the Board of Trade. Thus far I have only dealt with the statute of 1885, but subsequently, in 1896, the company and the corporation in the exercise of the power conferred by the words in the preface of section 88, "Unless otherwise agreed on between the corporation and the company," agreed to modify the provisions of section 88. I should here observe that in my opinion the power of agreement thus given in the prefatory clause of section 88 is only a power to alter the provisions in that section, and has no bearing whatever on the power of the corporation or the company to waive the provision contained in sub-section 22. Now the agreement thus made in 1896 between the corporation and the company, slightly modified, is confirmed by section 43 of the Manchester Ship Canal Act, 1896 (59 & 60 Vict. c. clxxxii.), which runs thus: [His lordship read the section set out above.] The agreement in the schedule recites the prefatory words in section 88 of the Act of 1885, and sub-section 14 of that section, and then recites an agreement of 1893 between the corporation and the company, whereby in consideration of the corporation not opposing the opening of the canal, although incomplete, the company agrees, subject to penalties, to complete at their own cost on or before the 1st of July, 1894, the dredging authorized by section 88, sub-section 14, of the Act of 1885, reserving all powers, rights, and privileges of the corporation and the manufacturers and traders of Warrington under the Acts relating to the company or otherwise. The recital of this agreement of 1893 is followed by a recital that by the same agreement the company agreed that during the time fixed for completion by that agreement the corporation, traders, and manufacturers at Warrington should have the right to carry, by means of their barges, goods from the Mersey to the Mersey along the Manchester Ship Canal free of rates or tolls. Then follows a recital of disputes and differences having arisen between the company and the corporation, and that the company and the corporation for the purpose of settling those disputes have agreed to execute these presents. This recital of the agreement between the corporation and the company is followed by a rather remarkable recital relating to the traders. It runs thus: "And whereas the traders, manufacturers, and all other persons now or hereafter carrying on business at or near Warrington are entitled to use portions of the canal and River Mersey and the locks and works at Walton, on the terms and conditions defined in sub-section 2 of section 88, and the corporation and the company have agreed to alter those terms and conditions as hereinafter mentioned." It will be observed that although it is rights of the traders and others carrying on business which are affected, it is the corporation and company who make the agreement, and this may be very important when one comes to consider whether, upon a breach of this agreement confirmed by statute affecting the rights of the traders and others, an action based on the breach may be brought by the injured person, as is the case when an individual is injured by the breach of a statute passed for his benefit, provided such a remedy comes within the purview of the Legislature in the particular statute which it is especially likely to do in a case in which the Act is not an Act of public and general policy, but is rather in the nature of a private legislative bargain between certain persons likely to be affected by the work authorized by a special Act, and a body of undertakers as to the manner in which they will keep up certain public works. The scheduled agreement by clause 1 provides that "Sub-section 14 of section 88 shall, for the purpose of this agreement"—I am not sure what these last words mean, but I think practically nothing—"be read and have effect as if the same were in the words following." Then follow some give-and-take clauses as to the dredging, and the two clause (*d*) and (*e*) which deal with wharves and the rights and liabilities of the company and the wharf-owners respectively in relation thereto. These clauses are remarkable because they embody a bargain with considerations to and from the company and the wharf-owners. [His lordship read the various clauses of the agreement which are set out above.] In clause 6 it will be observed that it is the surveyor of the corporation who has to give this notice. Clause 7 is unimportant, as no such notice was ever given. [His lordship referred to clauses 8 and 9, which are also set out above, and clause 10, which is set out in the argument of counsel for the appellants.] It will be observed that in clause 10 this clause differs very little from sub-section 22 of section 88, except that the engineer arbitrator is to be named by a different authority. Clause 12 says: "The corporation shall have all rights and privileges under and shall be deemed to be traders within the meaning of this agreement."

I think I have now called attention to all the material parts of the statutory agreement. It will be observed that the right to recover the tolls can only arise under the statutory agreement, although other damages could be recovered by traders and manufacturers for breaches of the provisions of section 88 affecting them if, indeed, traders individually have a right of action within the purview of the Act of 1885.

The right of the traders collectively to a declaration of rights, whether under the Act of 1885 or under the statutory agreement of 1896, I will consider presently. I think that the only matter which I have to call attention to before considering the preliminary point, based on an alleged ouster of jurisdiction of the court, is section 202 of the Act of 1885, which runs thus: [His lordship read the section set out above.] I may as well at once dismiss the consideration of section 202. In my judgment it is quite unnecessary to resort to the arbitration clause contained in the section, even in the case of general damages or return of tolls claimed by the traders individually, for whether such claims are based on the Act of 1885 or on the scheduled agreement, the claimants cannot succeed unless the company are in default, and the company cannot be proved to be in default unless and until

their liability or obligation has been fixed, and if that liability or obligation can only be fixed by arbitration, the claim for damages or return of money paid for tolls must fail until the obligation or liability has been so fixed, and the same proposition is true of an action for declaration of obligation or liability. I will now proceed to deal with the question where the effect of sub-section 22 of section 88 is to oust the jurisdiction of the court in the fullest sense of the word—that is to say, in the sense that jurisdiction cannot be given to the court to determine a question, the determination of which has to be relegated by Act of Parliament, even by the consent of the parties to the litigation in court. That a statute may thus bar a plaintiff from maintaining an action in a court of law and compel him to pursue the course laid down by the statute, cannot be doubted: see *Crisp* v. *Bunbury*, 8 Bing. 394; and also the provisions in the Building Acts. In that case it is to be observed that although there was a trial at *nisi prius*, and a verdict for the plaintiff, the objection to the tribunal was allowed to prevail without any plea to the jurisdiction on a mere objection taken at *nisi prius* and reserved to be disposed of by the court *in banc*. The same case shows that it is not necessary that the jurisdiction of the court should be barred by express words; it is sufficient if the jurisdiction is barred by necessary implication. A great deal of argument was addressed to us as to when and under what circumstances a statutory arbitration clause will in the full sense of the word oust the jurisdiction of the courts. Byrne, J., on the authority of *Caledonian Railway Co.* v. *Greenock and Wemyss Bay Railway Co.*, L. R. 2 Sc. & Div. App. 347, 22 W. R. Dig. 13, and the judgments of A. L. Smith and Chitty, L.JJ., in the *London and North-Western Railway Co.* v. *Donellan*, [1898] 2 Q. B. 7, 46 W. R. Dig. 147, which were approved by the House of Lords in the *Midland Railway Co.* v. *Loseby & Carnley*, 47 W. R. 656, [1899] A. C. 133, held that in the present case, if the matter had stood on the original Act independently of the words "unless otherwise agreed on," the jurisdiction of the courts would have been ousted by an arbitration enactment raising a statutory duty which could not be waived. Thus far I agree with Byrne, J., but the learned judge went on to hold the words in the prefatory clause of section 88, "unless otherwise agreed on," rendered it competent, in case an action was brought, for one of the parties by his conduct to agree to waive the right to insist on arbitration. I cannot agree. I think, as I have already stated, that these words only refer to a modification of the provisions of section 88. As to the ouster of jurisdiction, it was argued by the counsel for the respondents that Byrne, J., had misunderstood the decision of the House of Lords in the *Caledonian Railway case*, and that the opinion of A. L. Smith and Chitty, L.JJ., in the *London and North-Western case* had not been affirmed by the House of Lords on the appeal in the *London and North-Western Railway Co.* v. *Billington* or the *Midland Railway Co.* v. *Loseby & Carnley*. I cannot agree. The suggestion that the judgment of Lord Cairns in the *Caledonian case* had been misunderstood was largely based on observations by Cotton and Bowen, L.JJ., in the *London, Chatham, and Dover Railway Co.* v. *South-Eastern Railway Co.*, 37 W. R. 65, 40 Ch. D. 100, by which those Lords Justices expressed doubts whether Lord Cairns meant to decide, or meant to indicate his own opinion to the effect that the jurisdiction of the courts was ousted. With deference to those Lords Justices, I think that careful examination of the *Caledonian case*, as reported in L. R. 2 Sc. and Div. Apps. 347, in connection with the facts and pleadings as stated in the Court of Session decisions (10 Ct. Sess. Cas., 3rd ser., 892), shows that Lord Cairns did mean to decide and indicate that the jurisdiction of the court was ousted in respect of the particular matter in question. The matter stands thus: the plaintiffs brought their action claiming payment under certain clauses, 8, 9, and 14, of an agreement between the two companies—of one-fourth part of the balance of certain gross receipts after making certain deductions. The defendants pleaded to the whole action article 18 of the agreement, whereby it was provided that "All differences which may arise between the parties hereto respecting the true meaning or effect of this agreement or the mode of carrying the same into operation shall from time to time so often as any such questions or differences shall arise be referred to arbitration in terms of the Railway Clauses Consolidation (Scotland) Act, 1845, and the provision with regard to the settlement of disputes by arbitration in such Act shall be held to be incorporated with this agreement," and pleaded that the action was excluded by the said article 18. The Lord Ordinary sustained the plea in law and dismissed the action. [His lordship discussed this case, and the arguments in it in the House of Lords.] The case of the *London and North-Western Railway Co.* v. *Billington* only decided that the jurisdiction was not ousted, because there had been no difference existing between the parties before action, which is certainly not the fact in the present case. Assuming, then, as in my opinion you must, that the jurisdiction of the court may be ousted by statutory provisions which have no express words to that effect, let us see what are the modes by which jurisdiction may be ousted. Sometimes the statute constitutes arbitration the only tribunal in which disputes between certain parties can be determined, and thus ousts the jurisdiction. Sometimes the jurisdiction is ousted because the statute has plainly said that some matter essential to be proved in a particular action should only be determined by arbitration. The *Caledonian Railway case* seems to me to be an instance. In either case, if the arbitration provision thus enacted is for the public good, and not for the benefit of individuals, no deficiency in pleading and no waiver by litigants can give the court jurisdiction. In my judgment the intention of the Legislature as expressed in sub-section 22 is that, in regard to anything to be done or not to be done under section 88, the engineer to be appointed by the Board of Trade is intended to be the only tribunal for the determination of what is the true intent and meaning of the section, just as under sub-section 21 the same engineer is to have sole and exclusive jurisdiction to determine details as to sub-sections 13, 15, and 16, so under sub-section 22, that arbitrator has sole and exclusive jurisdiction to determine the obligations of the company under section 14. Section 88, in spite of its preface, cannot be regarded as merely embodying an agreement come to by the promoters of the Bill and the Corporation of Warrington in the course of the promotion. It provides for the protection of those who were parties to no agreement—traders, &c., because the Legislature thought it right that this section of the public should be so protected, and I cannot see that the fact that the preface authorizes the corporation and the company to agree on other provisions, alters the character of the section. It is still a section passed in the public interest and not merely the embodiment of private agreement. The Corporation of Warrington are obviously deemed to be sufficient guardians of public interests to entrust them with such modification of the provisions as receives the approval of the corporation and the company. I

will now pass to the scheduled agreement. The agreement is, by section 43 of the Act of 1896, confirmed and made binding on the corporation and the company. The corporation and the company are the only parties to it, and it seems to me to follow that it is impossible for the traders to sue upon the agreement *qua* agreement, and the rights of the traders seem to me to fall exactly within the words of Lord Watson in *Davis* v. *The Taff Vale Railway Co.*, 44 W. R. 172, [1895] A. C. 542, where, after pointing out that in cases where the provisions of a local and personal Act directly impose mutual obligations upon persons or companies, such provisions may be fairly considered as having this analogy to contract, and they must as between those parties be construed in precisely the same way as if they had been matter not of enactment, but of private agreement. [His lordship quoted the words of Lord Watson on p. 552 and 553 in that case.] It seems to me, therefore that in this case here, if we are to regard the scheduled contract as a mere contract between the parties to it, the traders cannot sue upon such a contract, and if, on the other hand, we are to regard the Act of 1896, or the Act of 1885, as operating as a direct enactment of the Legislature in favour of the traders, neither the traders nor the company can get rid of such a direct enactment by waiver or otherwise, unless upon a true construction of the Act the enactments appear to have been passed merely for the benefit of such persons and not in the interests of the public.

The outcome of these considerations is that, in my opinion, the preliminary objection ought to be allowed in respect of the whole action.

First, as to the statute, and the effect of sub-section 22 of section 88. It seems to me that alike in respect to the claims of the corporation and the traders collectively and individually the action is based on default by the canal company in the performance of their obligation after dredging the bed and banks of the River Mersey "for ever after to maintain the same dredged, so that, &c.," or if one treats sub-section 14 of section 88, as modified by clause 1 of the scheduled agreement, then for ever to maintain the channel dredged in accordance with the provisions of sub-section 14 as modified by that agreement, and it matters not whether one takes the arbitration clause in sub-section 22 of section 88, or takes the arbitration clause in sub-section 22 as modified by clause 10 of the scheduled agreement—in neither case can it be proved that there is a default in maintenance if the parties differ as to the true intent and meaning of the words of the statute as in force with relation to the obligation to maintain, until that difference has been settled in the manner provided by the statute. Now, that there had been for a long time before the date of this action a difference between the corporation and the canal company as to the true meaning and intent of the provisions regulating the obligation to maintain I cannot doubt, and it follows that the determination of this difference must go to arbitration before any action based on the statutes can be brought. Then as to an action by the corporation based on the agreement, as an agreement, in my opinion, confirmed agreement, having regard to its frame, and in particular to its modification under the statutory powers given by section 88, and to the sub-sections to that section, cannot be relied upon by the corporation as a mere agreement containing provisions which can be waived by the consent of the parties. I think, therefore, that no action can be brought by the corporation based on the agreement *qua* agreement. The action of the traders collectively claiming declaration of right fails for the same reasons which I have given in regard to the action of the corporation making similar claims. The claim of the individual traders for return of tolls paid fails because it is essential to the maintenance of this claim that default by the canal company should be proved, but this cannot be done until the standard of duty has been determined by the statutory arbitrator, which has not yet been done. I think that the arbitration clause in section 88 of the Act of 1885, and clause 10 of the agreement, prevents the traders in their individual capacity proving any default in fact by the canal company, but even if this were not so I should be inclined to hold that, as regards individual traders, jurisdiction is ousted by reason of section 202 of the Act of 1885. If, however, their action fails, merely because something essential to their cause of action fails to be decided by arbitration, I think the action might be staved and not dismissed.

With regard to the pleading, I agree with the contention that although according to the old rules of pleading it was not necessary to plead the jurisdiction, modern practice has been so to plead ouster of jurisdiction: see *Mayor of Folkestone* v. *Ladd*, [1893] 3 Ch. 22. But assuming the pleading of the defendant company is faulty in this respect, I am clearly of opinion that the pleading ought to be treated as amended. No one was placed in any difficulty by the omission to plead, and the case, in my opinion, bears no analogy to those cases in which there is a refusal to stay after a step has been taken by the defendant in actions brought in contravention of an arbitration clause contained in a voluntary agreement. In my judgment this appeal ought to be allowed.

STIRLING, L.J., read his judgment as follows: [His lordship stated the facts and referred to the Act of 1885 and the scheduled agreement of the 9th of April, 1896.] The first question to be considered is whether the traders and others carrying on business at or near Warrington are entitled to enforce such of the provisions of section 88 of the Act of 1885 as are intended for their benefit. Those provisions are found in the form of legislative enactment, and do not arise merely out of a contract which has received statutory confirmation; and they are expressed to be for the protection of such traders and others. I think the decision in *Davis* v. *Taff Vale Railway Co.* applies, and that the traders are entitled to enforce the provisions of the section. Next, can they enforce the similar provisions of the agreement confirmed by section 43 of the Act of 1896? These provisions do not take the form of legislative enactment, yet seeing that by the terms of section 88 of the Act of 1896 they are an authorized substitute for legislative enactment, it seems to me that the same right of enforcing them must exist. If, however, I rightly understand the way in which the plaintiffs in the present action shape their case, it may not be absolutely necessary to decide this point, for they base their claim on the provisions of section 88 of the Act of 1885, but do not desire to enforce them to an extent beyond those contained in the agreement of 1896, which are less favourable to them.

I now come to the main question to be decided on the present occasion—namely, whether the corporation and traders or either of them can enforce their claims by action, it being contended on behalf of the defendants that the provisions as to arbitration found in the Act of 1885 are such as to oust the jurisdiction of the courts. In support of this contention reliance is first and principally placed on section 88, sub-section 22, of the Act of 1885. It is not really disputed that this enactment does impose on the company and the corporation an obligation to refer to arbitration any

difference arising between them "as to the true intent and meaning of section 88," or as to anything to be done or not to be done thereunder; but there is a question as to nature of the obligation—namely, whether it is such as, in the language of Lord Cairns in the *Caledonian Railway case* on p. 350, to force the parties to have their disputes settled, not by the ordinary tribunals of the country, but by a reference to arbitration; or whether it is only such as to render it the duty of the court to enforce when either party insists on a reference to arbitration: see the *London, Chatham, and Dover Railway* v. *The South-Eastern Railway Co.* This is important, for if the latter be the correct view, then it may be that as a fact Bryne, J., has held the defendants were too late in claiming a reference, whereas if the former be that which is the true meaning, the objection is in fact that the court has no jurisdiction to entertain the action, and it may be properly raised at any time. Now the corporation does not claim damages. The questions between it and the defendant company are (i.) What is the true intent and meaning of sub-section 14 of section 88 of the Act of 1885 as varied by the agreement and statute of 1896? (ii.) Whether the company has or has not duly dredged and maintained the bed and banks of the River Mersey? In my judgment both these are questions which fall to be decided by arbitration in accordance with sub-section 22. This being so, and the obligation as to arbitration being imperative, and imposed by statute, it seems to me that the case falls within the terms used by Lord Cairns in advising the House of Lords in the *Caledonian Railway case*; and it is to be observed of Lord Chelmsford, Lord Hatherley, and Lord Selborne, that they expressed their unqualified concurrence with Lord Cairns. It is true that in the case just mentioned the circumstances were such that the same conclusion might have been arrived at, even if the true nature of the obligation imposed on the parties to that litigation had been such as was held by the Court of Appeal to exist in the subsequent case of the London, Chatham, and Dover Railway Co. It is also true that in that case Cotton and Bowen, L.JJ., expressed doubts as to whether Lord Cairns really meant to decide or express an opinion that the jurisdiction of the courts was ousted; and those doubts have caused me very great difficulty. But the decision in the *London, Chatham, and Dover Railway case* (by which, of course, I am bound) is not precisely in point, and on the whole it seems to me that the better course is that this court should follow the language of Lord Cairns, assented to by the other noble lords, and that any mistake as to its meaning (if such there be) should be set right by a higher tribunal.

I agree with Vaughan Williams, L.J., in thinking that the obligation to refer is not altered by the words "unless otherwise agreed on" at the beginning of section 88, and I will add nothing on that point.

Assuming, then, that the jurisdiction of the court is ousted in the case of difference as between the corporation and the company, within section 88, sub-section 22, of the Act of 1885, I have to inquire whether this is also true as to the difference between the traders and the corporation. Now it is obvious that sub-section 22 does not in terms extend to such differences, nor can I see that it makes the settlement of differences between the corporation and the company a condition precedent to the bringing of an action by the trader against the company. Many of the provisions of section 88 (*e.g.*, those in sub-section 2) are of the highest importance to traders, but might affect the interests of the corporation very slightly. In the case of differences arising between a trader and the company as to these provisions, the corporation might reasonably be desirous to avoid controversy, and the Act, so far as I can see, provides no means by which the corporation could be compelled to embark on what might prove to be an expensive contest before an arbitrator. Even where the corporation has an interest in the matter in dispute the trader might be differently affected, and serious injustice might be done if he were to be held bound by arbitration proceedings between the corporation and the company to which he could not be directly a party.

It is lastly contended that this case falls within section 202 of the Act of 1885. [His lordship read the section.] The reference is to the provisions in sections 126 to 137 of the Act. [His lordship criticized several other sections of the Act bearing on arbitration.] Section 202 appears to be a section of wide operation, applicable to all matters falling within its terms for which no specific provision has been made elsewhere. It is a positive legislative enactment that all questions arising between the company and any person "touching anything to be done or not to be done" under the provisions of the Act shall be determined by arbitration in the way pointed out. That seems to me to extend to anything to be done or not to be done under section 88.

Now, the main question at issue between the company and the traders is, whether the company have or have not duly dredged and maintained the bed and banks of the River Mersey; and that is a question as to a thing to be done, or not to be done, under section 88. If the question is as between the company and the corporation (as I think) to be settled by arbitration under section 88, sub-section 22, then it seems to me that for the same reasons it ought to be settled as between the company and the traders under section 202. It appears to me that it would be an anomaly if it were held that the difference between the company and the corporation must be settled by arbitration, while those on the same matters between the company and the traders need not. I do not think that the tolls and damages claimed by the trader plaintiffs are moneys to be paid under the provisions of the Act of 1885; but still, in accordance with what was done in the *Caledonian Railway case*, the action ought to be stayed until the question which falls to be determined by the arbitration has been decided. In my opinion, therefore, the action ought to be wholly stayed or dismissed as between the corporation and the defendant company, and should be stayed until the determination of the main question as between the traders and manufacturers and the defendant company.

COZENS-HARDY, L.J., read his judgment as follows: As I have the misfortune to differ from the majority of the court, it is necessary that I should as briefly as possible state my own views. [His lordship stated the nature of the action and the preliminary objection.] The question depends upon the proper construction and effect of a few sections in the Manchester Ship Canal Act, 1885. The plaintiffs' case is shortly this: [His lordship stated it as set out above.] Section 88 of the Act of 1885 is an elaborate section, obviously inserted in the interests of Warrington. It commences as follows: [His lordship read it.] Then follow twenty-three sub-sections under which various rights are conferred upon the corporation and the traders, and various restrictions and obligations are imposed upon the canal company. [His lordship referred to sub-section 14, and read sub-section 22.] Now it will be observed from the introductory words that although certain rights are given by the section to the traders, power is left to the corporation and the canal company by agreement to modify these provisions, but not, I think, to make entirely new and indepen-

dent provisions. For this purpose the corporation was apparently treated as representative of the the traders. In 1896 an agreement dated the 9th of April, 1896, was entered into between the corporation and the canal company, which was, I think, intended to operate and take effect under the introductory words in section 88. [His lordship referred to clause 1, and read clause 10 at length.] I may remark in passing that this arbitration clause differs from the arbitration clause in section 88 of the Act of 1885, the appointment of the arbitrator resting with the President of the Institute of Civil Engineers, and not with the Board of Trade. [His lordship read section 43 of the Act of 1896.] Now it is necessary to consider the case of the corporation separately from the case of the traders. I cannot regard section 88, in its original form or as modified by the Act of 1896, as a mere agreement between the corporation and the canal company. I think it was an enactment dealing with, and conferring rights upon, not the whole public, but a particular class of public, namely—manufacturers, traders, and others at or near Warrington; and this being so, it seems to me that section 88 must be taken to have conferred rights to be dealt with and enforced only in the manner prescribed by sub-section 22; or, in other words, I think that sub-section excludes the jurisdiction of the court in any case of difference between the corporation and the canal company falling within the language of the sub-section: see the *Caledonian Railway case*. The authorities which have decided that under the Building Societies Acts and the Friendly Societies Acts the jurisdiction of the courts is ousted may be referred to as illustrating the general principles: see especially *Crisp* v. *Bunbury* 8 Bing. 394, and *Municipal Building Society* v. *Kent*, 32 W. R. 681, 9 App. Cas. 260. In my opinion the position is not changed by reason of the Act of 1896. The scheduled agreement confirmed by the Act must either be regarded as something to be read into and to form part of section 88, or as something more than a mere agreement between the parties, and as in substance a public enactment affecting not merely the parties, but traders and others. I agree, therefore, with my lord and Stirling, L.J., that the objection, so far as the corporation is concerned, is valid. With reference to the traders different considerations apply. Neither of the two arbitration clauses referred to in terms affects the traders, each relating only to differences between the corporation and the company. It is quite true that in a certain sense the corporation might be said to represent the traders for the purpose of obtaining from the arbitrator a declaration, yet it is difficult to see how either of those arbitration clauses can be applied to the case of individual traders, each of whom alleges that he has sustained damage by reason of the breach by the canal company of its statutory obligations. No traders could be a party to such an arbitration or require such an arbitration to be entered upon. The introductory words of section 88 suffice to show that it was intended to confer certain rights upon the traders for whose benefit the section was enacted, and even apart from that there is sufficient in the section itself to entitle the traders to maintain an action for damages unless there is some other provision in the Act expressly excluding the jurisdiction of the High Court: see *Davis* v. *Taff Vale Railway Co.* It seems to me wrong to postpone the adjudication upon the claims of the traders until after an award in a reference to which they will not be parties. I agree with Stirling, L.J., on this point. It is suggested, however, that section 202 of the Act of 1885 has the effect of ousting or postponing the jurisdiction of the court. [His lordship read the section.] I may remark in passing that this arbitration clause differs from both the arbitration clauses I have already set out. No importance was attached to this section in the argument in the court below, but it is nevertheless open to the appellants to contend that the jurisdiction of the court is excluded by it. I am not able to attribute such force to the section. Even if, which may be doubted, it has any application to a claim to damages of the nature I have indicated, I think it is at the most only a clause enabling either party to apply to the court to stay the proceedings and to refer to arbitration, and is not a clause excluding the jurisdiction of the court: see the *London, Chatham, and Dover Railway Co.* v. *South-Eastern Railway Co.* I cannot conclude that the jurisdiction of the court is ousted for all time in every case of dispute between the canal company and members of the public with reference to the statutory obligations imposed on the canal company towards those members of the public. These obligations are both numerous and varied. They extend over nearly 100 sections. I find in some sections an express reference to section 202: see, for example, section 72, sub-section 7, and section 85, sub-sections 3, 8, and 10. It may be that section 202 only prescribes a mode of arbitration for those cases in which in the earlier part of the Act arbitration is prescribed but no particular mode of arbitration is specified. But, however that may be, I do not find myself able to agree with the view of the majority of the court, that it is not competent to us at the present moment to consider the case presented by the traders. The result, in my opinion, is that the objection prevails as to the corporation, but not as to the traders, and the strict course would be to strike out the corporation as co-plaintiffs, and to leave the other co-plaintiffs to continue the action. But although no relief could be given to the corporation in this action, the misjoinder is not very material, for the questions arising for decision as between the traders and the canal company involve or include the questions sought to be raised as between the corporation and the canal company, and under these circumstances, in my view, we ought now to deal with the merits of the appeal.

Appeal allowed.

Solicitors for the appellants, *Grundy, Kershaw, Samson, & Co.*

Solicitors for the respondents, *Burton, Yeates, & Hart*, for *Alexander Wilson & Cowie*, Liverpool.

From K. B. Div.
(Collins, M.R., and Romer and Mathew, L.JJ.) — May 6.

STEPHENS *v.* DUDBRIDGE IRONWORKS CO. (LIMITED). (*a.*)

Master and servant — Compensation for injuries by accident—Apprentice—Infant—Election by infant to claim under Workmen's Compensation Act, 1897—Agreement not for the benefit of infant—Subsequent action to recover damages at common law—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1. *sub-section* 2 (b); *s.* 7, *sub-section* 2.

An apprentice who was an infant, met with an accident in the course of his employment, and he agreed with his employers to accept a weekly payment amounting to half his wages in compensation, and signed a receipt.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

which stated that he elected to accept this sum under the Workmen's Compensation Act, 1897, *in full satisfaction and discharge of all claims for compensation. Subsequently he brought an action against his employers at common law for damages in respect of the same injuries, based on their negligence in not having fenced the machine plane.*

Held, that the Act by including an apprentice in the general word "workman" did not alter the law applicable to contracts made by infants, and that, it not being for the infant's benefit to accept compensation under the Workmen's Compensation Act, 1897, *his election to accept the same did not bind him, and his claim under the Act was therefore no bar to his common law right to sue.*

Decision of Bruce, J. (19 *Times L. R.* 665), *affirmed.*

Appeal by the defendant company from a considered judgment of Bruce, J., who tried the action by consent of the parties without a jury.

The action was brought by the plaintiff, a lad of seventeen years of age (suing by one Smith, his guardian and next friend), to recover damages for personal injuries caused by the defendants' negligence. The defence so far as is here material consisted in a plea that the plaintiff had elected to receive compensation under the Workmen's Compensation Act, 1897, and that, having received payment under that Act for a certain number of weeks, was debarred from any other remedy.

The facts were these: The plaintiff, who was apprenticed to the defendants, met with an injury by an accident arising out of and in the course of his employment at an unfenced planing machine and lost three fingers of his left hand. At the time of the accident he was receiving 5s. a week from the defendants as wages. Upon an application to the defendants for a lump sum of money as compensation for the injury, the defendants agreed to pay the plaintiff 2s. 6d. a week—*i.e.*, half the plaintiff's average weekly earnings, and the plaintiff agreed to accept this payment "in full satisfaction and discharge of all claims to compensation accrued or to accrue in respect of all injuries or injurious results" arising from the accident. The plaintiff on the following day went to the office and signed a receipt in the following terms: "Received of the Dudbridge Ironworks Co. (Limited), by payment of the Employers' Liability Assurance Corporation (Limited), the 4th day of October, 1902, the sum of 12s. 6d., being the first five of the successive weekly payments which I elected to accept under the Workmen's Compensation Act, 1897, in full satisfaction and discharge of all claims of compensation accrued or to accrue in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me or about the 15th day of August last whilst in the employment of the above." Under this agreement the plaintiff received a total sum of 37s., and the defendants then took him back to work at the same wages as before or higher wages.

The plaintiff then commenced the action by his next friend in the High Court claiming damages in respect of the injury which he had received and alleging negligence by the defendants in not having fenced the planing machine.

At the trial the defendants admitted negligence on their part, and the damages were assessed by agreement at £75; but they contended that the defendant had exercised his option in accepting the weekly payments as compensation under the Act of 1897, and was so debarred by s. 1, sub-section 2 (*b*) from claiming independently of that Act.

Bruce, J., on further consideration, held that the plaintiff, being an infant, was incapable of exercising an opinion whether to claim under the Act of 1897 or to proceed in an action for negligence, and he held that the agreement by the plaintiff to accept compensation under the Act in satisfaction of all his rights against the defendants in respect of his injury was not for his benefit; and he accordingly gave judgment for the plaintiff for the agreed amount of damages, less the sums which the plaintiff had received from the defendants by way of weekly payments under the Act.

The defendants appealed.

Ruegg, K.C. (*J. Corner* and *A. S. Poyser* with him), for the defendants.—The notice of claim given here was sufficient to start proceedings by an injured workman under the Act of 1897, and the agreement by the employers to pay 2s. 6d. a week could have been recorded by the registrar of the county court under Schedule II. (8): *Powell* v. *Main Colliery Co.*, 49 W. R. 49, [1900] A. C. 366. Therefore the acceptance of those terms by a workman would be an exercise of an option to proceed under the Act, and he could maintain no other remedy. By the definition of workman in section 7, sub-section 2, apprentice can be read into section 1, sub-section 2 (*b*), for workman, and therefore the plaintiff is debarred from claiming damages at common law. The intention of the Legislature was to provide an insurance scheme for workmen engaged in any employment to which this Act applied that should do away with the necessity of bringing an action if the parties would agree on the terms set out in the Act, and this settlement without legal proceedings would be rendered useless if this appeal is dismissed. The infant was competent to enter into this contract, and he must stand by it: *Clements* v. *London and North-Western Railway Co.*, 42 W. R. 338, [1894] 2 Q. B. 482.

A. T. Lawrence, K.C., and *Morton Brown*, for the plaintiff, were not heard.

COLLINS, M.R., after stating the facts, said: The defendants admitted negligence, and the only question we are called upon to decide is whether by reason of the proceedings which had taken place before the commencement of the action the plaintiff was estopped or prevented from putting in suit his common law right to damages. Shortly after the accident a claim was made on the masters by the lad's uncle and guardian. The claim purported to be a claim under the Workmen's Compensation Act of 1897, but the guardian asked for something—namely, a lump sum down—which it was not competent for him to get under the provisions of that Act. The masters replied that they were willing to make compensation in accordance with the Act—namely, to pay a weekly sum amounting to half the weekly wages which the lad had been earning before the accident. The offer was accepted, and the lad then signed a receipt in the fullest terms electing to accept the weekly payments in full satisfaction and discharge of all claims for compensation in respect of injuries arising from the injury, and he continued to receive the weekly payments until he was restored to health and was able to work again. He then apparently consulted a solicitor. At any rate this action was brought in the High Court, and by the defence the question of law was raised whether, by reason of the events which happened between the accident and the bringing of the action the lad was debarred from taking these proceedings at common law. Now, by sub-section 2 (*b*) of section 1 of the Workmen's Compensation Act, 1897, when injury is caused by the negligence of the employer or of some person for whose act or default he is responsible, nothing in this Act shall affect any civil liability of the employer, "but in that case the workman may, at his option.

either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of his employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act except in case of such personal negligence or wilful act as aforesaid." It was contended that the lad here was a workman within the meaning of the Act, and that under this sub-section he had an option as to which remedy he would pursue, and that he had exercised that option. In order to fortify that contention reference was made to the definition of workman given in section 7 of the Act which defines the word "workman" as including "every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing." It was argued that there was a statutory permission to a boy under age to make the option mentioned in the sub-section. But had the statute by giving that option altered or got rid of the ordinary law of the country? The ordinary law of the country is that an infant is not bound by a contract made by him which is not for his benefit. In this case Bruce, J., came to the conclusion that the contract which the defendants said ousted the jurisdiction of the court was not for the benefit of the infant, and he decided that he ought not to withhold from him the benefit of his common law right to damages. In my opinion the decision of Bruce, J., was right, and this appeal consequently fails.

ROMER and MATHEW, L.JJ., gave judgment to the same effect.

Appeal dismissed.

Solicitor for the plaintiff, *C. T. Courtney Lewis*, for *W. Langley Smith*, Gloucester.

Solicitors for the defendants, *Watson, Sons, & Room*, for *Wansborough & Co.*, Bristol.

From K. B. Div. (Collins, M.R., and Romer and Mathew, L.JJ.) March 4.

BOARD OF TRADE *v.* SAILING SHIP "GLENPARK" (LIMITED). (*a.*)

Ship — Seaman — Distressed seaman — Provisions for relief—Expenses of maintenance and passage home— "Sufficient evidence"—Wages paid abroad in excess of such expenses—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 190, 191, 193—*Merchant Shipping (Mercantile Marine Fund) Act,* 1898 (61 & 62 *Vict. c.* 44), *s.* 4.

Held, that a seaman might nevertheless be a "distressed seaman" abroad within the meaning of section 191 *of the Merchant Shipping Act,* 1894, *although the wages due and paid to him abroad exceeded the amount of the expenses incurred on his behalf for maintenance and passage home.*

Held, further, that although the mere fact that a seaman has been shipwrecked abroad is not conclusive evidence of distress, yet that in the present case there being evidence on which the learned judge could find (as he did) that the seamen were distressed, it was unnecessary to decide whether the "sufficient evidence" mentioned in section 193 *meant "conclusive evidence."*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Appeal by the defendant company from a judgment of Bigham, J., reported 51 W. R. 554, [1903] 2 K. B. 324, given in a commercial cause, tried upon an agreed statement of facts which was substantially as follows:

The action was brought as a test action by the Board of Trade against the defendants, the owners of the sailing ship *Glenpark*, of Liverpool, to have decided the meaning of the words "distressed seamen" in section 191 of the Merchant Shipping Act, 1894; and they sought to recover from the defendants £99, the balance of expenses incurred in relieving and sending home, as distressed seamen, certain members of the crew of the *Glenpark*, which in the course of a round voyage from Cardiff was wrecked off the coast of South Australia in February, 1901. The crew were saved, and were maintained by the authorities, first at Port Victoria and afterwards at Port Adelaide. At the latter place the representatives of the owners of the vessel paid the crew the wages due to them. The majority of the men were able to obtain fresh employment, but those who did not do so were sent home.

The owners had paid part of the expenses incurred by the authorities, but they disputed liability for the balance now claimed, on the ground that as to certain members of the crew to which the balance now claimed referred, they, after receiving their wages, had themselves sufficient money to take them home, and therefore were not "distressed seamen" abroad within the meaning of Merchant Shipping Act and the Board of Trade Regulations, Nos. 68, 90, and 95.

At the trial, Bigham, J., held that the eleven men in question were not the less "distressed seamen," there being nothing in the provisions of the statute which excluded from the category of distressed seamen those who being shipwrecked abroad happened, at the time of the disaster, to be entitled to arrears of wages, and he accordingly gave judgment for the Board of Trade.

The shipowners appealed.

Danckwerts, K.C., and *Maurice Hill*, for the defendants.—The part of the Merchant Shipping Act, 1894, containing the sections 190 to 194 is headed "Distressed Seamen." By section 190 the Board of Trade is empowered to make regulations for the relief, maintenance, and sending home of seamen and apprentices found in distress abroad, and no seaman shall have a right to such relief except his case comes within the conditions provided by those regulations. When those conditions are looked at, the case of the seamen in question here does not come within those regulations, because, shortly, by the payment of wages they ceased to be in a condition of "distress." In the case of these men the payment of wages does gave them the means to get home, which the Act says is a right they can claim only from the shipowners if they are shipwrecked abroad and have not the wherewithal to pay their passage back or keep themselves on the journey. No. 86 of the Board of Trade Regulations, which extended the relief to seafaring persons generally, being British subjects engaged in merchant vessels, is to the same effect, and by regulation 90 no relief is to be afforded to shipwrecked seamen who refuse to work their passage home or refuse to accept reasonable employment. So, too, by regulation 95, shipwrecked seamen who stand by a wreck to salvage property are not to be considered as distressed seamen during the time they are so earning money. [They also referred to section 191, sub-sections (1) and (4), of the Act of 1894.] By section 193 (i) as amended by section 4 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, such expenses are to be a

debt due to the Crown from the owner of the ship, and by sub-section (2) may be recovered by the Board of Trade on behalf of the Crown by ordinary process of law. Secondly, the production by the plaintiffs of the account of expenses, together with the proof of payment thereof, is not conclusive evidence of the plaintiffs' right to recover. It was only intended to save unnecessary expense as affording evidence of the total sum actually paid, and does not prevent the owners from objecting to items which they dispute. Section 193, sub-section (3) of the Act of 1898 enacts "that in any proceeding for such recovery the production of the accounts (if any) of the expenses furnished in accordance with this Act or the Distressed Seamen Regulations, and proof of payment of the expenses by or on behalf of the Board of Trade, shall be sufficient evidence that the expenses were incurred or repaid under the Act by or on behalf of the Crown." But all that section does is to merely cast upon the defendants the onus of proving that the expenses were not properly incurred. That still leaves the matter open to proof, for the Act uses the words "conclusive" where a contrary intention is intended: see, for example, section 310, sub-section (2). They referred to *Nothard* v. *Pepper*, 17 C. B. N. S. 39 at p. 50; *Barraclough* v. *Greenhough*, 15 W. R. 21; L. R. 2 Q. B. 612; and *Reg.* v. *Fordham Justices*, 22 W. R. 85; L. R. 8 Q. B. 501.

Sir Robert Finlay, A.G. (*Sir Edward Carson, S.G.*, and *Sutton*, with him), for the plaintiffs.—The evidence here supports the finding of Bigham, J., that the men while at a foreign port were "distressed seamen," and the mere fact that the wages paid to these men happened to exceed the actual cost incurred in obtaining their passage and food home does not in law refute the inference of fact drawn by the learned judge. It was never intended that a shipwrecked seaman who had signed on for a round voyage should be compelled to spend his wages paid him in getting home from a foreign port and thus land at home perhaps with nothing in his pocket on which he could support himself until he could find employment, and helpless to provide for those who were dependent on him for support. The time to look at is the time of the shipwreck. Then as to the defendants' contention that the production of accounts and proof of payment of expenses is not conclusive evidence. Their contention on that point that "sufficient evidence" in section 193 (3) does not mean conclusive evidence, we submit is wrong, but at any rate the decision on that question here is immaterial, because there was ample evidence, and that unrebutted, upon which the learned judge could find, as he did find, that at the time of the shipwreck these men were, in fact, distressed seamen.

Maurice Hill replied.

COLLINS, M.R.—This is an appeal from the judgment of Bigham, J., and the question that is raised for our decision is, shortly, whether certain seamen were "distressed seamen" within section 191 of of the Merchant Shipping Act, 1894. His lordship then referred to the facts, and continuing said: In these circumstances were the men, from and after the time when their wages were paid—and it was not disputed that up to that time they were distressed seamen—distressed seamen within the meaning of the statute, so as to require the governor or other specified officer to provide for their maintenance and passage home, in accordance with the provisions of section 191 (i) of the Merchant Shipping Act, 1894? It was contended that though these seamen at the time of the shipwreck came within the description of "distressed seamen," as used in that section, yet that they were not in distress at Port Adelaide, because each of them received wages which exceeded the amount of expenses incurred in his case. In my opinion, the question whether they were or were not distressed seamen, notwithstanding they had been paid arrears of wages due, is a question of fact. It is quite possible that a seaman who has lost all except what he stood up in might be said to be a distressed seaman, although he had wages due to him (which were paid) sufficient to bring him at his own expense back to the port from which he sailed. For aught we know the seaman might have a family to support in England, and unable on many grounds to meet the expense. It is all a question of fact, and therefore we are not permitted to hold that mere evidence that he was shipwrecked abroad is conclusive evidence of distress. A shipwrecked seaman might be a nobleman or a millionaire, with plenty of money in his pocket, and in such a case he could not be called a "distressed seaman" who was entitled to maintenance and a passage home at the public expense. I have already stated what the evidence was upon this point, and by section 193 (3) of the Merchant Shipping Act, 1894, the account of the expenses duly furnished, and proof of payment thereof by or on behalf of the Board of Trade, shall be sufficient evidence that the expenses were incurred or repaid by or on behalf of the Crown. It was said that under that section the account furnished by the person charged with the duty of meeting the expenses incurred in sending the men home was sufficient evidence that the expenses were incurred or repaid by or on behalf of the Crown. I need not now decide the point whether the word "sufficient" evidence used in section 193 of the Act means "conclusive" evidence, but, without deciding that, my opinion is that in favour of the view that the accounts furnished would be sufficient evidence unless that evidence, which is not the case here, was contradicted. I do not desire to decide that point, however, because in my opinion there is plenty of evidence to justify the finding of the judge below that these seamen were distressed seamen.

Therefore, for the reasons I have given, there is no ground shown for our interfering with the learned judge's decision, and indeed upon the evidence I myself should certainly have arrived at the same conclusion. Upon the second point—namely, whether the words sufficient evidence are to be deemed conclusive evidence—I desire to reserve my opinion, as I think that point does not really arise in the present case.

ROMER, L.J.—I concur. In my view the question whether a shipwrecked seaman was or was not a "distressed seaman" at a particular port is a question for fact in each case. I can quite understand that it might be said of a seaman who, when wrecked at a foreign port, had £500 in his pocket, that that seaman was not distressed within the meaning of the statute. In this case, however, the question was one of fact—whether or not these particular seamen were distressed. I think the evidence was sufficient to justify the finding of the learned judge that they were distressed seamen. There is in this case in my opinion what the Act calls sufficient evidence to support that finding. And, more, no evidence to the contrary was given.

I desire to express no opinion upon the question whether "sufficient evidence" means "conclusive evidence" under the Act in reference to the production of the accounts and proof of payment.

MATHEW, L.J.—I agree. As I understand the case it is not disputed that if the wages received by a shipwrecked seaman at a foreign port are short of

the expenses that would be incurred for his maintenance and passage home he would be a distressed seaman within the meaning of the Act. The question in this case must be, in my opinion, one of fact. A seaman does not necessarily cease to be a distressed seaman because he receives money which would be sufficient to take him home. He may have other obligations to meet. The receipt of wages in this case cannot be treated as conclusive.

Without giving any opinion upon the question whether the production of accounts and proof of payment is conclusive evidence that the expenses have been incurred under the Act, there was in this case sufficient evidence to that effect, and that evidence was unanswered.

I agree, therefore, that the plaintiffs are entitled to succeed, and that the appeal must be dismissed.

Appeal dismissed.

Solicitor for the plaintiffs, *The Solicitor of the Board of Trade.*

Solicitors for the defendants, *Rowcliffes, Rowles, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

High Court of Justice.

Chan. Div. } June 23.
Farwell, J. }

In re PIMM (DECEASED).
SHARPE *v.* HODGSON. (*a.*)

Will—Construction—Specific devise of freeholds—Direction to pay "my duties"—Estate and settlement estate duties—Freeholds exonerated—Finance Acts, 1894 (57 & 58 *Vict. c.* 30), *ss.* 5 (1), 6 (2), 8 (3) (4), 9 (1) (4), *and* 14 (1); *and* 1896 (59 & 60 *Vict. c.* 28), *s.* 19—*Direction to pay incumbrances—Mortgage on freeholds—Further security—Apportionment—Locke-King's Acts* (17 & 18 *Vict. c.* 113, 30 & 31 *Vict. c.* 69).

A testator devised freeholds in trust for his daughter and her children, and gave the residue of his estate, both real and personal, in trust for sale and conversion, the clear residue to be divided, after payment of his debts, funeral and testamentary expenses and duties, and any incumbrances charged on his said estate.

Held, a direction to pay all duties arising by reason of the dispositions of the will, and therefore to pay estate and settlement estate duties on the freeholds.

The same freeholds were subject to a mortgage, for which a life policy (which formed part of the residue) had been deposited as further security.

Held, that the mortgage debt must be apportioned according to the respective values of the properties charged, and that the proportion on the policy moneys should alone be paid out of residue.

In re Athill, 29 *W. R.* 309, 16 *Ch. D.* 211, *followed.*

Adjourned summons for determination of questions on the construction of a will.

James Norris Pimm, by his will dated the 28th of May, 1900, devised to his trustees his freehold houses, Nos. 4, 5, and 6, Fulwood's-rents, Holborn, upon trust to pay the net rents and profits to his daughter Martha (the defendant Mrs. Hodgson) for life, and afterwards upon trust for her children, with a power to her to appoint a life interest to her husband; and after disposing of his business and bequeathing certain pecuniary and other legacies, he devised and bequeathed "all the rest and residue of my personal estate and effects whatsoever and wheresoever, and all my real estate of every tenure and wheresoever situate, not hereby otherwise disposed of, including . . . my freehold property, The Mansion, Staines, my long and short leasehold properties . . . unto and to the use of my said trustees, their heirs, executors, administrators, and assigns, respectively," upon trust for sale and conversion with power to postpone sale, "And after payment, out of the net proceeds of sale, calling in, and conversion, of my debts, funeral, and testamentary expenses, and duties, and the incumbrances which may be charged on my said estate or any part thereof, and the said incumbrances on No. 2, St. James's-place, upon trust to hold the clear residue in trust for and to divide the same amongst my wife, Martha Pimm, and my five sons" (naming them).

Except as above-mentioned, there was no reference in the will to No. 2, St. James's-place, which, it was not disputed, formed part of the residue. The will as originally framed contained a specific devise of that house to the testator's wife, but he afterwards altered his intention, and the direction to pay incumbrances on that property was inadvertently left standing when the will was altered.

One of the three houses in Fulwood's-rents, No. 6, was subject to a mortgage for £1,500. This sum was secured by two deeds, one conveying the freeholds subject to a proviso for redemption, and the other purporting to assign a life policy. This second deed was expressed to be supplemental to the first, and was executed later but on the same day. It recited that it had been agreed that such further security should be given as was thereby made. It contained no covenant to pay, but in the proviso for redemption there was a reference to the covenant in that behalf in the principal indenture. It was stamped as a collateral security while the principal indenture bore the full stamp for a mortgage for £1,500. And there was a schedule which purported to contain particulars of the policy, but which had not been filled up. A policy on the testator's life for £1,250 with the Gresham Life Assurance Society was, however, deposited with the mortgagee after the deeds were executed.

James Norris Pimm died in 1903, and the present summons was taken out by his widow, his son J. N. Pimm the younger, and Samuel Sharpe, three of the executors and trustees—the fourth, another son, having renounced probate.

The questions for decision were: (1) Whether the estate duty and settlement estate duty on the freehold houses should be charged thereon or paid out of residue; (2) whether the mortgage debt on the freehold No. 6, Fulwood's-rents, and further secured on the policy of insurance should be discharged (*a*) entirely out of the said freehold or (*b*) out of the policy moneys so far as they would extend, or (*c*) apportioned rateably between the two.

The summons was first heard on the 29th of April, 1904, when it was ordered to stand over for further evidence, and the judge directed that the widow and J. N. Pimm the younger, both of whom were beneficiaries under the residuary bequest, should be made defendants in addition to Mrs. Hodgson, leaving Sharpe as the only plaintiff.

P. S. Stokes, for Sharpe, took no part in the argument, which was between the defendants Mrs. Pimm and her son and the defendant Mrs. Hodgson.

H. Greenwood, for the latter.—The short point on the Act is that apart from any direction the mortgage debt would be apportioned between the freehold and the policy moneys, each fund bearing its share: *Trestrail* v. *Mason*, 26 W. R. 260, 7 Ch. D. 655. The Act may be excluded by a very slight expression of

(*a.*) Reported by R. HILL, Esq., Barrister-at-Law.

a contrary intention, though by virtue of the Amending Act a mere direction to pay debts is not enough. The court was against me at the last hearing when I argued that by "my said estate" the testator meant his whole estate. I must therefore accept it that he meant his residuary estate. But he adds "or any part thereof," and this was a debt charged on part of his residuary estate—namely, the policy moneys. Therefore there is a direction to pay it out of residue unless some words are read in indicating that only a proportionate part is to be so paid. A contrary intention is here shown more clearly than by the words which were held sufficient by Chitty, J., in *In re Trevelyan, Perceval* v. *Trevelyan*, 26 SOLICITORS' JOURNAL 43. All that is necessary is a description of the debt; the mode of description is not important. As to the duties, there is nothing to cut down the meaning of the word "duties." In *In re Leveridge, Spain* v. *Lejoindre*, 50 W. R. 205, [1901] 2 Ch. 830, Joyce, J., held that a direction to pay "the estate duty" included the settlement estate duty; and the word here used is wide enough to include all duties.

Upjohn, K.C., and *Curtis Price*, for Mrs. Pimm and J. N. Pimm, the son, cited *In re Athill, Athill* v. *Athill*, 29 W. R. 309, 16 Ch. D. 211, *In re King*, 52 W. R. 230, [1904] 1 Ch. 363, and referred to the Finance Act, 1894, ss. 5 (1), 6 (2), 8 (3) (4), 9 (1) (4), and 14 (1), and the Finance Act, 1896, s. 19.

[THE COURT referred to *In re Lewis, Lewis* v. *Smith*, 48 W. R. 426, [1900] 2 Ch. 176; *In re Maryon-Wilson, Wilson* v. *Maryon-Wilson*, 48 W. R. 338, [1900] 1 Ch. 565.]

FARWELL, J., after reading extracts from the will as above quoted, said: The first point is this: The testator has specifically devised certain freeholds which he has settled so that settlement estate duty as well as estate duty becomes payable. It is contended on behalf of Mrs. Hodgson that both are payable out of the residuary estate. The question is what duties are included in the testator's direction to pay "my debts, funeral and testamentary expenses and duties," out of the proceeds of sale and conversion? The expression "my duties" is certainly a wide phrase, and I can see no ground for restricting its generality. I think it is a somewhat cumbersome mode of expressing what he had in his mind, and I think what he meant to say is "all duties to which my estate is liable by reason of any of the dispositions I have made in my will." I can see no other sensible construction of this direction in the residuary clause of the will. It is true that the duties are payable to the revenue, but they arise under the provisions of the testator's will and in this sense are the testator's duties. This being in my opinion the correct interpretation of the testator's language I can see no ground for restricting the generality of the expression "my duties," and I think the decision of Joyce, J., in *In re Leveridge* has some bearing on the present case. *In re King*, which depends on section 19 of the Finance Act, 1896, has no application here; it merely decides that a direction to pay "testamentary expenses" is not an express direction to pay settlement estate duty so as to throw the burden of that duty on residue in exoneration of specifically bequeathed personalty. The result is that all the duties in respect of this specifically devised property are payable out of the general residuary estate.

Another point arises in this way. The testator had created a charge on one of these houses and that charge also affects a policy of insurance which is part of the residuary estate. The policy was not in my opinion a collateral security in the sense of being secondary, but was mortgaged as part of the same transaction. The direction as to incumbrances is, in effect, to pay those affecting "my said estate," that is to say, the testator's residuary estate, and it implies knowledge on his part that the specifically devised estate was not entitled to be exonerated. Where he intends that such estate should be exonerated, as in the case of No. 2, St. James's-place, he takes care to mention it. My view is that when he refers to incumbrance he does not mean the amount which would be chargeable as between debtor and creditor, but the amount for which the policy would be liable in a due course of administration. The case comes within the general principle laid down by Cotton, L.J., in *In re Athill*, and there being nothing to show a contrary intention, the amount of the debt must be apportioned between the freeholds and the policy-moneys in proportion to their amount, the proportion falling on the latter being alone borne by the residue.

Solicitors, *Yarde & Co.; Albert Sargeant.*

Chan. Div.
Buckley, J. } April 19, 20.

In re SOUTH AFRICAN SUPPLY AND COLD STORAGE CO. (LIMITED). (*a.*)

Company—Winding up—"Reconstruction"—"Amalgamation"—Bonus to preference shareholders—Bonus to debenture-holders—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

Neither the word "reconstruction" nor the word "amalgamation" with reference to limited companies bear any definite legal meaning. These words are commercial expressions having no exact meaning.

The reconstruction of a limited company involves the desire to preserve the undertaking of the company otherwise than by selling it; that in some altered form the undertaking will be continued so that the persons carrying it on shall substantially continue to carry it on, and that substantially the same business shall be continued, although all the assets of the company may not pass to the new or resuscitated company, and all the shareholders of the old company may not become the shareholders of the new company. It does not necessarily involve that the new or reconstituted company should take over the liabilities of the old company. It is not vital, either, that the whole assets or that the liabilities should be taken over.

Amalgamation of two companies involves the blending of the two undertakings instead of the continuance of either one. It is not necessary that the whole of the two undertakings should become blended or that all the corporators should be parties to the transaction so long as that is what substantially takes place. It may take place either by a transference of undertakings A. and B. to a new corporation C., or by the continuance of undertakings A. and B. by B. upon the terms that the shareholders of A. shall become shareholders of B. It is not necessary that there should be a new company. There may be a continuance of one of the two companies upon the terms that the undertakings of the corporators of both companies shall be substantially merged in one.

S. company, by its memorandum of association, declared that its preference shareholders should, in the event of a winding up for the purpose of reconstruction or amalgamation, have a bonus of 15 per cent. It issued debentures upon the terms that in the event of a winding up for the same purpose the debentures should be redeemed at a percentage over the par value. The memorandum of association of A. company and the

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

terms of its debentures contained similar provisions. S. company sold its business and most of its assets to A. company for shares in A. company. A. company subsequently sold the business and assets it had bought of S. company to I. company for a sum equivalent to its share capital and debenture issue and a further sum. Subsequently S. company sold to a new company C. S. T. its shares in A. company and its remaining assets. S. company and A. then went into voluntary liquidation for the purpose of carrying out these agreements and thus enjoying their assets, and not for the purpose of realizing and dividing their assets.

Held, that the companies were being wound up for the purpose of reconstruction or amalgamation, and that consequently the events upon which the bonuses to the preference shareholders and the debenture-holders became payable had occurred.

This was a summons in the winding up of the above company which came on for hearing with another summons in the winding up of another company, and with a debenture-holder's action against each of the companies.

These matters raised a question as to the rights of the preference shareholders in the companies and of the debenture-holders; the same questions in the case of each company.

These questions were whether the preference shareholders were entitled to a bonus of 15 per cent. upon their shares, and whether the debenture-holders were entitled to a bonus, in the case of one company of 7½ per cent., and in the case of the other company of 5 per cent.

These matters came on originally before Byrne, J., when a further question, raised by one of the summons as to the rights of the preference shareholders to dividends for the period between the last payment of dividend and the commencement of the winding up was raised.

His lordship decided this question in the negative, but reserved judgment upon the other questions.

Byrne, J., having died before delivering the reserved judgment, the matter came on for hearing upon these latter questions before his lordship Buckley, J., and the case is reported only upon the principal question as heard and decided by Buckley, J.

The following statement of the facts is in its essential features taken from the judgment of the learned judge: The South African Supply and Cold Storage (Limited), called at the trial the "Supply Co.," was incorporated in 1899 with a capital of £300,000, subsequently increased to £309,000, in ordinary shares of £1 each, and £150,000 in preference shares of the same amount. Its memorandum of association provided for its carrying on a business in the supply of meat and cold storage, and subsidiary objects, including a power to amalgamate with any other company having objects altogether or in part similar to those of the company itself.

Clause 5 of the memorandum of association provided that the preference shares should confer upon the holders thereof "the right, in the event of a winding up for the purpose of reconstruction or amalgamation, to a bonus of 15 per cent. on their par value."

Article 159 of the articles of association provided for the division of assets in the winding up in *specie* with the sanction of an extraordinary resolution, and that "if thought fit"—which his lordship said meant if the resolution so provided—such division might be made otherwise than in accordance with the legal rights of the members of the company, except where defined by the memorandum of association.

The South African and Australasian Supply and Cold Storage Co. (Limited), called at the trial the "Australasian Co.," was incorporated on the 25th of February, 1902, with a capital of £1,000 000 in ordinary shares of £1 each, and £150,000 in preference shares of £1 each, and the memorandum of association contained a similar provision as to the rights of its preference shareholders to that of the Supply Co., there being a proviso in clause 5 as follows: "Provided, nevertheless, that in case of a winding up for the purpose of reconstruction or amalgamation there shall be paid to the holders of the said shares in addition to the amount of the capital paid up thereon a bonus of 15 per cent. on their par value."

And article 160 of the articles of association contained exactly the same proviso with regard to the division of the assets in specie in a winding up as that contained in article 159 of the Supply Co.

The Supply Co. created debentures to the amount of £100,000, which were to become enforceable (among other events) if an effective resolution for the winding up of the company should be passed.

Condition 1 of the debenture provided that "any of the stock not previously redeemed will be redeemed when and as soon as the security hereby constituted becomes enforceable, that is to say, at the rate of £107 10s. per every £100 of the stock in the event of the said security becoming enforceable by reason of a voluntary winding up of the company for the purpose of reconstruction or amalgamation, but otherwise at the rate of £100 for every £100 of the stock.

The Australasian Co. created debentures to the amount of £500 000, with a condition as to a bonus to the holders in the event of the winding up of the company for the purpose of reconstruction or amalgamation precisely similar to that of the debentures issued by the Supply Co., except that the bonus was to be £5 instead of £7 10s. for every £100.

On the 19th of February, 1902, shortly before the incorporation of the Australasian Co., there was incorporated the Imperial Cold Storage and Supply Co. (Limited), called at the trial the Imperial Co., with a capital of £650,000, in ordinary shares, and there was a prospect of competition between the companies.

In that state of things, on the 27th of February, 1902, the Australasian Co. entered into an agreement with the Supply Co. for the purchase of—shortly stated—the business and business premises of the Supply Co. and a portion of their assets amounting to about £1,665,000, consisting of investments, cash, and things other than its business, in consideration of £1,000,000, as to £333,333 in ordinary shares, £150,000 in preference shares, £116,650 in debentures, and £400,017 in cash, payable by the Australasian Co.

By this purchase the Australasian Co. acquired the business, stock-in-trade, and business premises, but they did not acquire a large amount of the outstanding assets.

This his lordship called "the first sale" by the Supply Co.

On the 26th of February, 1903, the Supply Co. entered into a second sale which will be later described.

On the 12th of May, 1902, another company, called the Cold Storage Trust (Limited), was incorporated with a capital of simply £618,000 in ordinary shares, this figure being exactly twice the amount of the ordinary shares of the Supply Co. Subsequently, on the 17th of February, 1903, the Cold Storage Trust (Limited), increased its capital by creating 150,000 preference shares of £1 each, so that at that date this company had an ordinary capital of double the amount of that of the Supply Co. and a prefer-

ence capital share for share the same. No explanation was given why it was originally created without the preference capital; his lordship said it was obviously a slip.

On the 11th of August, 1902, certain heads of agreement which were more formally entered into by an agreement of the 28th of May, 1903, the effect of which was that the Australasian Co. sold to the rival company, the Imperial Co., the business, stock-in-trade, and cash working capital it had bought in February, 1902, of the Supply Co., the purchase price being £1,650,000. That was in fact equivalent to £1,000,000, the capital of the Australasian Co., £500,000 the debenture issue, and a sum of £150,000. In the heads of agreement of August, 1902, this latter sum was in the schedule set apart for payment to certain firms interested in the Imperial Co. at that date, and was to represent the goodwill of the company.

Subsequent to this agreement a second sale by the Supply Co. took place. It had, under the agreement of February, 1902, acquired this large number of shares in the Australasian Co. which had sold its business to the Imperial Co. in consideration of shares in that company, so that the Supply Co. had thus become interested in the Imperial Co. The Supply Co. in that state of things, by an agreement of the 26th of February, 1903, sold to the Cold Storage Trust (Limited), all its assets, that is to say, its shares in the Australasian Co. and its remaining assets (£1,665,000 of which had been sold in February, 1902, to the Australasian Co.), with the exception of a sum of £295,085, which latter sum was sufficient to answer, with a margin of £40,000, the debts of the Supply Co. which were to be taken over by the purchasers. In substance it was a sale by the Supply Co. to the Cold Storage Trust (Limited) of all its assets with this exception for this purpose. The consideration to be given for the purchase by the Cold Storage Trust (Limited) was the whole of its capital, the 618,000 ordinary and 150,000 preference shares.

On the 28th of May, 1903, there was entered into the formal agreement which reproduced, or ratified, or carried out the terms evidenced by the heads of agreement of August, 1902. Neither these heads nor the formal agreement contained anything about going into liquidation, but clause 15 of the heads of agreement provided that the Australasian Co. should be entitled to retain out of its assets agreed to be transferred a sum of £500 "for liquidation expenses," which his lordship remarked was an indication that the company was thinking of liquidation at that time.

On the 19th of September, 1902, after the heads of agreement, but before the formal agreement of May, 1903, had been entered into, there was a meeting of the Australasian Co. at which the chairman and a shareholder made speeches describing in detail the transactions they were recommending to the company to be carried out.

On the 29th of December, 1902, there was a meeting of the Supply Co., who were then looking forward to the execution of the agreement of the 26th of February, 1903, for the sale to the Cold Storage Trust (Limited), at which the chairman dealt with the subject of the proposed agreement.

On the 27th of May, 1903, a resolution was passed to wind up the Australasian Co., which was confirmed in the June following. The resolution passed was simply that the company should be wound up voluntarily, without any words indicating the purpose of the winding up.

On the 8th of June, 1903, the Supply Co. passed a resolution which was confirmed in July, 1903, to wind up the company voluntarily, and the scheme was again detailed by the chairman. [The effect of the various speeches made at these meetings is stated in the judgment.]

On the 20th of November, 1903, at an extraordinary meeting of the Supply Co. it was resolved that the liquidators of the company should be authorized to distribute amongst the contributories of the company, in the proportion of two shares for every ordinary share held by the company, the 618,000 held by the Supply Co. in the Cold Storage Trust (Limited) under the agreement of the 26th of February, 1903.

Thereupon the above actions were commenced and summonses taken out.

The plaintiff in each of the above actions sued on behalf of himself and all other holders of debenture stock, and claimed a declaration that the holders of debenture stock were, in the events which had happened, entitled to be redeemed (in the case of the Supply Co.) at the rate of £107 5s. per £100, and (in the case of the Australasian Co.) at the rate of £105 per £100.

The defendant in each action, the Ocean Accident and Guarantee Corporation (Limited), was in the case of each company the trustee for the debenture-holders.

The above summonses were taken out in November, 1903, by the liquidator of the companies against preference shareholders for the determination of the questions (1) whether under the memorandum and articles of the companies and the agreements above mentioned the holders of the preference shares were entitled to receive on the winding up of the companies a bonus of 15 per cent. on the par value; and (2) whether the holders of preference shares were entitled to any and what dividend for the period from the 1st of April, 1903, on such shares to the commencement of the winding up.

Cave, K.C., and *Ashton Cross*, for the plaintiffs in the debenture-holders' actions.—The sale by the Supply Co. to the Australasian Co. was a reconstruction of the Supply Co, the sale being of substantially all the assets of the one company for shares in the other company. It falls within the definition of "reconstruction" given in the text-books: Palmer's Comp. Prec. (8th ed.), vol. 1, ch. 21, p. 1280, and Lindley on Companies (6th ed.), vol. 2, book 4, ch. 3. The effect of the transaction was that the old company became merged in the new company: *In re Bank of Hindustan, China, and Japan*, 13 W. R. 937, 2 Hem. & Mil. 657. It is not necessary that the whole of the assets should be taken over by the purchasing company: *Hooper* v. *Western Counties and South Wales Telephone Co.*, 41 W. R. 84, 68 L. T. 78. If it is not reconstruction, then it is amalgamation: *Wall* v. *London and Northern Assets Co.*, 47 W. R. 219, [1898] 1 Ch. 469; and see observations of Davey, L.J., in *New Zealand Gold Extraction Co. (Limited)* v. *Peacock*, [1894] 1 Q. B., p. 622.

Buckmaster, K.C., and *A. M. Wells*, for the preference shareholders of the Supply Co.

Jenkins, K.C. and *C. A. Bennett*, for the preference shareholders of the Australasian Co.—Our case is that the Australasian Co. amalgamated with the Imperial Co. There was a fusion of the two companies: *Wall* v. *London and Northern Assets Co.*

Astbury, K.C., and *W. E. Vernon*, for the ordinary shareholders of the Supply Co.—The winding-up of this company differed from reconstruction, as the whole assets were not transferred in consideration of the shareholders having shares in the new company share for share instead of their shares in the old company. What took place was a

sale, and not a reconstruction: *In re Borax Co.*, 49 W. R. 212, [1901] 1 Ch. 326. Nor was it an amalgamation, for the two companies remained distinct.

Norton, K.C., and *A. R. Kirby*, for the liquidators of the Supply Co. and of the Australasian Co.—There was no reconstruction of the companies for the reasons given. Nor was there any amalgamation of the Australasian Co. with the Imperial Co. To effect an amalgamation a new company must be formed distinct from either of the companies amalgamated, but which consists of both: Palmer's Comp. Prec. (8th ed.), ch. 22, p. 1317.

Gatey, for the Ocean Accident and Guarantee Corporation (Limited).

BUCKLEY, J.—The whole question which I have to determine is whether in the case of each of these two companies there has or has not been a winding-up "for the purpose of reconstruction or amalgamation." As regards these words I conceive that neither the word "reconstruction" nor the word "amalgamation" bears any definite legal meaning at all. It is not a legal, it is a commercial expression, and each of the words as a commercial expression bears no exact or definite meaning. It is a matter to be looked into in each case whether the transaction is such as that in the meaning of commercial men it is comprehended under those terms. Beyond that I have to consider whether the winding-up of those companies was "for the purpose of" such reconstruction or amalgamation. That question cannot be answered simply by reading the resolutions for liquidation and seeing whether they are expressed to be for the purpose of these things. I must examine whether, as a matter of substance and of fact, the liquidation or winding up was arrived at for these purposes. The facts with which I have to do are these. [His lordship stated the facts and continued:] At the meeting of the Australasian Co. on the 19th of September, 1902, before the agreement of May, 1903, was executed, there were speeches by the chairman and by Sir James Sievewright, detailing the transactions which they were recommending to the company. They were contemplating that the sale should provide share for share for the shareholders of the company the £1,000,000 capital of the Imperial Co. to replace the share capital of the Australasian Co., and the 500,000 debentures of the Imperial Co. were to provide for the 150,000 preference shares and the 350,000 debentures of the Australasian Co. The agreement does not say that they shall do that, I agree; but that is what they were contemplating, intending, and proposing in considering whether they should enter into the agreement or not. On the 29th of September, 1902, there was the meeting of the Supply Co. They were then looking forward to the execution of the agreement of the 26th of February, 1903, for the sale to the Cold Storage Trust (Limited). That is plain, because the chairman says, "I have much pleasure in meeting the shareholders. This feeling is tinged with sadness at the reflection that this is the last annual general meeting which we shall hold, as the next time you are called together will be to formally put the company into liquidation." That being so, he says, "I am going to ask you to consider whether you will enter into the agreement of the 26th of February, 1903; if you do, what we are going to do is to liquidate the company—of course for the purpose of carrying that out." He speaks of "merging" the companies, details exactly how the 618,000 shares of the Cold Storage Trust are to go, share for share, to represent £2 for every £1 in the Supply Co., and then says that the 150,000 preference shares are to answer the 150,000 preference shares of the Supply Co. The general observation is that it is quite plain that they were entering into an agreement for the purpose of carrying it out by liquidation.

The speeches made at the meeting of the Australasian Co. on the 27th of May, 1903, when the resolutions to wind up the company were passed, are again of the same purport as those of the meeting of the 19th of September, 1902. The scheme is again detailed at the meeting of the Supply Co. on the 8th of June, 1903, for the purpose of passing the winding-up resolution. It is quite plain from what was then said that they went into liquidation for the purpose of doing what was detailed in these agreements, and not for the purpose of winding up in the sense of realizing their assets and dividing the proceeds among themselves. They went into liquidation for the purpose of giving effect to this particular form of enjoying their assets by getting shares in another company for them, and directing them, or having the potentiality of dividing them, if proper resolutions were passed by the several companies, among the shareholders in the way detailed in the speeches. I have said enough to show that in my judgment the words "for the purpose of" are satisfied.

Then it remains to be considered whether what took place was a "reconstruction or amalgamation" within the words of the memorandum and articles of association and the conditions of the debenture stock. What does reconstruction mean? To my mind it means this: There is an undertaking being carried on of some definite kind. You arrive at the conclusion that it is not desirable to kill that undertaking; it is desirable to preserve it in some form. Then its reconstruction involves that you are not going to preserve the undertaking by selling it to an outsider who is going to carry it on. That would be a mere sale. It involves that in some altered form the undertaking is going to be continued so that substantially the same business shall be continued and substantially the same persons shall carry it on. It does not involve that all the assets shall pass to the new or resuscitated company, nor that all the shareholders of the old company should be shareholders in the new or resuscitated company, but that substantially the business and the persons interested must be the same. Does it make any difference that the new company, or reconstituted company does or does not take over the liabilities of the old company. I think not. I think it is none the less a reconstruction because you except from the assets taken over some such part as that substantially the business is left; and it is immaterial whether the liabilities are taken over by the resuscitated or new company or are provided for by excepting from the scheme of reconstruction a sufficient amount to answer them. It is not, therefore, vital that either the whole assets should be taken over or that the liabilities should be taken over. You have to see whether substantially the same people carry on the same business. That, I conceive, would be a reconstruction. Now, what is an amalgamation? An amalgamation involves, I think, to some extent a different idea. There you have got to have the rolling of two concerns somehow or other into one. You must weld two things together, and arrive at an amalgam—a blending of two undertakings. It does not necessarily follow that the whole of the two undertakings should pass, but substantially they must pass, nor need all the corporators be parties, but substantially they must be parties. The difference is that in the case of amalgamation you must have in some sense the blending of two concerns one with the other; not necessarily the continuance of one concern, but the blending of two concerns. An amalgamation may

take place, it seems to me, either by the transference of undertakings A. and B. to a new corporation C.; or it may be by the continuance of the undertakings of A. and B. by B. upon terms that the shareholders of A. shall become shareholders of B. In either case you have an amalgamation. It is not necessary you should have a new company. You may have a continuance of one of the two companies upon the terms that the undertaking of the corporators of both shall substantially be merged in the one. That is what I understand those two words to mean. Let us see what has happened in this case. First, as regards the Supply Co. By virtue of its two sales, first to the Australasian Co. for shares, &c., in the Australasian Co., and then by the sale of all those shares in the Australasian Co. and all its other assets to the Cold Storage Trust for all the share capital in the Cold Storage Trust, the Supply Co. (by which I mean that corporation) became entitled to all the shares in the Cold Storage Trust, which represented all the assets of the Supply Co. with the exception of this £295,000. The Supply Co. had the power, by using article 159 of its articles of association, to hold all those shares in the Cold Storage Trust as a corporation, and to distribute them among the corporators of the Supply Co., and in point of fact by a resolution of the 20th of November, 1903, they have resolved to divide the 618,000 shares amongst their ordinary shareholders. But suppose they had not done so, I do not think it would have made any difference. They would have carried out a transaction in which the undertaking which they theretofore carried on would be found reproduced by another corporation, the Cold Storage Trust; and the Supply Co. now has, and by virtue of its powers can give to its corporators. the right to be all the corporators in the Cold Storage Trust. To my mind that is a reconstruction of the Supply Co. You cannot say it is an amalgamation, as it seems to me, for this reason, that the Cold Storage Trust had nothing with which to amalgamate. It had not a business of its own; it was acquiring its business under this sale. The Cold Storage Trust comes into existence as a company which is a reproduction in a new manner of the Supply Co. I think that is a reconstruction of the Supply Co.

Then what happens with regard to the Australasian Co.? The Australasian Co. having become entitled to the business of the Supply Co. by virtue of its purchase, sold that business to the Imperial Co., who also had a business of its own. The Imperial people were taking £150,000 for the goodwill of that business. It seems to me that this is an amalgamation. Here the Supply Co.'s business and the Imperial Co.'s business became blended in the hands of the Imperial Co., and the corporators of the Australasian Co. were contemplated as becoming holders, share for share, of shares in the Imperial Co. to replace the shares of the Australasian Co.

I have only one word to add with regard to the Supply Co., which I have had to postpone to this date. It is that inasmuch as by the sale of February, 1903, the shares in the Australasian Co., which the Supply Co. had become entitled to, passed to the Cold Storage Trust, and by virtue of the sale by the Australasian Co. to the Imperial Co. they are reproduced in the form of shares in the Imperial Co., there is again a blending of the interest of the Cold Storage Trust and the Imperial Co., and the result of the whole complicated transaction is that everything that there was before is found either in the Imperial Co. or in the Cold Storage Trust, holding shares in one or the other. I think in the case of each of the two companies there have been satisfied the words "a winding up for the purpose of reconstruction or amalgamation." Briefly, they wound up, not for the purpose of discontinuing or parting with their undertaking, but for the purpose of continuing to be the owners of their undertakings in an altered form. The result is that the 15 per cent. bonus in the case of the preferential shareholders is payable on the share capital, and 7½ per cent. bonus is payable to the holders of debenture stock of the Supply Co., and 5 per cent. bonus is payable to the holders of the like stock of the Australasian Co.

Solicitors, *Gerrish & Foster; Mellor & Co.; F. Kimber, Bull, & Duncan; Ashurst, Morris, Crisp, & Co.; Bennett, Chance, & Ferris.*

Chan. Div.
Warrington, J. } May 16.

In re WHITING'S SETTLEMENT.
WHITING *v.* DE RUTZEN. (*a.*)

Settlement—Condition subsequent—Marriage of beneficiary at any time—Consent of third party necessary—Gift over.

A condition subsequent in a settlement, providing for forfeiture of the interest of a beneficiary and her issue in the settled property, if she should marry at any time without the consent of a specified person, is good, provided there is a gift over of the settled property.

By an indenture dated the 22nd of January, 1886, and by subsequent deeds-poll, Henry Whiting, the settlor, settled £30,000 upon trust for himself for life, and thereafter upon trust for his daughter Juliette for life, and thereafter upon trust for the issue of her marriage, and, in default of issue, upon certain other trusts.

There was a proviso that if the said Juliette should marry without the consent in writing of the said Henry Whiting, or, after his death and during the lives of J. A. Whiting (his wife), H. P. Whiting and M. N. Whiting, without the united consent of all three while living, or without the joint consent of the two survivors or without the consent of the last survivor, the trusts declared subsequent to the death of Henry Whiting were to cease and the trust fund was to vest in the magistrates for the time being of the police-court of Bow-street for the benefit of a police relief fund. The restraint was to apply to every marriage contracted by the said Juliette during the lives or life of the persons or person where consent was made necessary as aforesaid.

Henry Whiting, J. A Whiting, and M. N. Whiting died.

In 1902 Juliette married Sir A. Turner without H. P. Whiting's consent.

The question was whether the gift over had taken effect.

Mulligan, K.C., and *Vaughan Hawkins*, for the trustees and unborn children of Lady Turner.

Rowden, K.C., and *Marsham*, for the magistrates.

Sir E. Clarke, K.C., and *Manby*, for Lady Turner.

R. J. Parker and *Tomlin*, for the Attorney-General.

WARRINGTON, J., stated the facts and gave judgment to the following effect: In this case I consider myself bound by the decision in *Lloyd* v. *Branton*, 3 Mer. 108, 17 R. R. 33, to decide that the interest taken by Lady Turner and her possible issue has been forfeited in favour of the police relief fund. It is

(*a.*) Reported by PERCY H. WINFIELD, Esq., Barrister-at-Law.

contended on the part of Lady Turner that the condition subsequent on her marriage without consent is not merely inoperative and *in terrorem* only, but that it is void altogether as infringing the rule of the Canon Law, which has to some extent been incorporated into the law of England, that a condition in restraint of marriage is void.

It has been frequently decided that such a condition, limited as to time, place and person, is good notwithstanding the rules of the Civil Law. The contention here is that the condition, if it extends to any marriage made by Lady Turner at any time, is not within the exceptions so engrafted on the rule of the Canon Law. If there were no authority, that would be a very interesting question to discuss. But I am bound by the authority that is only really in point—*Lloyd* v. *Branton*. In that case there was a trust, as there is here, for the lady and her children and the proviso as to marriage, on the face of it, extended to any marriage. On behalf of the lady and her husband it was argued, first, that there was no sufficient bequest over—with that we have nothing to do here—and secondly, that the condition could not be held to extend to a marriage without consent after the party had attained twenty-one. The reporter, I think, ought to have stated a third head—that the condition, if held to extend to marriage without consent after the party had attained twenty-one, would be bad. What the reporter calls the second head was divided by counsel into two parts—first, with regard to construction, that the condition ought to be limited to marriage under twenty-one; secondly, an argument founded on the general proposition of law, independent of construction, that, if not so limited, the condition was bad. *Stackpole* v. *Beaumont*, 3 Ves. 89, was cited, and, so far as it went, the passage of the judgment at p. 97 was undoubtedly in favour of the arguments which counsel were then presenting to the court. I only refer to that case to show that counsel placed before the master of the Rolls all the materials available in support of their argument. Nevertheless, the Master of the Rolls said (at p. 116): "It is now too late to raise a doubt on the legality of the condition on which Mrs. Barnard's right to the bequests given her by the will is made to cease. In the modern case of *Dashwood* v. *Lord Bulkley*, 10 Ves. 230, the validity of such a condition does not seem to have been considered as at all open to controversy, although it was not confined to marriage under twenty-one.

It is true that *Dashwood* v. *Lord Bulkley* is not a decision in favour of the point then before the Master of the Rolls, but it is also true that, in that case, there was a very elaborate discussion as to whether consent had been given, which would have been irrelevant if the consent required had been limited to marriage under twenty-one.

In my opinion *Lloyd* v. *Branton* is a distinct authority for the proposition that a condition subsequent, causing a forfeiture of the previous gift in the event of the marriage of the donee at any time without the consent of a specified person, is good, provided there is a gift over. The case seems to me to be exactly in point, not only the general proposition, but also on the smaller question as to whether the condition as to forfeiture and the gift over destroyed the interest of the children as well as that of Lady Turner, and on that point I think I must so decide. I confess to having been anxious to find, if I could, some way out of giving effect to this condition, and I would have been glad to do so if, upon the true construction of these deeds, I could satisfy myself that the settlor intended to limit the condition to a marriage under twenty-six. But I must read the deeds together. With a certain amount of regret, I come to the conclusion that the interest of Lady Turner and her possible issue have been forfeited and that the magistrates at Bow-street are therefore entitled to have the fund transferred to them according to the terms of the settlement.

Solicitors, *Frere, Cholmeley, & Co.; Boxall & Boxall; Solicitor to the Treasury.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) May 3.

HOGMAIER *v.* OVERSEERS OF WILLESDEN. (*a.*)

Justices—Special petty sessions—Revision of jury list—Power to state a case—Summary Jurisdiction Act 1879 (42 & 43 *Vict. c.* 47), *s.* 33—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 13, *sub-section* 11.

Justices sitting in special petty sessions for the purpose of revising jury lists are not a court of summary jurisdiction, and have, therefore, no power to state a special case for the opinion of the court under section 33 *of the Summary Jurisdiction Act*, 1879.

Case stated.

The case was stated at the instance of the appellant to raise the question whether veterinary surgeons are exempt from service on juries, but was subject to the preliminary point as to whether in the circumstances of the case the justices sitting at special petty sessions had any power to state a case.

The following were the reasons, in the opinion of the justices: (1) There was no "hearing of an injunction or complaint" as required by section 2 of the Summary Jurisdiction Act, 1879; (2) the justices were not a court of summary jurisdiction within section 33 of the Act of 1879, which empowers any person aggrieved, who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, to apply to the court to state a special case; (3) the Interpretation Act, 1889, section 13, sub-section 11, enacts as follows: "The expression 'court of summary jurisdiction' shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by or who is authorized to act under the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, or whether, acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his commission, or under the common law." The justices conceived that the definition must be governed by the words "to whom jurisdiction is given by or who is authorized to act under the Summary Jurisdiction Act," otherwise the words at the end of the section would mean justices acting in any capacity whatever.

The jurisdiction of the justices in this matter was given to them, not under the Summary Jurisdiction Acts, but under special Acts relating to jurors. They could only sit in special petty sessions within the last seven days of September (the Juries Act, 1825 (6 Geo. 4, c. 50), s. 10), with an adjournment thereof within seven days (25 & 26 Vict. c. 10), s. 8). It had been held that justices sitting in special sessions for licensing were not a court of summary jurisdiction (*Boulter* v. *Kent Justices*, [1897] A. C. 556), nor in special sessions for granting game licences (*R.* v. *Bird*, 62 J. P. 301).

Morton Smith, for the appellant.—The justices have power to state a case. The expression "court of

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

summary jurisdiction" is defined by section 13, sub-section 11, of the Interpretation Act, 1889, to include justices acting under the Summary Jurisdiction Act "or any other Act." That is wide enough to cover justices exercising their duties under the Juries Act. They are also a petty sessional court within sub-section 12 of section 13 of the Interpretation Act, 1889, and on that ground was a court of summary jurisdiction. The cases cited by the justices are distinguishable. The case of *Fourth City Mutual Building Society* v. *Churchwardens of East Ham*, [1892] 1 Q. B. 661, is in my favour.

The respondent did not appear.

Lord ALVERSTONE, L.C.J.—The question we have to consider is whether justices sitting in special petty sessions for the purposes of revising and allowing jury lists under the Juries Act, 1825, have power to state a case for the opinion of the court. The power of stating a case is now governed by section 33 of the Act of 1879, which provides that any person who desires to question a conviction, order, or determination of a court of summary jurisdiction on the ground that it is erroneous in point of law or is in excess of jurisdiction may apply to the court to state a case. The language of that section is somewhat wider than section 3 of the Act of 1859, but in order to bring this case within section 33 of the Act of 1879 it is necessary that they should be sitting as a "court of summary jurisdiction. Counsel for the appellant has referred to section 13, sub-section 11, of the Interpretation Act, 1889, but I think the meaning of that section is that justices are a court of summary jurisdiction when they are exercising powers similiar to those conferred by the Summary Jurisdiction Act, but derived from the common law or from some other Act. Now, I quite agree that the courts of petty sessions may have power under the Summary Jurisdiction Acts, but I think if it had been intended to provide by the Summary Jurisdiction Act, 1879, that all justices sitting in petty sessions should have power to state a case one would have expected to find very different language used. When one considers section 10 of the Juries Act, 1825, it seems to me that there is a class of jurisdiction which cannot be properly described as being under the Summary Jurisdiction Act, or under Acts conferring similar powers. I think it more nearly resembles the proceeding of a public body who act on their own knowledge without being fettered by the rules of evidence. For these reasons I think the objection raised by the magistrates is one to which we must give effect, and that we cannot entertain this case.

WILLS, J.—I agree. I only wish to add that the words "petty sessional court" as used in section 13, sub-section 12, of the Interpretation Act is a comparatively modern phrase, and I doubt very much whether it could be found in any Act passed more than fifty years ago. I cannot help thinking that if the Interpretation Act had intended to include special petty sessions within the definition of a court of summary jurisdiction it would have said so. Probably it will be found that the phrase petty sessional court is never used unless the tribunal or court to which it is applied is really exercising judicial powers, and therefore it may very well be that that use of the words "petty sessional court" implies and involves that the tribunal is a court of summary jurisdiction with power to state a case. It would, however, be a very considerable extension of existing notions to bring all meetings of justices in petty sessions within the same category.

KENNEDY, J.—I agree.

Case struck out.

Solicitor for the appellant, *G. Thatcher.*

K. B. Div.
(Lord Alverstone, L.C.J., and Kennedy, J.) May 2.

ASHTON v. LANCASHIRE AND YORKSHIRE RAILWAY CO. (*a.*)

Railway—Bye-law—Intermediate station—Passenger breaks journey at a junction where it was necessary for her to change—Right of company to treat contract ended and to require ticket to be given up if passenger leaves the station.

The plaintiff took a return ticket, available for seven days, on the defendant's line from Chorley to Manchester. She returned the same day by a train from Manchester which only brought her as far as Bolton, where she had to change and wait some half-hour for the next train to Chorley. She therefore determined to visit a friend in the town and to return in the evening by a later train. On quitting the station the ticket collector informed her that, as the next train would be leaving for Chorley shortly, if she did not go by it but left the station and returned by a later train, she must give up her ticket and re-book. She gave up her ticket under protest, and on completing her return journey by a subsequent train took a ticket to Chorley, for which she paid 11½d. In an action by her to recover the sum so paid,

Held, that in the absence of special terms a contract by a railway company to carry a passenger from one station to another does not give the passenger a right to break the journey, although the station where the passenger desires to alight and stay for a time is a junction at which he or she was obliged to change trains. Therefore, in the present case, the sum paid for a ticket from Bolton to Chorley could not be recovered back by the plaintiff from the company.

Appeal by the company from a decision of the registrar of the county court of Lancashire holden at Chorley.

The action was brought to recover the sum of 11½d. paid by the plaintiff to the defendants under protest in the following circumstances:

On the 15th of September, 1903, Mrs. Ashton, the plaintiff, who lived at Chorley, took a return ticket from Chorley to Manchester available for seven days. On the same day she started back from Manchester by a train which went as far as Bolton on the way to Chorley, but diverged at Bolton and went on to Blackburn. No question was raised as to the plaintiff's right to travel by this train as far as Bolton. At Bolton she alighted. Half-an-hour afterwards a train was timed to leave Bolton for Chorley, but as she wanted to pay a visit in the town of Bolton, she decided to return by a later train and left the station. The ticket collector required her to give up her return ticket, and she had consequently to take a new ticket from Bolton to Chorley at a cost of 11½d, which sum she claimed to recover in this action.

The registrar held that the case of a person making a necessary change at a junction could be distinguished from that of a passenger who alighted at an intermediate station from a train which would have carried him direct to his destination. The bye-laws which applied in the latter case could not, in his opinion, be deemed to extend to the former unless the language of them was strained. He therefore entered judgment for the plaintiff for 11½d. against the defendants. Hence the appeal by the railway company.

C. A. Russell, K.C., and *Openshaw*, for the defendants.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Arthur Powell, K.C., and *Woodfin*, for the plaintiff.

Lord ALVERSTONE, L.C.J.—This is not a question, as it seems to me, of the right of a passenger to leave the railway company's premises while waiting for a train in which to continue his journey. The plaintiff is seeking to impose on the company the duty of carrying her by two separate transits, and the effect of her counsel's contention would be that she could claim a right to terminate the contractual relations between herself and the company and to resume them again at her will. We must apply our common knowledge of the ordinary incidents of railway travelling. Everybody knows what is meant by breaking a journey. Tickets are sometimes issued by railway companies with special terms enabling the passenger to break the journey at certain stations—that is, to leave the company's premises and then to return and resume the journey under the same contract. Counsel for the plaintiff contended that this is the common incident of every railway journey; that a return ticket from Chorley to Manchester and back implies a contract by the railway company not only to carry the holder of the ticket from Chorley to Manchester and back, but also, if the train stops at any station between the termini, and the passenger is minded to leave the railway, to permit him to do so and to return and resume the journey when he pleases and so to travel between two termini—there being nothing on the ticket to designate the particular train or to limit the number of the trains by which the plaintiff might travel—by a series of journeys instead of one journey. I can see no ground for suggesting that that is the contract of the company. It is well known that a passenger by leaving the station breaks off contractual relationship with the railway company. The contract of the defendants was to carry the plaintiff from Chorley to Manchester and back by one continuous contractual operation, not to perform that operation piecemeal by enabling the plaintiff to enter into a series of contractual relations from hour to hour or day to day as and when she pleased. The appeal must therefore be allowed.

KENNEDY, J.—I am of the same opinion. The plaintiff's contention, if sound, would convert one single contract to carry a passenger from London to Liverpool into a series of separate contracts to carry from London to the first intermediate station, and so on from each intermediate station to the next, and then from the last intermediate station to Liverpool. I think it clear that apart from special terms passengers have no right to deviate or to break the journey.

Appeal allowed.

Solicitors for the appellants, *Woodcocks, Ryland, & Parker*, for *C. Moorhouse*, Manchester.

Solicitor for the respondent, *William Buttle*, for *John Whitfield*, Chorley.

IN BANKRUPTCY.

K. B. Div. (Bigham and Darling, JJ.) — June 13.

In re EVERSON.

Ex parte THE OFFICIAL RECEIVER. (a.)

Bankruptcy—Practice—Appeals from county courts—Leave to appeal—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 104—*Bankruptcy Appeals (County Courts) Act*, 1884 (47 *Vict. c.* 9), *s.* 2—*Bankruptcy Rules, rr.* 129 (2), 134 (a).

Except by leave of the county court judge no appeal lies to the Divisional Court from any order relating to property when it is apparent on the face of the proceedings that the money or money's worth involved does not exceed £50 in value. A refusal of leave to appeal is not an "order subject to appeal" within the meaning of section 104 (2) *of the Bankruptcy Act*, 1883.

Appeal from the decision of the county court judge at Newport, Mon., refusing to avoid as a fraudulent preference a payment of £16 12s. 6d. made by the debtor to a creditor within three months of bankruptcy.

The county court judge refused leave to appeal, whereupon application was made *ex parte* to Bruce, J., in chambers (acting as bankruptcy judge in the absence of Wright, J.), for leave to appeal, and the application was granted.

Muir Mackenzie, for the appellant.

Hansell, for the respondent.—There is a preliminary objection to this appeal being heard, the money's worth involved does not exceed £50, and by rule 129 (2): "Except by leave of the court no appeal to the Court of Appeal shall be brought when it is apparent from the proceedings that the money or money's worth involved does not exceed £50." If that rule be read in conjunction with section 2 of the Bankruptcy Appeals (County Courts) Act, 1884, which assigns appeals from county courts to the Divisional Court instead of the Court of Appeal, it is clear that "the court" in rule 129 must mean the county court. [BIGHAM, J.—"The court" evidently means the court of original jurisdiction.]

Muir Mackenzie.—There is a right to come and question the order of the county court judge refusing leave to appeal. By section 104, sub-section 2, as amended by section 2 of the Bankruptcy Appeals (County Courts) Act, 1884, orders in bankruptcy matters in the county court shall, at the instance of the party aggrieved, be subject to appeal to the Divisional Court, and by rule 134*a* it is provided that where there is an appeal to the High Court from the county court any order not involving the decision of the appeal may be made by the bankruptcy judge of the High Court, who in this case was represented by Bruce, J.

Hansell, in reply.—An order refusing leave to appeal is not an "order" from which an appeal lies within the meaning of the Act: *Laing* v. *Eadie*, [1901] A. C. 210.

BIGHAM, J.—The preliminary objection must prevail. It appears on the face of the notice of motion that property of less than £50 in value is involved and the case therefore comes within rule 129 (2): "Except by leave of the court no appeal to the Court of Appeal shall be brought when it is apparent from the proceedings that the money or money's worth involved does not exceed £50." "Court" there means the court of original jurisdiction, in this case

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

the county court and "court of appeal" means in this case the Divisional Court. The leave of the county court to appeal in this case has never been granted, and therefore it cannot be heard.

It is argued that you can appeal from a refusal of leave to appeal, and it is said that Bruce, J., in chambers has reversed the county court judge. We do not think that an order refusing leave to appeal is an "order" from which any appeal can be brought at all.

DARLING, J.—I agree. It has been argued that if the court below refuses leave to appeal, you can appeal against that refusal, the result of which is that you can appeal without the leave of the court below. If that contention is right, there is no meaning in the words, "except by leave of the court . . . no appeal shall be brought" in rule 129.

Appeal dismissed.

Solicitor for appellant, *Solicitor to the Board of Trade.*

Solicitor for respondent, *F. Kinch.*

House of Lords.

From C. A. (England). May 17.

CANNON BREWERY CO. (LIMITED) v. GAS LIGHT AND COKE CO. (a.)

Gas—Arrears of gas rent due by outgoing tenant—Purchase by incoming tenant of outgoing tenant's business and interest in premises—Right to recover from incoming tenant—Gasworks Clauses Act, 1847 (10 & 11 *Vict. c.* 15), *s.* 16—*Metropolis Gas Act,* 1860 (23 & 24 *Vict. c.* 125), *s.* 39—*Gas Light and Coke Co.'s Act,* 1872 (35 & 36 *Vict. c. xxiii.*), *s.* 18.

Under the 18*th section of the Gas Light and Coke Co.'s Act,* 1872, *an incoming tenant who has purchased the goodwill of his predecessor and continues to carry on the business on the premises, but does not require a supply of gas, is not liable for arrears of gas rate due by the outgoing tenant. Should he require a supply for the premises himself, then the gas company may insist on payment of these arrears as a condition of such supply.*

Decision of the Court of Appeal (51 *W. R.* 565, [1903] 1 *K. B.* 593) *reversed.*

Gas Light and Coke Co. *v.* Mead, 45 *L. J. M. C.* 71, 24 *W. R. Dig.* 111, *approved.*

Appeal from an order of the Court of Appeal (Vaughan Williams, Stirling, and Mathew, L.JJ.) (reported 51 W. R. 565, [1903] 1 K. B. 593), which reversed that of the Divisional Court (Lord Alverstone, L.C.J., and Darling and Channell, JJ.).

In June, 1901, the lessee and occupier of a house in the Harrow-road, where he carried on the business of a grocer and retail wine and spirit and beer merchant, sold his interest in the premises and the good will of his business to the appellants, and gave up possession to them, leaving £10 1s. 3d. due for arrears of gas supplied to him by the respondent gas company.

The appellants continued to carry on the business, but made no application for, nor did they require, any gas from the respondents, who, however, sued the appellants, the brewery company, for these arrears under the 18th section of the Gas Light and Coke Co. Act, 1872, and the Divisional Court thought they were not liable.

The Court of Appeal held that they came within one of the exceptions, and that consequently the arrears might be recovered from them as the incoming tenant continuing the business of his predecessor from whom the goodwill had been purchased.

The various sections of the Acts sufficiently appear in the judgment.

C. A. Russell, K.C., and *A. H. Spokes,* for the appellants.

Danckwerts, K.C., and *R. Vaughan Williams,* for the respondents.

Lord MACNAGHTEN.—In this case the respondents, the Gas Light and Coke Co., sued the Cannon Brewery Co. for arrears of gas rates. The Court of Appeal supported the claim and gave judgment in favour of the gas company. The arrears were not attributable to any default on the part of the brewery company. The brewery company had no relations with the gas company in the past. They do not propose or desire to have any relations with them in future. The debt they have been adjudged to pay is not their debt in any sense. It is the debt of the outgoing tenant, whose interest in the premises supplied with the unpaid gas they have purchased, and whose trade or business they are now continuing. The claim was made on the strength of the following section of the Gas Light and Coke Co.'s Act, 1872: "18. In case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid unless the incoming tenant agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid to the owner, lessee, or mortgagee in possession, or to the outgoing tenant of such premises, a consideration for so doing, but the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this Act on being required by him to do so." The grounds on which the Court of Appeal proceed are these: Their view is that when the Act says that the gas company shall not require from an incoming tenant payment of arrears left unpaid by the outgoing tenant unless one or other of two conditions is fulfilled, it is necessarily implied that if either of those conditions is fulfilled such payment may be required. Now, it is admitted that the second condition has been fulfilled in the case of the brewery company. The gas company, therefore, they say, are authorized by this Act to require payment of the arrears from the brewery company. Then comes the question, what is the meaning of the word "require"? To solve that question the learned judges of the Court of Appeal turn to the last sentence of the section. And there they find an absolute obligation on the part of the gas company to supply gas to an incoming tenant notwithstanding the existence of arrears owing by his predecessor in title. The next step is easy enough. As the obligation to supply the incoming tenant is in their opinion absolute and unconditional, it would be idle to tell the gas company that they may require payment of arrears unless power is given to enforce compliance with the demand. Hence it follows that the word "require" imports liability on the part of the incoming tenant, and confers a right of action on the gas company. The result is certainly startling. Gas companies in the metropolis,

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

alone of all traders, corporate or unincorporate, are privileged in certain cases to collect debts due by defaulting customers from persons who have never been and never mean to be customers of theirs. The learned judges of the Court of Appeal, in deciding against the brewery company, advisedly overruled a decision of Blackburn and Lush, JJ., which was in point and directly contrary to their view. I refer to the case of *The Gas Light and Coke Co.* v. *Mead*, 45 L. J. M. C. 71, 24 W. R. Dig. 111, decided in 1876. There is, however, as Mr. Russell pointed out, one flaw in the reasoning of the Court of Appeal. The learned judges have overlooked a few words in section 18. The obligation on the part of the gas company to supply gas to an incoming tenant is not absolute or unconditional. It is qualified by the words "as required by this Act." When the history of gas legislation in the metropolis is borne in mind, those words are very significant, and the difficulty created by a provision at first sight indirect and obscure vanishes altogether. Originally, gas companies in the metropolis were free to extend their works as they pleased. The system of separate districts was unknown. The service of gas was left to the ordinary laws of supply and demand. At length, "in order to economise capital and avoid the too frequent opening of streets," the principal companies, including the Gas Light and Coke Co., agreed to confine their supply of gas to separate districts. This arrangement was confirmed and regulated by the Metropolis Gas Act, 1860. "Districting," to use an expression found in the Act, made a great change in the position of gas companies. In its own district each company obtained a monopoly. It was, therefore, necessary, in the interest of consumers, to place certain restrictions on dealings between gas companies and intending customers. Subject to the provisions of the Metropolis Gas Act, 1860, every gas company was still left free to enter into any contract with any owner, occupier, or local authority for the supply of gas "in such manner and on such terms and conditions" as the parties might agree (section 19). But by section 21 no contract for the supply of gas was to contain "any term or condition contrary to any of the provisions" of the Act. And then came section 39, which is word for word the same as section 18 of the Gas Light and Coke Co.'s Act of 1872, except that the latter section introduces for the first time the condition about the incoming tenant continuing the trade or business of the outgoing tenant. Now, the Gas Clauses Act, 1847, the Metropolis Gas Act, 1860, and the several Acts of the Gas Light and Coke Co., by incorporation and reference, all form one code, and the expression "this Act" in section 18 of the Act of 1872 includes them all. The result is that if the brewery company, on taking over the premises, had required a supply of gas, they and the gas company might have entered into any contract in relation to such supply not contrary to any of the terms and conditions of the code. As a condition of such supply the gas company, under the circumstances, might have required from the brewery company payment of the arrears left unpaid by the outgoing tenant. But inasmuch as the brewery company do not require the gas company to supply them with gas, section 18 of the Act of 1872 does not apply, and the gas company are not in a position to require payment of arrears from the brewery company. I am, therefore, of opinion that the decision in *The Gas Light and Coke Co.* v *Mead* was quite correct, and that the order of the Court of Appeal in the present case ought to be reversed, with costs, both here and below, and I move your lordships accordingly.

Lord DAVEY.—I think that the decision in the case of *The Gas Light and Coal Co.* v. *Mead* was right, though the reasons for it are not very fully or clearly expressed in the reported judgments of the learned judges. In my opinion the question for our decision turns exclusively on the proper construction to be put on section 18 of the Gas Light and Coke Co.'s Act of 1872; but in order to understand and apply that section it is necessary to consider the law regulating the relations between the gas company and their customers at that date. Without troubling your lordships with going through the sections of the various Acts to which reference has been made, the situation may be summed up thus: The occupier of any premises within the district had a right to require a supply of gas to the premises subject to his entering into a contract, if so required by the gas company, to pay gas rates for such supply for two years, and subject to his giving security if required (see sections 14 and 15 of the Metropolis Gas Act, 1860). The remedies of the gas company for recovery of the gas rates were by summons or action against the consumer to whom the gas had been supplied, and the company was empowered to stop the gas from entering the premises of such person by cutting off the service pipe (section 16 of the Gasworks Clauses Act, 1847). Section 18 of the gas company's Act of 1872 deals with the case of a change in the occupation of the premises. In its original form this section is first found in the Metropolis Gas Act, 1860, section 39 of which is identical with this section, except that the words "unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid . . . a consideration for so doing" are omitted. It reappears in the same form in the gas company's Act of 1870, where it is found in a group of clauses (12 to 14) enabling the company to require a contract to be signed at any time, and to require an incoming tenant to give security, as well as the person to whom the supply was originally made, and in each of these cases the remedy of the company was to discontinue the supply of gas and remove the meter, and providing also that where the occupier is an agent or servant of some other person such last-mentioned person shall be liable to pay gas rent to the company in the same manner and to the same extent as the occupier. I am of opinion that it would be contrary to sound principles of construction to imply from such negative words as you find in section 18 of the gas company's Act, 1872, an affirmative enactment giving a right of action against an incoming tenant coming within the excepted description for his predecessor's debt if some other construction can be found for the words. I am of opinion that there is another construction which does less violence to the words and is the right construction. The Master of the Rolls expressed the opinion that the learned judges would not have decided Mead's case as they did had they not thought that the gas company had a right to cut off the supply as against the incoming tenant till the arrears owing by the outgoing tenant were paid. If they thought so, I am not so certain as the Master of the Rolls is that they were wrong; for the words "premises of such person" may be construed as descriptive only of the premises in respect of which the supply of gas has been made. But it is not, in my opinion, necessary to decide this question for the purpose of construing section 18 of the Act of 1872. I think that the words "the company shall not require from the next tenant of the premises payment of the arrears so left unpaid" are amply satisfied by referring them to the conditions of supply to the new tenant, and mean that the company shall not require payment of the arrears as a condition of continuing such supply or before entering into a contract for the

same. And I construe the words at the end of the sentence "but the company shall, notwithstanding any such arrears . . . supply gas to the incoming tenant" as meaning a tenant within the protection of the section, or (in other words) I read the words of exception "unless, &c.," as applicable to the whole of the section. The right, therefore, from which an incoming tenant who is within one of the two excepted descriptions is excluded is that which other incoming tenants enjoy —of being entitled, notwithstanding the arrears, to a supply of gas by the company if required by him. This seems to me to give an harmonious, consistent, and rational construction to the whole section without doing any violence to the words or making any such implication as that of a right of action against one person for another person's debt. The construction which I have thus put on section 18 appears to me to be favoured by the context in which the corresponding clause is found in the Act of 1870 in two respects. In the first place, it gives the company the same remedy against the excepted persons as they have against an incoming tenant who refuses to sign a contract or to give security, and in the next place, in section 14 of the Act of 1870, where it was intended to make one man liable for another's debt, it is properly done by express words. The result is that, in my opinion, the appellant, coming within one of the excepted descriptions of incoming tenants, if he requires a supply of gas, will have to pay the outgoing tenant's arrears before he can obtain it; but if he does not require a supply, he is under no liability, and cannot be sued for the arrears. I am, therefore, of opinion that the appeal should be allowed, with costs here and below.

Lord JAMES OF HEREFORD read a short judgment to the same effect.

Lord ROBERTSON.—As is justly observed by Stirling, L.J., "it is an unusual piece of legislation to make a person who has not incurred a debt liable to pay for it." The facts of the present case give peculiar point to that remark. The appellant company have no sort of relation to the respondents, have never used their gas, and want none of it. They have merely bought the business of a customer of the respondents, who left owing them for his gas. On no doctrine or principle of law or ethics can it be suggested that, apart from statutory enactment, there is any obligation on the appellants to pay this account. This being so, the respondents can only succeed by showing some positive enactment that A shall pay B's debt. Now I have never been able to see, in the section relied on, either the form or the substance of such an enactment. The main proposition of the section is negative, that is to say, it prevents the respondents doing something which it assumes them to have the power to do. This seems to me to furnish the key to the enactment. Before looking at the exceptions we have got to find out what it is to which they are exceptions. We have got to find out something which the respondents had, antecedently, the right to require, for it is this which (with the exceptions stated) the Act is going to prevent. Well, now, two competing theories are put forward. The one is that the word "require" means require as a condition of supplying gas. It seems to me that this is clearly the meaning of the word, at all events in the Act of 1860, in which, as section 39, this section first appears. The Act deals with the question what are to be the contractual relations between the gas company and its customers, and what may, and what may not, be the conditions of the contract. Among other things, the company may not require from a new occupier payment of his predecessor's arrears, and so on. Now it is difficult to suppose that when this section was put into subsequent Acts it was intended to have a new and different meaning, and in the absence of anything to the contrary, I should read it in the Acts of 1871 and 1872 just as I read it in the Act of 1860. The main proposition in the section, as ultimately framed (section 18 of the Act of 1872), is interrupted to express the exceptions, but it is resumed in the latter part of the section. The initial and the concluding words are correlative and co-extensive. With the exceptions stated, says the Act of 1872, the company shall not require payment of arrears, and, notwithstanding non-payment, gas shall be supplied. This construction is supported when the exceptions are looked to. The main enactment being, in the interests of the customer, to prevent a new occupier being coerced by the pressure of monopoly into a contract to pay other people's old scores, it is fair enough that this protection should not be given in the specified cases. The competing theory, adopted by the Court of Appeal, is that the word "require" is made to extend to persons not contracting or seeking to contract with the company. Now it is quite certain that, before this clause was enacted at least, they had no right to sue the successor, and the theory, therefore, is that the main enactment forbids the exercise of a non-existent power. Accordingly, the only operative part of this section on this theory would be the exceptions, and in the exceptions to a negative the respondents find the statutory enactment of liability for a third party's debts. This seems to me a grave infringement of principle in statutory construction, and I say so with the less hesitation because the learned judges do not discuss this difficulty, and accordingly have done nothing to remove it. Where a new liability is to be created the Legislature does it by direct enactment, and Mr. Spokes pointed with great force to section 15 of the Act of 1871, as showing that this rule is observed in the very *catena* of statutes now before your lordships, and in matter closely germane to the present question. The exception to a prohibition is *primâ facie* the conservation of the existing state of things. We were not referred to any illustration in legislation of pecuniary liability being imposed on a class of the community by such circuitous methods. It is in vain to appeal to solecistic or conversational slovenliness as justifying far-reaching implication in statutes imposing liability, and it is to be remembered also that this is not even a case of contract or statutory contract when individual parties are dealing with their own rights. In the present case I think the true meaning of the section is sufficiently ascertained, and presents an intelligent and coherent enactment; but, even if the matter had been left more obscure than it is, I should have declined to affirm the liability of the appellants.

Appeal allowed.

Solicitors, *Boulton, Son, & Sandeman*, Bedford; *Monier-Williams & Robinson.*

Court of Appeal.

From Chan. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) } May 31; June 1.

In re H. L. LONGBOTHAM AND ANOTHER. (*a*.)

Solicitor — Costs — Taxation — Third party — Bill of mortgagee's solicitor taxed by mortgagor—Application for review—Certificate of taxing-master—Practice—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.

Under section 38 *of the Solicitors Act,* 1843 (6 & 7 *Vict. c.* 73), *where a third party taxes a bill, this taxation is on the footing of a taxation between the solicitor and the client, and if the third party be only interested in and liable to pay the costs of one matter, under this section, as a matter of principle, he can obtain taxation of the bill so far as concerns that one matter only, and on the footing of being liable to pay only the taxed costs of that matter.*

Where in the taxation of a solicitor's bill of costs incurred by him under a mortgage transaction, if the third party is a mortgagor and he is only interested in the relations between the solicitor and his client, a mortgagee, so far as they concern the position of the client strictly in his character of mortgagee, the mortgagor is entitled under this section to have taxation of the solicitor's bill of costs limited to the items of costs incurred by the client strictly in his position of mortgagee.

Decision of Kekewich, J. (*reported W. N.*, 1904, *p.* 78), *affirmed.*

This was an appeal from a decision of Kekewich, J. (reported W. N., 1904, p. 78).

The facts were as follows:

The matter came before Kekewich, J., on an application to review a certificate of the taxing-master on the taxation by a mortgagor of the bill of costs of the solicitor of the mortgagee under section 38 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73).

By an order dated the 19th of August, 1903, upon the petition of L. B. Crossley, it appeared that L. H. Longbotham and A. T. Longbotham, a firm of solicitors, were employed by a client on or about the payment off of moneys due under a mortgage executed by the petitioner in favour of the client and the transfer thereof to a third party; and that the said solicitors, on or about the 4th of July, 1903, delivered unto the petitioner their bill of fees and disbursements, which the petitioner was advised ought to be taxed, and it was accordingly ordered that it be referred to the taxing-master to tax and settle the said bill, and that the petitioner and also the said solicitors produce before the master, upon oath as he should direct, all books, papers, and writings in their custody or power respectively relating to the matters thereby referred or any of them.

The taxing-master certified that he had taxed the bill upon the principles laid down in *In re Gray*, 49 W. R. 298, [1901] 1 Ch. 239, 49 W. R. Dig. 172, that the taxation was on a party and party basis, and that all the items which, in his opinion, could not be charged as between the mortgagor and the mortgagee had been taxed off. Objection was taken by the solicitors to this taxation of their bill of costs under the order of the 19th of August, 1903, and they presented a long list of objections, to which the master replied on the 24th of December, 1903.

The matter came before Kekewich, J., on a summons, when counsel, in support of the summons, strongly contended that the case was completely covered by authority, which laid down that the taxation of a bill of costs of the solicitor of a mortgagee as mortgagee must proceed according to the rules which would govern the taxation of the same bill of the solicitor for the mortgagee personally. His lordship thought that the cases which were decided on the construction of the Act of 1843, by s. 38, virtually decided that the taxation must proceed as between solicitor and client (these cases are found in Beavan's Reports, *vide infra*). The learned judge, after stating that, apart from practice, it was a matter of very considerable importance, and after hearing counsel for the applicants, and before he heard counsel for the respondents, and also having regard to the decision of Cozens-Hardy, L.J. (then Cozens-Hardy, J.), in *In re Gray*, above referred to, upon which the taxation was based, thought it was desirable to obtain a certificate from the taxing-master as to what the practice was at the present time, and he therefore prepared a short case, stating the facts and the point which was raised, and he also gave the taxing-master an opportunity of seeing the papers to see exactly how the point arose. He received from the senior taxing-master a certificate in the following terms: "To the Honourable Mr. Justice Kekewich. Your lordship having desired a certificate from the Master of the Supreme Court (Taxing Office) of the practice generally in cases between the mortgagor and the solicitor of the mortgagee, I beg respectfully to report that the practice followed by the Masters under section 38 of 6 & 7 Vict., c. 73 (the Solicitors Act) up to within recent years was to tax as between the solicitor and the client (the parties chargeable in the first instance) and not as between the solicitor and the party liable to pay, effect, however, being given as far as possible to the cases of *Re Negus* (1895) 1 Ch. 73, and *Re Abbott* 4 L. T. N. S. 476, and the observations of Cotton, L.J., in *Re Morecroft*, 29 SOLICITOR'S JOURNAL 471 in the Court of Appeal. The principles, however, laid down by these cases were, in the opinion of the masters, considerably extended by the case of *Re Gray*, [1901] 1 Ch. 239, and since that case the practice in the Taxing Office in taxations under this section has been to tax, apart from the order, as between the solicitor and the party or estate liable to pay."

His lordship stated that after that certificate he felt it his duty to follow the practice laid down, subject, of course, to his decision being reversed by the Court of Appeal.

He accordingly dismissed the summons with costs, giving leave to appeal.

The solicitors appealed.

G. Lawrence, for the appellants.

He cited *In re Wells*, 8 Beav. 416; *In re Jones*, 8 Beav. 479. on p. 480, per Lord Langdale; *In re Tyson*, 9 Beav. 119; *In re Bignold*, 9 Beav. 269; *In re Barrow*, 2 W. R. 109; 17 Beav. 547; 18 Jur. 181; 2 W. R. Ch. Dig. 51, 84; *In re Taylor*, 2 W. R. 249; 18 Beav. 165; 18 Jur. 666; 2 W. R. Ch. Dig. 85, 94; *In re Baker*, 11 W. R. 792; 32 Beav. 526; 2 N. R 151; 11 W. R. Ch. Dig. 108; *In re Massey*. 13 W. R. 797; 34 Beav. 463; 11 Jur. N. S. 594; 13 W. R. Ch. Dig. 86; *In re Abbott*, 4 L. T. N. S. 576; 9 W. R Ch. Dig. 85; *In re Newman*, 15 W. R. 630 and 1,189; 2 Ch. Apps. 707; 15 W. R. Ch. D. 128 & 129; *In re Morecroft*, 29 SOLICITORS' JOURNAL 471; *In re Holliday and Godlee*, 58 L. T. N. S. 301; 36 W. R. Dig. 56; *In re Dickson*, 5 W. R. 108; 8 D. G. M. & G. 655; 5 W. R. Ch. Dig. 93; *Brown* v. *Burdett*, 36 W. R. 225; 40 Ch. D. 244; *In re Negus*, 43 W. R. 68; [1895] 1 Ch. 73; 43 W. R. Dig. 176; *In re Gray*, 49 W. R. 298; [1901] 1 Ch. 239; 49 W. R. Dig. 172; Daniel's Chancery Practice (7th ed.), p. 1,728; Fisher on Mortgages (5th ed.),

(*a*.) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

on p. 911; Morgan and Wurtzburg on Costs, p. 41. [By COZENS-HARDY, L.J.—*Re Brown*, 15 W. R. 1,030; L. R. 4 Eq. 464, 15 W. R. Ch. Dig. 30.]

T. L. Wilkinson, for the respondent, was not called on.

THE COURT reserved judgment till the day following.

June 1.—ROMER, L.J., read his judgment as follows: I will deal first with this case on the principle that when a third party taxes a bill under section 38 of the Act of 1843, it is clear, both from the wording of the section itself and the authorities, that the taxation must be on the footing of a taxation between the solicitor and the client. But the third party, is not for all purposes in connection with the taxation, to be treated as if he were himself the client. For instance, when the client has paid the bill, and might not be able to show special circumstances sufficient to entitle him to have the bill taxed, it does not follow that of necessity the third party is thereby precluded from obtaining taxation. The proviso at the end of section 38 shows that, and in my opinion that proviso is important and useful, and a court will doubtless act upon it in cases where justice requires that the third party should not be bound by what has taken place between the solicitor and the client. Again, the solicitor may have acted for the client in more than one completed matter, and the client may not be entitled as against the solicitor to obtain delivery of a bill and taxation except on the footing of having all the matters included and taxed. But if the third party be only interested in and liable to pay the costs of one matter, it is clear in my opinion, as a matter of principle, that under section 38 he can obtain taxation of the bill so far as concerns that one matter only, and on the footing of being liable to pay only the taxed costs of that matter. And that principle really decides this case, and shows that the appeal should fail. For in the present case the third party is a mortgagor, and he is only interested in the relations between the solicitor and his client so far as they concern the position of the client strictly in his character of mortgagee. The mortgagor, therefore, is entitled, under section 38, to have taxation of the solicitor's bill limited to the items of costs incurred by the client strictly in his position of mortgagee. And it is on that principle that the taxing-master has proceeded. It may well be that the client, as between himself and the solicitor, is liable for costs incurred in relation to the mortgaged property, with which the mortgagor is not concerned, and for which the mortgagor is not liable. Those will be costs incurred by the mortgagee in his personal capacity so far as regards the mortgagor, and not costs incurred by him in the capacity of mortgagee strictly and properly considered, and accordingly would not have to be taxed or considered by the taxing-master in a taxation by the mortgagor as third party. And I may add, though it may not be necessary to do so for the purposes of the present case, that if the mortgagee chose to sanction a charge of his solicitor beyond what he and the solicitor knew, or must be taken to have known, could be properly charged as against the mortgagor, though the mortgagee might be bound for the excess by reason of his sanction, the mortgagor would not be bound, for the sanction by the mortgagee would be held to be given by him in his personal capacity, and not in his capacity of mortgagee. With regard to the authorities, they are so numerous that I do not pretend to say that all the observations of the various judges who decided them can be reconciled. But the principle on which this judgment is based is not, in my opinion, contrary to any express decision that has been cited. I do not think it will serve any useful purpose to go through the cases cited *seriatim*. The appeal will accordingly be dismissed with costs.

VAUGHAN WILLIAMS and COZENS-HARDY, L.JJ., concurred.

Appeal dismissed.

Solicitors, *Bower, Cotton, & Bower*, for *Longbotham & Sons*, Halifax; *Indermaur & Brown*, for *Pearce*, Todmorden.

Appeal.
(Collins, M.R., and Romer and Mathew, L.JJ.) April 22.

GIBSON v. WORMALD & WALKER (LIMITED). (a.)

Master and servant—Accident—Compensation—Award by arbitrator appointed by a county court judge—Appeal to Court of Appeal—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule II., clause* 4.

Under the Workmen's Compensation Act, 1897, *no appeal lies direct to the Court of Appeal from the award of an arbitrator appointed by a county court judge to assess a claim for compensation under that Act.*

Appeal by the defendants from the decision of an arbitrator appointed by the county court judge of Dewsbury under the Workmen's Compensation Act, 1897.

The applicant having filed a request for arbitration for the assessment of compensation under the Act, the county court judge, under clause 2 of Schedule II. to the Act, appointed a barrister, under the authority of the Lord Chancellor, as arbitrator to hear and determine the claim.

The arbitrator found for the applicant. The employers entered this appeal from his decision and the appeal now came on for argument.

Upon the appeal being opened, counsel for the applicant took the preliminary objection that no appeal lay direct to the Court of Appeal from an award of an arbitrator appointed by the county court judge. No application was made to the arbitrator during the hearing to state a case for the opinion of the county court judge, and though an application was made to him after he had made his award, he held that he was *functus officio* and could not entertain the application.

Compston, for the applicant in support of the objection.—The only right of appeal against the decision of an arbitrator appointed by a county court judge is that which is given by clause 4 of Schedule II. of the Act of 1897, which says the Arbitration Act of 1897 shall not apply to any arbitration under this Act; but the arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, "and the decision of the judge on any question of law, either on such submission or in any case where he himself settles the matter, shall be final unless . . . either party appeals to a Court of Appeal. . . ." By clause 3 the arbitrator has all the powers of a county court judge. By rule 30 of the Workmen's Compensation Rules, 1898, where an arbitrator submits a question of law to the county court judge, such submission must be in the form of a special case: See judgment of Collins, L.J., *Leech* v. *Life and Health Assurance Association*, 49 W. R. 482, [1901] 1 K. B., at p. 709.

Scott Fox, K.C. (with him *Wilberforce*), for the

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

employers.—This appeal raises a question of law and comes therefore within the subject-matter of clause 4. By clause 3 of Schedule II. the arbitrator has all the powers of the county court judge. When his decision is given it carries with it all the limitations and incidents attendant to the decision of a county court judge sitting as arbitrator under the statute. One of those incidents is the right of "appeal by either party to the Court of Appeal." The reasonable view of the power given by clause 4 of Schedule II. to an arbitrator appointed as deputy for the county court judge to submit a point of law to the judge is that should he not do so, and the parties are dissatisfied, the parties are left to their right of appeal to this court. If the contention of the applicant is upheld, and the objection allowed, the effect of it would be that the award of a deputy arbitrator would be final in every case in which he refused or was not asked to state a special case during the course of the proceedings. The difficulty might be got over by this court treating the question now raised as a *casus omissus* from the provisions of the Statute. If the court takes that view, then they would have, under the general jurisdiction, power to give the words in clause 4 the suggested interpretation and hear the appeal on its merits: *Rex* v. *Owen*, 51 W. R. 168; [1902] 2 K. B. 436.

COLLINS, M.R.—I think this preliminary objection must succeed. Clause 4 provides the only way in which a decision of a tribunal of first instance constituted under the Act can be reviewed by us, and in that clause there is a distinction drawn between an arbitration before a county court judge and one that is held before an arbitrator. In the latter case the only way in which his decision can be reviewed is, if the arbitrator thinks fit, he may submit any question of law to the county court judge, whose decision upon such submission would, subject to the rules, be open to appeal. It was contended that the other clauses of the schedule, when looked at, showed that the Legislature must have intended to give an appeal from the decision of an arbitrator, and it was pointed out in particular that clause 3 gives to such an arbitrator all the powers of a county court judge. The answer to that contention is that the right of appeal is a matter outside the powers of the county court judge, and consequently outside the powers conferred on the arbitrator. The right of appeal from the judge arises *aliunde*, and the right to review the decision of an arbitrator must also arise *aliunde*. A strong appeal was made on the ground of the anomalies that would arise from holding that there was no direct appeal from the decision of an arbitrator appointed by a county court judge. We were asked to say in effect that the decision of such an arbitrator was open to the same review as that of the judge on the ground that this was a *casus omissus*, and that we should carry out the intention of the Legislature. But it must be remembered that the Act was necessarily passed before any of its provisions could be tried by the test of practice. It is probable that the Legislature had before them the view that proceedings under the Act were generally to be by arbitration before a committee or an arbitrator, and not proceedings of a technical legal character. The primary idea seems to have been an arbitration not open to review, and dealt with by non-technical process. An appeal was given in cases before the county court judge, but in other cases the only appeal given is where the arbitrator thinks fit to submit a question of law for the decision of the county court judge. It does not appear, in this view of the matter, that the present is a *casus omissus*, for it is reasonable to suppose that the intention of the Legislature was carried out in the provisions of the section. There is no provision for an appeal direct to this court from any arbitrator other than the county court judge, and we cannot enlarge our own rights. The only method of reviewing the decision of an arbitrator is by submission of a point of law to the county court judge, and consequently no appeal lies to this court, and the preliminary objection to our hearing this appeal succeeds.

ROMER, L.J., and MATHEW, L.J., concurred.

Appeal dismissed.

Solicitors for applicant, *Telfer Levianskey & Co.*, for *Clegg & Sons*, Sheffield.

Solicitors for the employers, *Walker & Rowe*, for *F. Dwyer*, Dewsbury.

From Chan. Div. (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) — Jan. 29, 30; Feb. 1, 2.

In re HANBURY.
HANBURY *v.* FISHER. (*a*.)

Will—Construction—Precatory trust—Gift beneficial or in trust—Absolute gift to wife "in confidence"—Gift over in default—Power of appointment—Absolute donee.

A testator gave, bequeathed, and devised to his wife the whole of his real and personal estate absolutely "in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces." The testator died childless, leaving a widow and seven nieces surviving him.

Held (*by* Vaughan Williams *and* Stirling, L.JJ., Cozens-Hardy, L.J., *dissenting*), *that the widow took the property absolutely for her own benefit, and that no trust was created in favour of the nieces.*

Per Cozens-Hardy, L.J.—*Upon the construction of the will as a whole the widow took more than a life interest, and if all the nieces died before her the absolute gift would remain. But it was clear the testator intended that the nieces should take a share, either as she should determine or in default in equal shares.*

Decision of Kekewich, J., *affirmed.*

This was an appeal from a decision of Kekewich, J.

The facts were as follows: An originating summons was taken out before Kekewich, J., for the determination of the will of the late Right Hon. William Hanbury, M.P., the President of the Board of Agriculture.

The will was dated the 31st of October, 1893, was in the testator's own handwriting, and contained the following clause: "I give, bequeath, and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces."

(*a*) Reported by A. R. TAYLOUR, Esq., Barrister-at-Law.

The testator further added: "I make this will in full confidence that my dear wife will show the affection of a daughter to my dear mother and stepfather." He appointed his wife and Charles Fisher executrix and executor of his will, and he gave the said Charles Fisher "such sum, not exceeding £150, as my dear wife may decide upon."

The testator died on the 28th of April, 1903, leaving his wife and seven nieces him surviving.

The summons was taken out by the widow against the said Charles Fisher, the other executor, and the seven nieces for the purpose of having the will properly construed.

Kekewich, J., held that under the will the widow was the donee absolutely for her own benefit of all the real and personal estate and property of the testator.

The nieces appealed.

Warmington, K.C., Vernon Smith, K.C., Christopher James, and *Mark Romer*, for the nieces.—It is a precatory trust. The testator expresses a wish that his nieces should have an interest in his estate. *In re Bagshaw's Trusts*, 25 W. R. 659, applies here. The testator's intention in the will must be looked to, and not from any particular words: *In re Hamilton, Trench* v. *Hamilton*, 43 W. R. 461, 577, [1895] 2 Ch. 370, 43 W. R. Dig. 200. A trust, however expressed, is obligatory. This will is an absolute gift to the wife, with a gift to such nieces as she selects living at her death, and in default of appointment, to all the surviving nieces. The whole will must be looked at *In re Williams, Williams* v. *Williams*, 45 W. R. 519, [1897] 2 Ch. 12, 29, 45 W. R. Dig. 174 (where Rigby, L.J., quoted the words of Lord Langdale, M.R., in *Knight* v. *Knight*, 3 Beav. 148, 172).

They also cited *Sherratt* v. *Bentley*, 2 My. & K. 149 157.

[VAUGHAN WILLIAMS, L.J., referred to Williams on Executors, 9th edit., vol. 2, at p. 934.]

Haldane, K.C., Warrington, K.C., and *Austen-Cartmell*, for the widow.—The main idea of the will was to give the widow an absolute and unfettered discretion in the disposal of the property. "Devise" does not mean to "appoint." [STIRLING, L.J.—Does not "in full confidence" impose some restriction?] It means to express the motive of the absolute gift. There is no power of appointment.

They cited *Holmes* v. *Godson*, 8 W. R. 415, 8 D. M. & G. 152, 159, 8 W. R. Dig. 118.

Vernon Smith, K.C., replied.

Cur. adv. vult.

Feb. 2.—VAUGHAN WILLIAMS, L.J., read his judgment. [His lordship stated the will, and continued:] I will for the purpose of my judgment first assume that the words in this will following the words "in full confidence" do not, having regard to recent decisions, constitute a trust in favour of the nieces. Now, if that is so, the main question which we have to decide is whether the words "and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces," impose a condition which is repugnant to the previous absolute gift, or whether these words should be construed as creating an executory devise or gift over after an absolute gift. Now, in the first place, if you read the words from "I give and bequeath" down to the word "absolutely," and omit the words from "in full confidence" down to but exclusive of the words "and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces," it seems to me impossible to construe those latter words as creating an executory devise or gift over, or otherwise than as repugnant to the absolute gift and devise to the wife. It was argued that if we take into consideration the words "in full confidence . . . that at her death she will devise it to such one or more of my nieces as she may think fit," this justifies us in reading the words "in default of any disposition by her thereof by her will and testament" as if they were "in default of any such disposition," and it is said that if we do this the direction "in default of such disposition" really constitues a devise or gift over in favour of the nieces who shall survive the widow. In the first place, the words are not "any such disposition," and in my opinion it cannot be said that there is anything in the will which renders it necessary to interpolate that word "such," except the fact that the words of the will, read as they stand, contain a direction inconsistent with the law, founded on principles of public policy, which says, that in the event of an owner in fee dying intestate the estate shall go his heir, and in the case of personal property to his next-of-kin; or, to put it shortly, contains a direction which defeats the course of devolution which the law provides as incident to an absolute interest. My observation is, of course, quite apart from the question whether the words of this will, taken as a whole, create a trust binding on the conscience of the widow as owner in fee of the realty, or absolute owner of the personalty. *Holmes* v. *Godson*, 8 W. R. 15, 8 D. M. & G. 152, 159, and in particular the judgment of Turner, L.J., seems to me, if properly applied, to govern this case, and to justify thus far my conclusion. Now, is there a trust in favour of the nieces? The law appears to me now to be this—that a gift, followed by such expressions as "in full confidence," will not by mere force of the words create a trust. You must take the will which you have to construe and see what it means—see, that is, what is the intention of the testator as expressed in his will, and answer the question "aye" or "no," according to the intention of the testator as expressed by that will. I will first deal with the considerations arising on this will which favour the trust, and then with the words which go to negative it. The words "in full confidence that she will make such use of it as I should have made myself" favour a trust, because they suggest that the wife is not to dispose of the *corpus*, but to keep it till her death; but this is a very lame mode of that which is really inconsistent with the ordinary use of the word "absolutely," which *primâ facie* means in a will unfettered in respect of any condition or trust. Next we have the words "I hereby direct," which are certainly consistent with a trust, but, it may be observed, are inconsistent with the word "absolutely." Lastly, there is the bequest "I give to Charles Fisher such sum, not exceeding £150, as my dear wife may decide upon." This can hardly be said to favour a trust otherwise than in the sense that it goes to negative the absolute property of the widow. But I cannot think that there is really anything in this point, especially as the sentence, taken as a whole, is evidence of the wish of the testator that his wife's discretion should control everything. I think I ought to add in favour of the trust that there does not seem to me to be any uncertainty of fund or object. On the other hand, the word "absolutely" certainly goes to negative a trust imperative on the widow, and the words "in full confidence" in immediate collocation with the word "absolutely" go to emphasize that word, as if the words had been "in full confidence nevertheless that my very dear wife will use the property as I should have done." I

cannot easily bring myself to the conclusion that this form of words would be used by any one who at the same time intended to impose any obligation on his wife. Again, the words "in default of any disposition by her thereof by her will or testament" seem to me unnatural, if a trust was intended, although, of course, they are not so absolutely inconsistent with the trust as they would have been if the words had been "any disposition," omitting the words "by her will or testament." Then the testator directs that "all my estate and property acquired by her under this my will" shall be divided, &c., which looks very much like an attempt by him to control the disposition of property which he had intended she should absolutely acquire under his will. Again, he uses in the clause relating to the personal relations of the widow with his mother the words "in full confidence" when he obviously could not have intended to create a trust. Then there is the general form of the will, which seems to me to exclude any intention by the testator to bind his wife by imperative obligations. In the case of the gift of money to go to his sister, where he did intend an imperative obligation, he carefully excludes this money from the property which is to go to his wife absolutely. On the whole I think there is no trust, and no executory devise or gift over, but merely a forgetfulness by a testator, who intended to give to his wife an unfettered absolute property, of the rule of law which prevents him when he has made such a gift from controlling the subsequent devolution of the property thus acquired by his gift. I ought to add that I have considered that part of the argument in which it was contended that, according to the true construction of the will, the wife took a life estate, with a power of appointment, and I think that cannot be supported. The result is that the judgment of Kekewich, J., will be affirmed.

STIRLING, L.J.—I have come to the same conclusion, and substantially for the same reasons, but having regard to the difference of opinion which unfortunately exists in the court, I think it is right that I should state in my own way the reasoning which has brought me to take the view which I have just expressed. We have to deal with a will which is the workmanship, as I understand, of the testator himself, or at all events of someone not skilled in the law, and certainly it is expressed in such a way as to give occasion to great difficulty in ascertaining the real meaning of the testator. He begins with a disposition which is absolutely clear if it stood by itself: "I give, bequeath, and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely"; but later on there are words which appear strongly to indicate an intention on the part of the testator that in certain events the property so given to the widow absolutely should go over to his surviving nieces. He says that in a certain event, which I shall refer to in a moment, "I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces," and to my mind the real question which we have to deal with is, What is the event on which that gift over was to take place? It was admitted by the counsel for the nieces that if the will had run thus: "I give, bequeath, and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely," and that had been followed by the words, "and in default of any disposition thereof by her will or testament I hereby direct," and so forth, the gift in default of any disposition of the property by the wife by her will or testament would be repugnant and void in law. In my opinion this admission was well founded, and is in accordance with the law laid down in *Holmes* v. *Godson*. It was admitted, on the other hand, by counsel for the widow, that if the will had run thus: "I give, devise, and bequeath to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely, and if one or more of my nieces shall survive my said wife, then at her death to such one or more of them as she shall by will select, and in default of such selection to all my said surviving nieces in equal shares," the gift over in favour of the surviving nieces would have been perfectly good, and would have taken effect by way of executory devise and bequest in the event of any niece surviving. An example of such a gift is to be found in *Crozier* v. *Crozier*, 21 W. R. 398, L. R. 15 Eq. 282, 21 W. R. Dig. 278.

Now, the argument for the nieces consisted substantially in an endeavour to bring the case under the last category to which I have referred. They are, however, met with this great difficulty, that the event on which the testator has in terms said that the property acquired by his wife is to go over is not the event of any of the nieces surviving his widow, but the event of his widow failing to make any testamentary disposition. To escape from this difficulty it was said that the will must be read as a whole, and that weight must be given to the clause of which up to this point I have not taken any notice—namely, "in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit." Unquestionably the whole will must be read together, and that clause must be taken into consideration. It was contended that this being done the will ought to be read as if the word "such" had been inserted before the word "disposition," so that the gift would take effect only in the event of the testator's widow failing to dispose of his property by will in favour of one or more of the surviving nieces. I confess that during the argument I was much impressed by this contention, and if I thought that this really expressed the intention of the testator, I should have been very willing to have given effect to it. But after careful consideration I cannot find enough in this will to enable me so to hold. The insertion of the word "such" appears to me entirely to alter the complexion of the will, and to afford an indication that the testator's intention was that his widow should not be at liberty to make a testamentary disposition of his property except in favour of one or more of the surviving nieces. Reading the will as it stands, and by the light of the view taken by the majority of the Court of Appeal in *In re Williams* as to the effect to be given to such expressions as "in full confidence," I am unable to find that the testator has given such an indication. It appears to me that all the testator intended to do was to provide against the possible intestacy of his widow, and that he has in this respect made a mistake as to the law—a mistake which is not infrequently found in the testamentary dispositions of persons who make their own will. In my opinion, therefore, the appeal fails.

COZENS-HARDY, L.J., read his judgment: This case affords a striking instance of the difficulty of construing a will drawn by a layman, although at the first glance the language used seems clear and free from ambiguity. The testator was a man of large property, real and personal. He left a widow but had no child. Among his nearest relations were his nieces. It is apparent that he was minded to benefit his wife, in whom he had full confidence. It is equally apparent that he desired that such of his

nieces as should survive his wife should, directly or indirectly, derive benefits under his will.

Now, it is contended on the part of the widow that the gift to her is absolute and free from any trust, condition, or gift over, and that in so far as the testator has expressed a "confidence" that she will devise her absolute property in a particular way, no binding effect can be attributed to it, and that the final direction in the event of her not making any disposition thereof by will is repugnant and void: *vide Holmes* v. *Godson*, 8 W. R. 15, 8 D. M. & G. 152. On the part of the nieces it is contended that there is a clear gift on the widow's death in favour of the surviving nieces equally, subject to a power of appointment by will given to the widow enabling her to distribute the property between the nieces in different proportions.

Upon the whole I think the widow's contention cannot prevail. I do not doubt that she takes more than a life interest. Should all the nieces predecease her her absolute interest will remain. But the surviving nieces, if any, are sufficiently indicated as the persons to take after her death. Effect can be given to this overriding intention without unduly straining the language. There are several points which tend to support this view. In the first place, the testator seems to have contemplated that, although his widow would use the property, it would remain intact at her death. In saying this I of course do not refer to things *quæ usu consumuntur*. Use and enjoyment, as distinguished from disposition of the capital, is what the testator's words indicate. This alone would not suffice to cut down or destroy her *primâ facie* title as absolute owner, but it cannot be wholly disregarded. In the second place, the words "at her death she will devise to such one or more of my nieces as she may think fit" do not necessarily import a disposition by her of her own property, but may well be read as an appointment by her of his property. No technical words are required for either the creation or the exercise of a power, if the intention is clear. In the third place, the words "in default of any disposition by her thereof by her will" seem from the context necessarily to require the insertion of the word "such" before "disposition." In the fourth place, there is the positive direction that, in the event of what I have called the special power of appointment not being exercised by the wife, all the property shall be equally divided among the nieces. You are not left, as frequently happens, to imply a gift, or to hold that the wife is bound to make an appointment. This express gift is the most distinguishing feature of the case. Lastly, I attach some slight importance to the final legacy to Charles Fisher of "such sum not exceeding £150 as my dear wife may decide upon." If she were the sole and absolute owner of the whole property, why this limit of £150? If the other view is adopted, there is an intelligible reason for the form of this bequest. Not more than £150 is to be taken away from the capital to which the nieces may become entitled.

The result is that, though, I need not say, not without considerable doubt, I do not find myself able to agree with the judgment of Kekewich, J., or my brethren Vaughan Williams and Stirling, L.JJ.

Appeal dismissed.

Solicitors for the appellants, *Walker, Martineau, & Co.*

Solicitors for the respondents, *Patersons, Snow, & Co.*

High Court of Justice.

Chan. Div.
Swinfen Eady, J. } July 5, 6, 18.

MELLOR v. WALMESLEY. (a.)

*Land by the sea—Foreshore—Accretion—Parcels in conveyance—"Situate on seashore"—"Bounded by seashore"—Meaning of "seashore"—Measurements and plans inconsistent with description—*False demonstratio—*Hearsay evidence—Declaration in discharge of professional duty.*

A conveyance of land described in the parcels as "situate on the seashore" and "bounded on the west by the seashore" passes all the land down to the foreshore—i.e., to the high-water mark of medium ordinary tides, notwithstanding that the plan on the deed shows a more restricted boundary which satisfies the measurements and contents given in the parcels.

The lord of a manor, of which the foreshore at B. was parcel, granted in 1864 two plots of land there to M. and H. respectively in fee. In each of the deeds the parcels described the plot as "situate on the seashore" and as "bounded on the west by the seashore." the northern, southern, and eastern boundaries being also named. The measurements from east to west and from north to south, and the contents correctly calculated from those measurements, were given, and agreed exactly with a rectangular figure representing the plot in a plan drawn on the deed, three sides of the figure corresponding with the north, south, and east boundaries named. The plan also showed a wavy line marked "sea coast," between which and the fourth or west side of the figure was a strip of land a few yards wide. It was proved that in 1864 the sea had sometimes covered this strip, and occasionally even washed over the plots as they were marked on the plans. Also, that the distance between the lines of high-water of ordinary spring tides and ordinary medium tides was about 100 yards, but the position in 1864 of neither of these high-water marks could now be ascertained. Since then the sea had gradually receded, leaving considerable accretion to the land. In an action by successors in title of the grantees against successors in title of the grantor to ascertain the true western boundary of plaintiff's land,

Held, that the word "seashore" was used in the deeds as equivalent to "foreshore," and as meaning that space, primâ facie, *vested in the Crown, of which the landward limit was the line of medium high tide between the springs and the neaps; that the deeds thus contained an adequate description of what was intended to pass by them, which was not vitiated by errors in dimensions or quantity nor by inaccuracies in the plans; that the western boundary at the date of the grant was, and still remained, the seashore; and that any accretion belonged to the plaintiffs.*

Levels taken by a deceased surveyor under contract with a local board not admitted in evidence.

This was the trial of an action by the respective owners in fee of two dwelling-houses and plots of land, situate by the seaside at Blundellsands, in the township of Great Crosby, in Lancashire, to have the seaward boundary of the said plots determined as against the defendants, by whose predecessor in title they had been granted, and for an injunction to restrain the defendants from erecting a fence or committing trespass on the plaintiffs' land, and from excluding the plaintiffs from access to the sea. The claim involved the question of right to accretion of land by gradual recession of the sea.

The said plots had been respectively granted in 1864 to James Mellor and Thomas Huntington (who

(a.) Reported by R. HILL, Esq., Barrister-at-Law.

were the respective predecessors in title of the plaintiffs Mellor and the plaintiff Brown) by Nicholas Blundell, who was then lord of the manor of Great Crosby. The land comprising the plots was originally part of Great Crosby Marsh, and was allotted to the predecessor in title of Nicholas Blundell under an Inclosure Act, 52 Geo. 3, c. 6, the western boundary being given in the award as "the high-water mark on the strand or shore of the River Mersey," which was an arm of the sea. The foreshore was parcel of the manor.

The conveyance to James Mellor was dated the 30th of July, 1864, the parcels being as follows: All that piece of land situate on the seashore at Blundellsands, in the township of Great Crosby, in the county of Lancaster, and measuring in front thereto 93 yards or thereabouts, on the eastern boundary 93 yards or thereabouts, and running in rear or depth backwards on the north and south sides thereof respectively 77 yards or thereabouts, and containing in the whole 7,161 superficial yards or thereabouts, be the said several dimensions and admeasurements respectively a little more or less, which same piece of land is bounded on or towards the south by other land of the said Nicholas Blundell, on or towards the east by an intended new road of 15 yards in breadth to be called Burbo-bank-road, on or towards the north by Blundellsands-road, and on or towards the west by the seashore."

The conveyance to Huntington was dated the 17th of October, 1864, and the parcels were in identical terms with the foregoing, except that in this case the northern boundary (where the plots adjoined) was given as "land lately sold to James Mellor," instead of the Blundellsands-road.

The parcels in each deed referred to a plan drawn thereon in which the dimensions were the same as in the parcels, the plots being shown as abutting eastwards on the proposed Burbo-bank-road (which had since been made in the position intended), while towards the west, separated from the plots by a strip of sand a few yards wide, was a thick, black, wavy line, which was marked "sea-coast."

Each of the grantees erected a house on his plot, and afterwards built a wall separating the plot from the sands, and having an opening and steps by which to pass from the plot to the sands.

Nicholas Blundell died in 1894, and in the year 1902 the defendants, who were his devisees in trust, erected on the strip above mentioned a post and rail fence, excluding the plaintiffs from access to the sea.

The plaintiffs thereupon brought this action for a declaration that their respective premises were bounded on the west side thereof by the sea shore, and that they, as owners of the said premises, and their respective lessees and tenants, were respectively entitled to free access and egress to and from the sea, from and to the said premises respectively. They also asked for an order for the removal of the fence and an injunction restraining the defendants from erecting any fence on the plaintiffs' said premises or committing any trespass thereon or doing any act to obstruct or impede the said free access or egress. Their contention was that the defendants, as privies of Nicholas Blundell, were estopped by the deeds from denying that at the date thereof the premises comprised in and conveyed thereby immediately adjoined and were bounded on the west side by the seashore.

The tide at Blundellsands was subject to considerable variation. It was in evidence that in 1864 the sea had sometimes, even on a calm day, washed over the land not disputed to have been sold to Mellor and Huntington, and that it frequently reached the site of their walls. Also that the difference between high water of ordinary spring tides and high water of ordinary medium tides was about 100 yards, but the exact position of either of these lines of high water in 1864 could not be ascertained. A witness, called on behalf of the defendants for the purpose of identifying the first-named with the black wavy line on the plans, produced for that purpose a level book founded on surveys made by a deceased surveyor under a contract with the Great Crosby Local Board in 1864, and it was submitted this might be received in evidence as a declaration made in discharge of duty in the ordinary course of business or professional employment, but the court, on counsel for the plaintiffs objecting, ruled that the evidence was inadmissible.

It was proved that since 1864 the sea had gradually receded, leaving bare a considerable quantity of land opposite to the plaintiffs' plots, and the right to the accretion depended on the result of this action.

Neville, K.C., and *Courthope Wilson*, for the plaintiffs.—One question is, Suppose a discrepancy between parcels and plan in a conveyance, which ought to prevail? Another is this: When you grant land, describing it as "situate on the seashore," and as "bounded on or towards the west by the seashore," can you afterwards be heard to say that it is not so situate and bounded? We submit you cannot. They cannot here prevent the plaintiffs' land from extending to the foreshore, because the seashore is one of the boundaries. [SWINFEN EADY, J.—It comes to this, then, that seashore and foreshore are the same thing.] Seashore in these conveyances means foreshore, and has no other meaning. It is the space between high and low water mark, as laid down in *Attorney-General* v. *Chambers*, 2 W. R. 636, 4 D. M. & G. 206. "Seashore" is the proper legal term, used by Lord Hale (*De jure maris*, chap. 6), and "foreshore" is a term substituted for it. If the measurement is inconsistent with the boundaries it is *falsa demonstratio*, without which there is a proper description of the land conveyed. The contents are unnecessary. As to accretion in such a case as this, the line of high water is a fluctuating boundary, and the adjoining owner's boundary fluctuates with it.

They also cited *Horne* v. *Struben*, [1902] A. C. 454, 50 W. R. Dig. 20; *Scratton* v. *Brown*, 4 B. & C. 485, 498; *In re Hull and Selby Railway*, 5 M. & W. 327; *Roberts* v. *Karr*, 1 Taunt. 495, 503; *Espley* v. *Wilkes*, L. R. 7 Ex 298, 303; *International Tea Stores Co.* v. *Hobbs*, 51 W. R. 615, [1903] 2 Ch. 165; *Llewellyn* v. *Earl of Jersey*, 11 M. & W. 183, 189; Hall on the Seashore (2nd ed.) p. 8; and Moore on the Foreshore (3rd ed.) p. 674.

Levett, K.C., and *O. Leigh Clare*, for the defendants.—Lord Hale gives three definitions of seashore, but the word is also one of a general signification. A curious instance of its use in this sense is to be found in *The Queen v. Gee*, 1 E. & E. 1068, 1070, where in the questions for the decision of the court it is indiscriminately applied to different sections of the land from high-water of spring tides down to low-water of neap tides. The plaintiffs' own witnesses admit that in 1864 the sea only occasionally washed the outside of Mellor's wall, and at exceptional times came a few yards further, and that the foreshore, or line of high water of ordinary tides, was 100 yards lower down. The plans on the deeds show, by the wavy line, what is meant by the seashore or seacoast, and it is clearly not the foreshore. We are not estopped from relying on the true facts as disclosed by the plaintiffs' witnesses. Estoppel requires words of certainty, and when you find in the deeds two expressions—seashore and seacoast—and when writers so old as Lord Hale use "seashore" in three different significations, there is not sufficient certainty

for an estoppel. *Roberts* v. *Karr* was a case of right of way only; here a right of property is in question. As to accretion, we admit that if the plaintiffs have a boundary up to the foreshore they must succeed.

They cited also *Blundell* v. *Catterall*, 5 B. & A. 268, 278, 299, 301.

Neville, K.C., in reply.—"Foreshore" is the equivalent of *littus maris*, and is the word used when "seashore" would be inapplicable, as in the case of a tidal river. *Attorney-General* v. *Chambers* shows the "shore" to be the ground between ordinary high and low-water mark. This also is what would pass by a grant of the seashore.

The grant must be construed most strongly against the grantor. He has conveyed land bounded by the seashore, and the defendants now want to say that it was bounded by other land of the grantor and not by the seashore. The effect of the grant cannot be limited by reference to the plan. It is *falsa demonstratio*. The words of grant by metes and bounds are to be relied on and one of these is a fluctuating boundary.

On the question of access he cited: *Lyon* v. *Wardens, &c., of the Fishmongers Co.*, 25 W. R. 165, 1 App. Cas. 662; *Attorney-General of Straits Settlement* v. *Wemyss*, 13 App. Cas. 192; 36 W. R. Dig. 203.

Cur. adv. vult.

SWINFEN EADY, J.—The question to be determined in this action is whether the piece of land intervening between the western wall of the plaintiffs' premises and the sea belongs to the plaintiffs or to the defendants. The plaintiffs claim the whole of it; the defendants claim it, and have enclosed with a post and rail fence a part of it. No distinction has been drawn between the two adjoining properties, owned by the plaintiffs respectively.

The plaintiffs' premises are situated at Blundellsands, in Lancashire, and were conveyed to their predecessors in title, respectively, in fee in the year 1864 by the defendants predecessor in title, the late Mr. Nicholas Blundell, of Crosby Hall.

In the conveyance to the late James Mellor the land upon which Weston House has since been erected was described as follows: "All that piece of land situate on the sea shore at Blundellsands, in the township of Great Crosby, in the county of Lancaster, and measuring in front thereto ninety-three yards or thereabouts; on the eastern boundary ninety-three yards or thereabouts; and running in rear or depth backwards on the north and south sides thereof respectively seventy-seven yards or thereabouts, and containing in the whole 7,161 superficial yards or thereabouts, be the said several dimensions and admeasurements respectively a little more or less, which same piece of land is bounded on or towards the south by other land of the said Nicholas Blundell on or towards the east by an intended new road of fifteen yards in breadth to be called Burbo-bank-road on or towards the north by Blundellsands-road, and on or towards the west by the seashore, which said piece of land hereinbefore expressed to be hereby granted is more particularly delineated in the plan drawn on the back of these presents and therein marked with the letter A."

The plan shows a rectangular piece of land, with the exact dimensions given in the parcels figured upon it, and also shows a small strip some ten feet in width intervening between the land and what is called "sea coast" on the plan.

It appears that since 1864 a considerable accretion has occurred at the spot in dispute, and the question is to whom does the accretion belong. The gain has been slow and gradual. It is clear, from the case of *In re Hull and Selby Railway*, 5 M. & W. 327, that in all cases of gradual accretion which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs to which the accretion is added, and *vice versâ*, both as between subject and subject, and as between Crown and subject. In that case Alderson, B., said: "Suppose the Crown, being the owner of the foreshore—that is, the space between high and low water mark—grants the adjoining soil to an individual, and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible, in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land as granted, the Crown would be the gainer of the land."

The question therefore is—to whom does the land belong to which the accretion has been added?

It was contended on behalf of the defendants that although the parcels in the conveyance describe the land as bounded on or towards the west by the seashore, the word "sea shore" was not used in its more restricted sense, or the third of the three meanings given by Lord Hale in his treatise *De jure maris*, chapter 6, and moreover that the plan on the conveyance showed a narrow strip of ground a few feet wide, intervening between the western boundary of the land conveyed and a thick, black, wavy line with the words "sea coast" written just beyond it, which indicated that the grantor did not intend granting the land right down to the water, the land conveyed being described and shown on the plan by exact dimensions which were satisfied without including the additional strip.

The real question is whether, according to the true construction of the deed, the land conveyed extends to the boundary of what is in legal intendment the seashore—namely that portion only of the land adjacent to the sea, which is alternately covered and left dry by the ordinary flux and reflux of the tides.

It was established in *Attorney-General* v. *Chambers*, 2 W. R 636, 4 D. M. & G. 206, that in the absence of all evidence of particular usage, the right of the Crown to the seashore landwards, is, *primâ facie*, limited by the line of the medium high tide between the springs and the neaps. This is the seashore or foreshore, which is ordinarily and *primâ facie* vested in the Crown, subject to the rights of the King's subjects of fishing and navigation. In my judgment it is in this sense and meaning that the word is used in the conveyance, where the land conveyed is expressed to be situate on the seashore, measuring in front thereto 93 yards or thereabouts, and bounded on or towards the west by the seashore. The intention of the grantor, to be gathered from the language used in the deed, was to convey the land between the Burbo-bank-road on the east and the seashore on the west—otherwise the western boundary would have been described not as the seashore but as other land of the grantor.

Defendants contended that the black line shown on the plan on the conveyance was the high water mark of ordinary spring tide, that is, the bi-monthly spring tide occurring at full and change of the moon, and that the line of high water ordinary tide was 400 feet away. The defendants were, however, unable to prove the line of high water ordinary spring tide. They called for that purpose Mr. Goodison, a civil engineer and surveyor, formerly practising at Liverpool, but it appeared from his examination that he was unable to verify the figures of the survey, which were taken by his principal, Mr. Taylor. The actual line of high water spring tide, or high water medium tide, in 1864, at the spot in question has not been proved.

Even if the defendants had succeeded in showing

that the thick black line on the plan was the line of high water spring tide in 1864, it would not have been of much assistance for the purpose of explaining the plan and reconciling it with the parcels in the deed, as there was still the intervening strip of ground to explain and account for. According to the plan the land would not even then be bounded on the west by the seashore, assuming that seashore extends landwards to the limit of high water spring tides.

There are still higher tides twice a year at the equinoxes, but according to the evidence these tides, about the date of the conveyances and afterwards, came considerably above the thick black line and above the strip, for Mr. J. A. Huntington remembered Blundellsands House being built, and when the first bricks were being laid on the site where the house itself still stands, the tide surrounded the people, who could not leave until it went down, and the bricks were laid where the tide had been. This was on a very calm day with no wind. As the plans for that house were passed by the Local Board on the 7th of March, 1865, this incident probably took place at the spring tides occurring at the vernal equinox in that year.

With regard to the other plot, upon which the house was not built until much later, Mr. James Mellor remembers seeing the sea come over a portion of their garden several times after Huntington's wall was built. These exceptional high tides came over a portion of the plots, which, on any construction of the deed, are included in the land conveyed.

The result is that no one of the three meanings of the word "seashore" given by Lord Hale would make the description of the property, as contained in the parcels, accurately fit in and accord with the plan. The intervening strip, to which the defendants attach so much importance, would prevent the land being bounded by the seashore. Having regard to the description of what was intended to be conveyed—namely, a piece of ground on the seashore—and to the east and west boundaries being given—namely, Burbo-bank-road and the seashore—I am of opinion that the deed contains an adequate and sufficient definition, with convenient certainty, of what was intended to pass by it—namely, all the land between the Burbo-bank-road and the seashore—or foreshore in the strict and legal sense and meaning, and accordingly that any erroneous statement as to dimensions or quantity, or any inaccuracy in the plan, will not vitiate the description or have any effect: see *Morrell* v. *Fisher*, 4 Ex. 591, 604; *Doe d Smith* v. *Galloway*, 5 B. & Ad. 43, 51; *Llewellyn* v. *Earl of Jersey*, 11 M. & W. 183, 189; *Horne* v. *Struben*, [1902] A. C. 454, Sheppard's Touchstone, 247.

I therefore decide that by the two conveyances the grantees acquired all the land of the grantor between the Burbo-bank-road and the seashore, and that the accretion to this land belongs to them, and that the western boundary of their land remains to-day what it was on the day of the grant—namely, the seashore.

Solicitors, *Sharpe, Parker, & Co.*, for *Payne, Frodsham, & Bewley*, Liverpool; *Rowcliffes, Rawle, & Co.*, for *Weld & Thomson*, Liverpool.

Chan. Div. Warrington, J. } June 29, 30.

HARRIS v. BOOTS CASH CHEMISTS (SOUTHERN) (LIMITED). (a.)

Landlord and tenant—Restrictive covenant—Assignment of lease—Covenant by assignees to observe covenants of lease—Action by assignees—Injunction—Indemnity—Negative or positive covenant—Construction.

The usual covenant in an assignment of leaseholds on the part of the assignees to observe and perform the covenants and conditions of the lease, and keep the lessees, their assignors, indemnified against all claims and demands on account of the same, is to be construed as one of indemnity only, and the lessees are not entitled as of right to have the negative covenants specifically enforced against the assignees by injunction. And, if the lessor has not sued them or threatened them with proceedings in respect of the breaches of the covenants in the lease by the assignees, the lessees cannot obtain either an injunction against or damages from the assignees.

Semble, *that the covenant by the assignees being affirmative in form, although to perform other covenants of a negative kind, is not a covenant which the court is bound to enforce by injunction.*

A. let premises to B. for thirty years at a rent, B. covenanting (among other things) not, during the term, to make any alteration or addition to the premises. B. assigned the premises to C. (a company), which covenanted with him during the residue of the term "to observe and perform the covenants and conditions contained in the lease, and which henceforth on the lessees' part ought to be observed and performed, and keep indemnified" B., against claims and demands on account of the same. C., without B.'s leave, made certain alterations in the premises which were required for the convenience of the business carried on there. B. thereupon sued C. for an injunction to restrain it from altering, and for a mandatory injunction to restore the premises to their former condition. The lessor had not objected to the alteration or threatened B. with legal proceedings.

Held, that the covenant by C. was one of indemnity only, and that B. could not enforce it as of right against C. by injunction; and that, as B. was not threatened by his lessor, and had himself suffered no damage, he had no cause of action.

Action.

This was an action by the lessee under a lease containing restrictive covenants against their assignees, upon the usual covenant in the assignment as to the covenants of the lease and indemnity, and the question was whether the covenant was to be construed as merely one for indemnity or not.

In October, 1902, a house and premises, No. 162, Western-road, Brighton, were demised by a Mr. Broadbridge to the plaintiffs for a term of thirty years at the rent mentioned. The lease contained a covenant on the part of the plaintiffs not to make any alteration or addition whatever to the premises, except with regard to putting in a new shop front in the manner provided for.

On the 24th of June, 1903, the plaintiffs made an assignment of the premises for the residue of the term of thirty years to the defendants. The assignment contained a covenant by the defendant company as follows: "And the company hereby covenants with the vendors"—that was the assignors—"that the company, their successors, or assigns, will during the residue of the said term pay the rent reserved by the said indenture"—that was the indenture of lease of October, 1902—"and observe and perform the covenants and

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

conditions therein contained, and which henceforth on the lessees part ought to be observed and performed, and will keep indemnified the vendors and each of them, and their and his estate and effects, from and against all claims and demands on account of the same."

On the same date the lessor, Broadbridge, demised the premises to the plaintiffs for a further term of forty-one and a-half years from the end of the term of thirty years. The defendants entered into possession of the premises, and carried on a large business there as chemists and druggists, and dealers in fancy articles. Finding that the water-closet accommodation was insufficient for the convenient carrying on of their business they constructed three new closets upon the first floor, making new windows, and carrying the soil pipes outside the building. This was done without the consent of the plaintiffs. As the defendants refused to re-instate the premises in their former condition, the plaintiffs brought this action against them, claiming an injunction to restrain them from making alterations upon the premises, a mandatory injunction directing them to remove the new closets, and to restore the premises to their former condition, and also claiming damages.

Cave, K.C., and *Curtis Price*, for the plaintiffs.—We have a right to enforce the covenant entered into by the defendants. It is affirmative in form but negative in substance, as it is to observe the covenants in the lease, one of which is not to make any alteration in the premises.

Rowden, K.C., and *Maughan*, for the defendants.—A covenant of this kind has never been enforced by injunction against assignees; no such case can be found in the books. The contract is one of indemnity merely: *Poole and Clarke's Contract*, 48 SOLICITORS' JOURNAL 588, 20 Times L. R. 604. Moreover, this is an affirmative covenant which the court has a discretion not to enforce by injunction. The covenant will not be construed so as to prevent alterations necessary for the convenient occupation of the premises, *Bickmore* v. *Dimmer*, 51 W. R. 180, [1903] 1 Ch. 158. Further the alterations must have been made to comply with the regulations of the sanitary authority, and the court will not under such circumstances either grant an injunction or give damages against the occupiers for complying with these requirements.

They also referred to *Lloyd* v. *Dimmack*, 26 W. R. 458, 7 Ch. D. 398, and *Moule* v. *Garrett*, 18 W. R. 697, L. R. 5 Exch. 132.

WARRINGTON, J.—It has been argued on behalf of the defendants that the alteration made by the defendants was not a breach of the covenant contained in the lease, for the reason that it was necessary for the convenient and proper carrying on of their business, the carrying on of which was contemplated at the time the lease was taken. On that point I will merely say this: There is a good deal to be said for that contention, and I do not propose to express my opinion one way or the other. It was further contended on behalf of the defendants that, assuming what was done to be a breach of the covenant, the court would not interfere by injunction, inasmuch as it was said that the alteration was necessary in order to comply with the requirements of the proper sanitary authority. On that point, also, I express no opinion. There remains the question whether the plaintiffs are entitled to require the defendants specifically to perform the negative covenant contained in the lease. In considering that question one must first see what is the position of the plaintiffs in reference to the person who can enforce the covenant in the original lease—the lessor. He clearly cannot obtain an injunction against the plaintiffs for two reasons—one, because they have committed no breach of it. The breach has been committed by persons over whom they have no control. And he cannot obtain a mandatory injunction requiring them to restore the premises to their original condition, because they are not in possession, and have no right to possession. He cannot therefore obtain an injunction against the plaintiffs in any form. He can, however, obtain damages from them if he has suffered any by breach of the covenant. Next, under the circumstances, and having regard to the relative positions of the lessor and the original lessees after the assignment, what is the true meaning and effect of the covenant contained in the assignment upon which the plaintiffs are suing? That covenant seems to me to be one of indemnity, and indemnity only. If I were to hold that that covenant was intended to require the assignees, as between themselves and the original lessees, specifically to perform every covenant in the lease, I must say that it is quite immaterial whether the lessor objects to the breach, or whether he waives the right to enforce the covenant. It would be an independent covenant entered into with the lessees by the assignees, and I should have nothing to do with anything else. I cannot so hold. I think that the true object of the covenant entered into in an assignment of a lease is to indemnify and protect the original lessee against breaches of the covenants in the lease under which he holds. There is admittedly no direct reported decision on this question; there is no case where a lessee has sought to enforce by injunction against an assignee a negative covenant contained in a lease. I have to guide me only an expression of opinion by Vaughan Williams, L.J., concurred in by the other lord justices in the recent case of *Poole and Clarke's Contract*. That case related to the sale of freeholds which were subject to negative covenants entered into by the vendor, and the Court of Appeal held that the vendor was entitled to a covenant of indemnity only, and qualifying words for that purpose were added to the covenant, and Vaughan Williams, L.J., expressed the opinion that on the sale of leasehold property the words of the covenant ought to be construed as having the effect of the covenant as qualified in the case before them. That decision and *dictum* assist me in coming to the conclusion that the plaintiffs are not entitled as of right and as covenantees in the assignment to enforce specifically the negative covenants of the lease; they are entitled to an indemnity only. If the lessor sues them for damages for the breach which has been, or is alleged to have been, committed by the assignees, they have a right to indemnity from the assignees, but the covenant goes no further. The lessor has not sued the lessees, and I see no reason to suppose from the letters he has written that he intends to sue them, and consequently the lessees have no present right of action against the assignees. It has been further contended that the covenant in the assignment is not a negative covenant at all, and there is a good deal to be said for that contention. If I were driven to a decision, I should conclude that it was not a negative covenant within the rule binding the court to enforce it by injunction. I think that there is a difference between the case where a vendor or lessor takes from the purchaser or lessee a covenant that a certain thing shall not be done and where all he insists on is that certain other covenants shall be performed. If the lessees had insisted upon, and the assignees had entered into the same covenants as those contained in the lease, there

would have been a negative covenant contained in the assignment which the lessees could have enforced by injunction. This may be repeating what I have already decided. The covenant here is in terms affirmative, and that distinguishes it from the cases where the court has no discretion in granting an injunction.

Judgment for the defendants.

Solicitors, *Nye, Norton, & Clowes*, for *J. K. Nye & Treacher*, Brighton; *Tyrrell, Lewis, Lewis, & Broadbent.*

K. B. Div. (Bigham, J.) May 19; June 6.

AKROKERRI (ASHANTI) MINES (LIMITED) *v.* ECONOMIC BANK (LIMITED) AND NOBBS.
BIPPOSU MINES (LIMITED) *v.* SAME.
ATTASI MINES (LIMITED) *v.* SAME.
ASHANTI MINES (LIMITED) *v.* SAME. (*a.*)

Bank—Stolen cheques—Payment for a customer—Collecting agents—Holders for value—Special crossing—"Holder"—Addition to crossing—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 77, *sub-section* 3; *ss.* 78, 82.

An account was opened by N. with stolen cheques at the defendant bank, and stolen cheques were paid in from time to time N. knew at the time of opening the account that the bank's practice was not to discount bills, and that cheques paid in would not be paid against until cleared. On paying in the counter-clerk entered the amount in a book and handed the cheque and paying-in slip to a clerk, who entered the particulars in the waste-book. The cheque was put in a box, the paying-in slip was then given to the ledger clerk, who posted then and there the amount in the ledger to the credit of N.'s account. The cheque was crossed generally. The bank specially crossed the cheque to W. D. & Co., and impressed on the cheque the words "account Economic (defendant) Bank." From time to time the cheques were forwarded to W. D. & Co. for clearance. If no notice of dishonour from W. D. & Co. was received by 9 a.m. on the day following the defendant bank entered the amount of the prior day's cheques to the credit of N. in his pass-book, but under the date of the paying in of the cheque. The defendant bank had a current account, which was in credit, and a loan account, which was in debit, with W. D. & Co. W. D. & Co. held securities exceeding in value the debit to the loan account, specifically deposited by the defendant bank. There was no negligence or want of good faith on the part of the defendant bank.

Held, that the ledger entries did not constitute the bank holders for value. The bank was an agent to collect, and received payment for their customer. The clearing agents had no lien on the cheques by reason of the debit to the loan account. The impressed words did not amount to an addition to the crossing. The defendant bank could cross specially the cheques crossed generally: section 77 (3). "Holder" does not necessarily mean "holder for value."

Action tried in the Commercial Court.

This was an action to recover damages for money had and received, and for conversion.

Scrutton, K.C., and *Bateson*, for the plaintiffs.

Hamilton, K.C., G. Wallace, and *A. M. Talbot*, for the defendants.

The following cases were referred to: *Capital and Counties Bank* v. *Gordon*, 51 W. R. 671, [1902] 1 K. B. 242, [1903] App. Cas. 240; *Bank of England* v. *Vagliano Brothers*, 39 W. R. 657, [1891] App. Cas. 107; *Clutton & Co.* v. *Attenborough & Son*, 44 W. R. 114, [1897] App. Cas. 90; and *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia*, 34 W. R. 417, [1886] 11 App. Cas. 84.

The facts sufficiently appear in the following considered judgment.

BIGHAM, J.—These actions are brought to recover damages for the alleged conversion of a number of cheques, and the question which I have to determine is whether the defendants are entitled to the benefit of the statutory defence provided by section 82 of the Bills of Exchange Act, which enacts that: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." The facts are as follows: The four plaintiff companies had one office in London, which they used in common. They had also one clerk, a man named Nobbs, who acted as their secretary. From time to time Nobbs fraudulently procured the directors to sign cheques drawn on the companies' bankers and made payable to the order of different persons with whom the companies were in the habit of doing business. The cheques were crossed generally and then handed to Nobbs to be forwarded to the different payees. Nobbs, however, kept them for himself, forged the endorsement of the payees, and then handed them to the defendant bank, by whom they were forwarded to the plaintiff's bankers for presentation and payment. They were duly paid, and Nobbs received the proceeds from the defendants. Nobbs has been prosecuted to conviction for the frauds, and is now in prison. To assist him in carrying out his frauds Nobbs had opened an account with the defendants, and the better to conceal his frauds he opened it in a false name—that of Evans. The defendant bank carries on a business which may be described as that of a deposit or savings bank. By the memorandum of association its objects are described as being "to carry on the business of a bank, but so that a company shall not engage in any discount operations or make loans or permit any overdrafts"; and the investments which it is permitted to make are limited to certain selected statutory trustee securities. When Nobbs opened his account he read and signed an application form, which contained, amongst other things, a notice that no bills would be discounted and that cheques would not be paid against until cleared. The course pursued when Nobbs brought the stolen cheques to the defendants was this. He filled up a paying-in slip and handed it, together with the cheque, to the defendants' counter clerk; this clerk entered the amount in a book kept for such purposes at his desk. The clerk then gave the cheque and the paying-in slip to another clerk, who entered the particulars in a book called the waste-book. The waste-book clerk then put the cheque into a box and handed the paying-in slip to the ledger clerk, who posted the amount there and then in the ledger to the credit of the Evans (Nobbs) account. The box was used as a receptacle for all cheques brought to the bank by customers, and it was cleared several times in each day by a messenger, who took the cheques to the bank of Messrs. Williams Deacon & Co., to whom the defendants specially crossed the cheques. Beneath the special crossing the defendants by a rubber stamp impressed on the cheques the words "account Economic Bank." Thus when the cheques reached Williams Deacon & Co.'s hands they were specially crossed to those bankers,

(*a.*) Reported by W. T. TURTON, Esq., Barrister-at-Law.

and bore in addition the words mentioned. It appears that the defendants had two accounts open with Messrs. Williams Deacon & Co.—one a current account, which was always in credit, and the other a loan account, which was always in debit. Williams Deacon & Co. always held securities belonging to the defendants exceeding in value the debit to the loan account. These securities were deposited specifically to secure that account. There were occasions when the amount to the debit of the loan account exceeded the amount to the credit of the current account. On the evening of the day on which Williams Deacon & Co. received the cheques they attended with them at the Clearing-house and cleared them. By 9.30 on the next morning the defendants were informed by Williams Deacon & Co. whether any, and, if any, which, of the cheques had been dishonoured, and if no such advice arrived the defendants assumed that the cheques had been duly honoured by the banks on which they were drawn; and it was then, and not till then, that the defendants entered the amounts to the credit of the customers of the pass-books. The entries, however, though in fact made the day after the cheques were received, were dated as of the day of the receipt of the cheques.

Thus Nobbs never got a credit entry in his pass-book until after the defendants had received the proceeds of the cheque which he had handed to them. The defendants acted throughout in good faith and without negligence. On the foregoing facts, it is quite clear that at common law the defendants by what they did rendered themselves liable to account to the plaintiffs for the proceeds of the cheques. They had no more right as against the plaintiffs to deal with the cheques than had the thief from whom they got them. Then arises the question whether they have a statutory defence, and that depends upon whether the facts bring them within the protection afforded by section 82 of the Act. Now it is clear that the cheques were crossed cheques when they were received by the defendants. They were, therefore, of the kind to which the section applies. It is also clear that the defendants were bankers within the meaning of the section and that they acted in good faith and without negligence. So far, therefore, the defendants are within the terms of the section. What is it, then, that remains to be considered? Two things. The first, whether, when the defendants received payment, they did so for their customer; the second, whether there are any circumstances outside the receipt of payment which render them liable for the conversion. The section says that, in order to afford a protection to the defendant banker, the payment must have been received by him for a customer; and the section then limits the protection to the liability incurred by reason of such receipt. Then, first, did the defendants receive the payment for their customer? The expression "for a customer" has been often discussed, and its meaning has now been made fairly plain by judicial interpretation. Money is received for a customer in those cases only where the banker acts as a mere agent to collect. Thus it is that if the banker as between himself and his customer becomes the holder of the cheque for value before he collects it, he does not receive the payment for his customer, he receives it for himself. The question, then, resolves itself into this—Did the defendants receive the payments as mere collecting agents for Nobbs? It is argued that they did not, because they gave Nobbs credit for the value of the cheques in their ledger before they sent them to Williams Deacon & Co. for collection, and, so it is said, made themselves holders of the cheques for value. But, in my opinion, the entries in the bank's ledgers did not make the bank holders for value. The entries neither conferred any right on Nobbs to draw the money out of the bank, nor did they fix the bank with any liability to pay the money to him. It might have been different if the entries had been made in the pass-book, for that book belongs to the customer and the entries made in it by the bank are statements on which the customer is entitled to act. Suppose, after the ledger entries were made, but before the cheques were sent to Williams Deacon & Co., Nobbs had asked the defendant bank to return him the cheque, could the bank have refused to comply with his request? Could they have said, No; the cheques are ours, for by entries in our ledger of which you know nothing we have given you credit for the amounts and so have made ourselves holders for value? I think not. Nobbs, having regard to the terms on which the business was carried on, would have been entitled to say that he had never assented to any transfer of the cheques, and that therefore they were still his. In truth, notwithstanding the ledger entries, no credit was given to Nobbs, nor was it intended that he should have credit; and, if Nobbs had demanded the money, the defendants would have been entitled to refuse to pay it to him. I think, therefore, that the defendants, in forwarding the cheques to Williams Deacon & Co., and so obtaining the money, were acting as mere agents to collect and were receiving the payment for their customer within the meaning of the section of the Act. The next question is—Have the defendants done anything more than receive payment so as to make themselves liable in trover? It is said that they have. It is argued that, in sending the cheques to Williams Deacon & Co.'s bank, they subjected them to a lien in the hands of that bank by reason of the existence of the loan account, the debit to which at times exceeded the credit to the current account, and that this constituted a conversion. This is, in my opinion, a fanciful point. Williams Deacon & Co. received the cheques for the purpose of collection merely, and, therefore, could not use them except to present them for payment. They could not have detained them; they were bound at once to present them for payment. Moreover, Williams Deacon & Co., as bankers, would know that the cheques paid in to them might be the property of the defendant bank's customers (as, in fact, these particular cheques were), and they could have no right to exercise a lien on securities which were not the property of the defendants. Then it was said that the defendants had made an unauthorized alteration in a material part of the cheques by changing the general crossing into a special crossing. No doubt the Act of Parliament by section 78 makes the crossing a material part of a cheque and forbids any addition to or alteration of it except as authorized by the Act. But section 77, sub-section 3, expressly provides that where a cheque is crossed generally the holder may cross it specially. It was argued that this authority does not extend to mere agents for collection, and that "holder" must be read as meaning only holder for value. I see no reason, however, for limiting the operation of the section in such a way. Holder does not necessarily mean a holder for value. The expression includes every person who is in lawful possession of the instrument, and therefore includes an agent for collection. Lastly, it was said that the defendants had made an unlawful addition to the crossing by stamping upon the cheque the words "account Economic Bank." But, in my opinion, these words are not in any sense an addition to the crossing. A crossing is a direction to the paying bank to pay the money generally to a bank or to a particular bank, as the case may be, and when this has been done the whole purpose of the crossing has been served. The paying bank has nothing to do

with the application of the money after it has once been paid to the proper receiving banker. The words "account A.B." are a mere direction to the receiving bank as to how the money is to be dealt with after receipt. The truth is, that all that the defendants did from the moment they received the cheques down to the time when they received the payment was done in the ordinary course of business for the purpose of safely and properly obtaining payment; and as section 82 protects the banker from the common law liability which the receipt of the payment would involve, it also of necessity protects him from any consequences which might otherwise flow from the steps properly taken to obtain the payment. This is made quite clear in the opinion of Lord Macnaghten, delivered in the House of Lords in the case of *Capital and Counties Bank* v. *Gordon*, [1903] A.C., 240. It is to be found at page 241: "The only question, therefore, is, Did the banks receive payment of these cheques for their customer? If they did, it is obvious that they are relieved from any liability which perhaps might otherwise attach to some preliminary action on their part taken in view and anticipation of receiving payment. The section would be nugatory—it would be worse than nugatory—it would be a mere trap if the immunity conferred in respect of receipt of payment, and in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business and intended to lead up to that result."

Judgment for the defendants, with costs.

Solicitors for the plaintiffs, *Stibbard, Gibson, & Co.*

Solicitors for the defendants, *Pritchard & Sons.*

Prob. Div. & Adm. Div. Admiralty. } Feb. 16.

"THE MINNETONKA." (a.)

Ship—Collision — Damage — Freight — Substituted expense.

A steamship chartered by the Admiralty to carry a cargo of coal from the Tyne to Capetown came into collision with another steamship and put into the Thames for repairs. By agreement between the Admiralty and the owners of the cargo, the cargo was unshipped in London and sold, and a sum of £1,000 was paid by the Admiralty to the owners of the vessel as a "substituted expense" in lieu of the estimated greater expense of storage and re-shipment on board the vessel after the necessary repairs had been effected. Both ships were held to blame for the collision, and at the reference a moiety of the claim by the owners of the collier was paid by the owners of the other vessel, but at the reference as between that other vessel and the Admiralty, the claim made by the Admiralty for an adjuster proportion of the sum paid as "substituted expense" was disallowed by the registrar.

The Court, affirming the report of the registrar, held that that claim failed, because it was not a loss sustained by the Admiralty directly in consequence of the wrongdoing of the other vessel.

Motion.

This was an objection by way of motion to a report of the assistant registrar disallowing a claim by the Admiralty against the owners of the steamship *Minnetonka* for a sum of £276 18s. 4d., which they had agreed to pay the owners of the steamship *Uskmoor* (Messrs. Runciman & Co.) as consideration for the abandonment of a voyage on which *The Uskmoor* had been chartered by the Admiralty to carry coal to Cape Town, and which voyage had to be abandoned by reason of a collision in the Channel between *The Uskmoor* and *The Minnetonka*, in which collision both vessels were held to blame.

Acland, K.C., for the Admiralty.

Aspinall, K.C., and *Pritchard*, for the owners of *The Minnetonka.*

The following cases were cited in the course of the arguments: *Jackson* v. *Union Marine Insurance Co.*, 10 C. P. 125; *The Milan*, Lush 388; *The Marpessa*, [1891] P. 403.

BUCKNILL, J., in giving judgment, said: This is an application by way of appeal from the report of the registrar, on the ground that that report cannot be supported in law. The matter has been before the court on two occasions. On the last occasion the court referred the matter back to the registrar to find whether any part of the amount claimed by the Admiralty, namely £276 18s. 4d., had in fact been allowed to *The Uskmoor*, in the reference between the owners of *The Uskmoor* and the owners of *The Minnetonka*, for the damage sustained by *The Uskmoor* in consequence of a collision between those two ships, for which they were found both to blame. The registrar has found that this amount has not been dealt with in that reference. Now, the story of the case must be gone into in order to get clearly at the facts—the real, the true facts. *The Uskmoor* was on a voyage from somewhere on the N.E. coast to South Africa, if I recollect rightly, laden with a cargo of coal, the property of the Admiralty. During that voyage she came into collision with *The Minnetonka*, in consequence of which *The Uskmoor* herself was damaged, and also, to a certain extent, the cargo on board. *The Uskmoor* then was taken to the River Thames to be repaired, and when it was ascertained that the repairs would take some time—it was estimated about six to eight weeks—the Admiralty and the owners of *The Uskmoor* very properly put their heads together to see what could be done in the circumstances for the benefit of each other. The Admiralty, in the first instance, suggested that the voyage should be abandoned. The charterers, it may be said, to make it quite clear, would have been contributors to the general average which would have had to be made up in the long run. On the 12th of June the Admiralty wrote to the owners of *The Uskmoor* asking them what arrangements they had made with regard to the storage of the cargo on shore or in lighters during the repairs to the ship. The letter ended with this paragraph: "Until the receipt of the surveyor's report it will not be possible to form a definite opinion as to the best course to pursue, but I should be glad to have your views as soon as possible as to the advisability of selling the coal and considering the voyage terminated, so as to avoid the expense of storage and re-shipping." The expense of re-shipping would not fall entirely upon the cargo owners, but the expense of storage, subject to general average, would fall upon the cargo owners. That letter was answered by the owners of *The Uskmoor* on the 13th of June, when they said the repairs would take about eight weeks, and it was impossible for them to advise the Admiralty as to the termination of the voyage, but that if the Admiralty wished to do so they (the owners of *The Uskmoor*) would do so for the consideration of 7s. 6d. per ton "as full freight." Then on the 17th of June the surveyor writes to the Admiralty, amongst other things, this: "Messrs. Runciman will now accept £1,000 in respect of the freight, which is a trifle more than Messrs. Hopkins,

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

Son, & Cookes had advised you. They had written their letter to you before they could make sure whether it was £996 or £1,000. All that is wanted from you now is a letter to Messrs. Runciman stating that you offer them £1,000 in respect of the freight and stating that you will give them another cargo to replace the present one at the 16s. rate, or more if freights should rise in the meantime, of course they giving you proper and sufficient notice when the vessel is expected to be ready, and Messrs. Runciman to have the option of refusing the offer." On the same day Messrs. Hopkins, Son, & Cookes wrote to Mr. Lowrey, the secretary of the Salvage Association, and they put the case in this way: "We beg to inform you that we have carefully considered the facts and circumstances of this case, and assuming the voyage is terminated in London, and the shipowners are paid 4s. 6d. per ton, equal to £996 15s., this amount will be apportioned as per annexed sheet as a substituted expense in lieu of hire of barges: Six weeks £664 10s., shifting ditto £106 17s. 6d., re-shipping cargo £424 10s. 10d., total £1,195 18s. 4d.; and in addition to the above expenses which will be saved, the expected deterioration by breakage of coal, estimated by Mr. Lewis at about 10 per cent. at least on Cape Town values, and 2 per cent. for loss of weight, is avoided. It will, of course, be necessary to obtain the agreement of all interests to this arrangement." Then Mr. Lowrey wrote on the 18th of June to Messrs. Hopkins: "The ship underwriters have approved our suggestion that the coals should be sold in London and that the loss of the freight should be treated as a substituted expense." The keynote of this case is that the loss of freight should be treated as substituted expense. Then comes the letter of the 18th of June, setting out the figures of general average and freight, and there is the final letter from the Admiralty, on the 20th of June, to Messrs. Runciman: "Your expression 'to pay the shipowners the sum of £1,000' is understood as meaning the sum of £1,000 will be apportioned on the basis stated in my letter of the 18th of June, and a claim made by the owners upon the Admiralty for the portion thereof falling upon the cargo when the general average adjustment is completed." Now, when this case first went before the registrar and merchants it was put in this way: That the shipowners and the Admiralty had agreed that the sum of £1,000 was to be paid for freight. It is so mentioned in the shorthand writer's notes, which I have before me. To-day the claim is not for freight at all. It is not put as having anything to do with freight. That part of the case has been put on one side. It is put in this way: That the Admiralty have entered into an obligation, binding upon them, to pay to the owners of the ship £276 odd, and that there was a good consideration for that binding contract between them for the abandonment of the voyage. When ones comes to test the claim, to see what it really means, it is put in this way: If the voyage had not been abandoned, and if the cargo had remained in barges, and if the Admiralty had become responsible to pay, as they would have become, for the hire of the barges, the amount would have certainly exceeded £276. It may be that this is a sum of money which, in the circumstances of this case, the shipowners could recover from the Admiralty—I do not say it would be so or would not be so—but it does not follow that, because the Admiralty would be liable to the shipowners, therefore the Admiralty can put that liability over on to the backs of the owners of *The Minnetonka*, the wrong-doing ship. The only way in which the Admiralty can recover against the owners of *The Minnetonka* here is by showing a certain loss, or a sum of money lost; that is, a certain loss in consequence of a reasonable arrangement by the person having a claim minimising the claim which he has against the wrong-doer. But it must be a loss and a liability arising directly in consequence of the wrong-doing act of *The Minnetonka*. If it is not, then it is not recoverable. Is it the case here? I think it is not. The real facts, as I find them to be, and as I understand them to be, and as to them there is really no contradiction, are these: The abandonment of the voyage; as between the shipowners, *The Uskmoor*, and the cargo owners the Admiralty, a sum of money greater than £276 agreed to be paid; It is said now that that sum of money is a sum of money for which the Admiralty would have been liable in an event which has not in fact occurred; and to be a sum of money which directly represents a loss by the Admiralty occasioned by the wrongdoing of *The Minnetonka*. I think all these suggestions are not according to the real facts—that what really has happened is this, that the parties have put their heads together and come to some hypothetical figure not based upon fact, and not representing a direct loss or damage by the Admiralty in consequence of the wrongdoing act, and that therefore the Admiralty cannot make good this claim as against the owners of *The Minnetonka*. But there is something else, which, though not absolutely conclusive, is very important to be considered, and that is that this £276, if the Admiralty could make the owners of *The Minnetonka* pay it, would be payable to *The Uskmoor*, and the owners of *The Uskmoor* have already been paid all the loss they have sustained in consequence of the collision; and although it is possible to conceive a case where the owners of a ship may make a profit by the wrong-doing of the other party, in this case I think the owners of *The Uskmoor* would not be entitled to make such a profit, although, of course, that would not be answerable by the Admiralty if the Admiralty had undertaken, for good consideration, to pay a sum of money to *The Uskmoor*. In conclusion, it seems to me that this case fails, because it has not been made out in law or in fact to be a loss sustained by the Admiralty directly in consequence of the wrong-doing act of *The Minnetonka*. Therefore, my judgment must be against the appellants, and I confirm the report No. 1 of the registrar, and also report No. 2, with the result that those who have succeeded must have the costs of this appeal, and also of the second reference.

Solicitors for the Admiralty, *The Treasury Solicitor*.

Solicitors for the owners of *The Minnetonka*, *Pritchard & Sons*.

House of Lords.

From C. A. (England). May 16.

SAMUEL v. JARRAH TIMBER AND WOOD-PAVING CORPORATION. (a.)

Mortgage—Redemption action—Security for loan—Stipulation that mortgagee may purchase at fixed price within definite time—Clog on equity of redemption.

A stipulation in a mortgage that the mortgagee is to have the option of purchasing the whole or any part of the mortgaged security within a definite time is invalid, as a clog on the equity of redemption, and the rule applies to a mortgage by a company of its debenture stock.

Decision of the Court of Appeal (51 *W. R.* 439, [1903] 2 *Ch.* 1) *affirmed.*

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Appeal from an order of the Court of Appeal (Collins, M.R., Romer and Cozens-Hardy, L.JJ.) affirming the decision of Kekewich, J. (50 W. R. 601, [1902] 2 Ch. 479).

The facts are stated in the judgments.

P. O. Lawrence, K.C. (*J. W. Manning* with him), for the appellant.—The case is like *Reeve* v. *Lisle*, 51 W. R. 576, [1902] A. C. 461, and different from *Bradley* v. *Carritt*, 51 W. R. 636, [1903] A. C. 253. The stipulation amounts to an agreement to lend a further sum on specified terms. The appellant is entitled to damages, if not to specific performance: *South African Territories* v. *Wallington*, 46 W. R. 545, [1898] A. C. 309.

Warrington, K.C. (*Martelli* with him), for the respondents.—In *Noakes & Co.* v. *Rice*, 50 W. R. 305, [1902] A. C. 24, there was no interference with the right of redemption. This is at any rate an infringement of the doctrine "once a mortgage always a mortgage."

P. O. Lawrence, K.C., replied.

THE HOUSE took time for consideration.

Earl of HALSBURY, L.C.—I regret that in this case the state of the authorities leaves me no alternative than to affirm the judgment of Kekewich, J., and the Court of Appeal. A perfectly fair bargain made between two parties to it, each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened between the two parts of the arrangement, the fact of the bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced, but a line of authorities going back for more than a century has decided that such an arrangement as that which was here arrived at is contrary to a principle of equity, the sense or reason of which I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from.

Lord MACNAGHTEN.—By letter dated the 11th of of June, 1901, the appellant, Henry Samuel, offered to advance to the respondent company £5,000 at 6 per cent. upon the security of £30,000 first mortgage debenture stock of the company, subject to his having "the option to purchase the whole or any part of such stock at 40 per cent. at any time within twelve months." Other conditions were attached to the offer, but they are not material for the purpose of the present question. Then followed this provision: "The advance to become due and payable with interest at thirty days' notice on either side." The offer was accepted by the company. The stock was duly created and registered in Samuel's name. Within the period of twelve months, and before the company gave notice of intention to repay the advance, Samuel claimed to purchase the whole of the mortgaged stock at the agreed price. Thereupon the company brought this action, asking for redemption and a declaration that the option was illegal and void. Both Kekewich, J., and the Court of Appeal decided in favour of the company. Having regard to the state of the authorities binding on the Court of Appeal, if not on this House, it seems to me that they could not have come to any other conclusion, although the transaction was a fair bargain between men of business without any trace or suspicion of oppression, surprise, or circumvention.

It is, I think, unnecessary to consider what the true construction of the agreement between Samuel and the company may be. The result would have been precisely the same if the agreement had in terms declared that the option was not to continue after repayment. The law undoubtedly is that a condition such as that in question, if legal and binding at all, must come to an end on repayment of the loan.

In the Court of Appeal the question was treated as governed by the principle, of which *Noakes* v. *Rice* is a recent example, that on redemption the mortgagor is entitled to have the thing mortgaged restored to him unaffected by any condition or stipulation which formed part of the mortgage transaction. That principle, I think, is perfectly sound. But, in my opinion, the question here depends rather upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property. This latter rule, I think, is founded on sentiment rather than on principle. It seems to have had its origin in the desire of the Court of Chancery to protect embarrassed landowners from imposition and oppression. And it was invented, I should suppose, in order to obviate the necessity of inquiry and investigation in cases where suspicion may be probable and proof difficult. I gather from some general observations made by Lord Hardwicke in *Mellor* v. *Lees*, (1742) 2 Atk. 494, that he would have been disposed to confine the rule to cases in which the court finds or suspects "a design to wrest the estate fraudulently out of the hands of the mortgagor" and to cases of "common mortgage"—that is, as I understand it, mortgage of land by deed. It will be observed that in the later case of *Toones* v. *Consett*, (1745) 3 Atk. 261, which is often referred to for a statement of the rule, his lordship speaks only of "a deed of mortgage"—an instrument which perhaps rather lends itself to imposition; for no one, I am sure, by the light of nature, ever understood an English mortgage of real estate. In *Vernon* v. *Bethell*, 2 Eden 110, 113, Lord Chancellor Northington, then Lord Henley, laid down the law broadly in the following terms: "This court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency, will submit to any terms that the crafty may impose upon them." This doctrine, described by Lord Henley as an established rule nearly a hundred and fifty years ago, has never, so far as I can discover, been departed from since or questioned in any reported case. It is, I believe, universally accepted by text writers of authority. Speaking for myself, I should not be sorry if this House could have seen its way to modify it so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arm's length and negotiating on equal terms. The directors of a trading company in search of financial assistance are certainly in a very different position from that of an impecunious landowner in the toils of a crafty moneylender. At the same time, I quite feel the difficulty of interfering with any rule that has prevailed so long, and at present I am not prepared to differ from the conclusion at which the Court of Appeal has arrived.

I am therefore of opinion that the appeal must be dismissed with costs.

Lord LINDLEY.—The letter of the 11th of June, 1901, written by the defendant to the plaintiff company, contained an offer of a loan of £5,000 to the company upon certain terms, and this offer and the terms proposed were accepted by the company by their letter in answer dated the 14th of June, 1901.

These two letters constituted an agreement between the parties. The main provisions are as follows—namely, first, that the defendant should forthwith lend the company £5,000 at 6 per cent., redeemable on thirty days' notice by either party. Secondly, that the defendant should have as security £30,000 of the company's first mortgage debenture stock transferred to him. Thirdly, that the directors of the company should elect a nominee of his on their board. Fourthly, that the defendant should have the option of purchasing the whole or any part of such stock at 40 per cent. at any time within twelve months. Fifthly, that he should have a further option—namely, in the event of the company at any time raising further capital or selling its undertaking for shares or stocks of another company, the defendant should have the option of underwriting the taking up of such new capital, or shares, or stocks at a commission of 10 per cent.

The first question is, what is the true nature of this agreement? Is it a mortgage with an option to purchase, or is it a conditional sale? Or is it an agreement giving Samuel an option to hold the debenture stock as a mortgage or a purchase? It appears to me to be clearly a mortgage with an option to purchase. A loan of £5,000 on security was what the company wanted, and what Samuel agreed to let the company have on terms. They were not bargaining for anything else. As soon as the £5,000 was advanced, and the debenture stock was placed at Samuel's disposal. he was in the position of mortgagee of that stock. He had the rights of a mortgagee, and the company had the rights of a mortgagor. There was that reciprocity and mutuality of remedies which distinguish a mortgage transaction from a conditional sale from other transactions more or less resembling a mortgage, but not really constituting a mortgage. The transaction was, in my opinion, a mortgage, *plus*, amongst other things, an option to purchase, which, if exercised by the mortgagee, would put an end to the mortgagor's right to redeem—that is, would prevent him from getting back his mortgaged property. This was the view taken by Mr. Justice Kekewich, and by all the members of the Court of Appeal, and I am unable myself to view the transaction differently.

In *Lisle* v. *Reeve*, [1902] 1 Ch. 53, Buckley, J., suggested some instances in which he considered a mortgagee might validly stipulate for an option to buy the equity of redemption; but although his decision was affirmed first by the Court of Appeal and afterwards by this House—*Reeve* v. *Lisle*—the affirmance proceeded entirely on the fact that the agreement to buy the equity of redemption was no part of the original mortgage transaction, but was entered into subsequently, and was an entirely separate transaction to which no objection could be taken. It is plain that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the original mortgage. The Irish case, *In re Edwards' Estate*, (1861) 11 Ir. Ch. Rep. 367, is to the same effect.

I cannot help thinking that both parties intended that the two options to purchase the £30,000 debenture stock and to underwrite further capital or debenture stock, if issued, were to be exercisable even after payment off of the £5,000. But the decision of this House in *Noakes* v. *Rice* and *Bradley* v. *Carritt* conclusively show that, whatever might have been intended, Samuel could not have been entitled to exercise either option after payment of his loan. But these decisions, and the previous decision of *Salt* v. *Northampton* (*Marquis*), 40 W. R. 529, [1892] A. C. 1, emphatically recognize the old doctrine, "once a mortgage always a mortgage," which is too well settled to be open to controversy. Lord Hardwicke said, in *Toomes* v. *Conset*: "This court will not suffer, in a deed of mortgage, any agreement in it to prevail, that the estate become an absolute purchase in the mortgagee upon any event whatsoever." But the doctrine is not confined to deeds creating legal mortgages. It applies to all mortgage transactions. The doctrine "once a mortgage always a mortgage" means that no contract between a mortgagor and a mortgagee, made at the time of the mortgage and as part of the mortgage transaction—or, in other words, as one of the terms of the loan—can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid, and is inconsistent with the transaction being a mortgage. The principle is fatal to the appellant's contention if the transaction under consideration is a mortgage transaction, as I am of opinion it clearly is.

Then it was contended that, as the property mortgaged was debenture stock issued by a limited company, the case did not fall within the principle to which I have been referring. I confess my inability to follow the argument on this point. Debenture stock is usually a sum of money charged on the assets of the company issuing it. It may be redeemable or irredeemable, in which case it is not a mortgage at all. But whether redeemable or irredeemable, it is capable of being made a security for money lent upon it. It can be mortgaged as well by the company which issues it as by an ordinary holder. I can discover no reason for treating a mortgage of debenture stock as something so different from other mortgages as to render the principle "once a mortgage always a mortgage" inapplicable to it.

In my opinion the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Dale, Newman, & Hood.*

Solicitor for the respondents, *H. Percy Becher.*

Court of Appeal.

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) — July 18.

MILLETT *v.* BALLARD. (*a.*)

County court—Appeal—Action of ejectment—Action for recovery of tenements—Premises of annual value not exceeding £20—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 59, 120, 138, 139.

An appeal lies from the county court to the High Court in all actions of ejectment on title, as distinguished from actions by landlords against tenants for the recovery of tenements under sections 138 *and* 139 *of the County Courts Act,* 1888, *even though the annual value of the premises does not exceed* £20.

Earl of Shrewsbury *v.* Garfield, 60 *L. J. Q. B.* 765, 40 *W. R. Dig.* 63, *overruled.*

Appeal from a decision of a Divisional Court (Lord Alverstone, L.C.J., and Kennedy and Phillimore, JJ.), in an appeal from a county court.

The question was whether an appeal lies to the High Court from the judgment of a county court in an action of ejectment where the annual value of the land does not exceed £20.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The action was brought in the Wandsworth County Court for a declaration that the plaintiff was entitled to the possession of a piece of land for a term of years granted by an indenture of lease dated the 22nd of December, 1898. The plaintiff also claimed possession of the piece of land.

By the said indenture the defendant had demised to one Harry Marchant the house and premises called "Dunraven," situate in Oakdale-road, Streatham, in the county of Surrey, having a frontage on the said road of 24 ft., or thereabouts, for the term of ninety-nine years from the 25th of December, 1898.

By virtue of various mesne assignments, and ultimately by an indenture dated the 12th of July, 1903, the term of years became vested in the plaintiff for the residue of the term.

The defendant was owner and occupier of premises adjoining "Dunraven" and also fronting on Oakdale-road. The piece of land in question was a narrow strip of land on the boundary between "Dunraven" and the defendant's premises, having a frontage of three feet, or thereabouts, on Oakdale-road.

The plaintiff alleged that the said piece of land was part of the premises demised by the indenture of the 22nd of December, 1898, and that the defendant had wrongfully taken possession of it and fenced it in.

The annual value of the piece of land did not exceed £20.

The county court judge gave judgment for the plaintiff, and no leave to appeal was granted by him.

The defendant appealed to the Divisional Court.

The plaintiff took the preliminary objection that by section 120 of the County Courts Act, 1888, no appeal lay without the leave of the county court judge.

The Divisional Court, on the authority of *Earl of Shrewsbury* v. *Garfield*, 60 L. J. Q. B. 765, 40 W. R. Dig. 63, allowed the objection, and dismissed the appeal, but gave leave to the defendant to appeal to the Court of Appeal.

J. Eldon Bankes, K.C. (*S. G. Lushington* with him), for the defendant.—The defendant had an absolute right to appeal to the High Court without any leave from the county court judge. The question depends on the true construction of section 120 of the County Courts Act, 1888. That section begins by saying that any party to a county court action who is dissatisfied with the determination of the county court judge on any point of law may appeal therefrom to the High Court subject to certain conditions as to giving notice or otherwise. There then follows this proviso: "Provided always, that there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed twenty pounds, nor in any action of replevin where the amount of rent or the damage or value of the goods seized does not exceed twenty pounds, nor in any action for the recovery of tenements where the yearly rent or value of the premises does not exceed twenty pounds . . . unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal." The first part of that proviso is not accurately expressed. It speaks of "any action of contract or tort other than an action of ejectment." An action of ejectment is not an action of either contract or tort. But if the words "other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question" are read as being in a parenthesis, then the meaning seems to be fairly clear, viz., that an appeal shall not lie in an action of contract or tort where the debt or damage claimed does not exceed £20, but that in an action of ejectment an appeal shall lie. The words in the parenthesis are an exception to an exception. The words in the third clause of the proviso, "any action for the recovery of tenements," have a special meaning and do not cover actions of ejectment. They refer to the two classes of cases dealt with by sections 138 and 139 of the Act—viz., actions brought by landlords against tenants to recover possession of small tenements where either the term has expired or been determined by notice, or the rent has been in arrear for half a year. A distinction has been drawn in all the County Courts Acts between actions of ejectment and actions by landlords against tenants to recover possession of small tenements. In the original County Courts Act of 1846, jurisdiction in ejectment was expressly excluded by section 58, while jurisdiction to entertain actions by landlords against tenants to recover possession of small tenements on the expiration of the term was given by section 122. The County Courts Act, 1850, while extending the general jurisdiction from £20 to £50, by section 1 preserved the exclusion of ejectment, and a right of appeal was given for the first time by section 14. The distinction drawn in the original Act between the two classes of actions, viz., actions of ejectment and actions to recover possession of small tenements, was thus preserved, and was further maintained in the County Courts Act, 1856, which, by section 25, gave jurisdiction by consent of the parties in actions involving questions of title, and by sections 50 and 52 gave jurisdiction in actions by landlords against tenants to recover possession of small tenements where the term had expired or been determined by notice, or the rent had been in arrear for half a year, and by section 68 gave an appeal in all actions for the recovery of tenements where the yearly rent or value of the premises exceeded £20. The County Courts Act, 1867, by section 11, for the first time gives jurisdiction in ejectment, and by section 13 allowed an appeal in all actions of ejectment. The County Courts Act, 1888, which has repealed all the earlier Acts and has consolidated the law, continues the distinction which has been drawn throughout the legislation, dealing with actions of ejectment in section 59, and with actions for recovery of possession of small tenements in sections 138-145. The distinction is further emphasised in the County Court Rules, 1903, ord. 5, r. 3. The proper way of construing section 120, therefore, is to read the words "any action for the recovery of tenements" in the narrow sense of any action in which a landlord seeks to recover possession of premises from a tenant where the term has been determined or rent is in arrear, and to read the first clause of the proviso as giving in all actions of ejectment properly so called an absolute right of appeal without any limitation. The case of *Earl of Shrewsbury* v. *Garfield* was wrongly decided.

Montague Shearman, K.C., and *H. B. D. Woodcock*, for the plaintiff.—This is an action for the recovery of a tenement. There is no ground for the distinction attempted to be drawn between an action of ejectment and an action for the recovery of tenements. The word "tenements" is used in section 59 of the Act of 1888, which deals expressly with actions of ejectment. It occurs twice in the collocation "lands, tenements, or hereditaments." Lower down in the section the expression "lands or hereditaments" is used, but the meaning must be the same. The word "tenements" is generally understood as being a word of the widest possible import in real property law, and as being equivalent to lands. Section 120 does not give an absolute right of appeal in any class of action. In actions of contract, tort, and ejectment alike it gives only a qualified right of appeal.

COLLINS, M.R.—This is an appeal from the decision of a Divisional Court on an appeal from the judgment of a county court in an action of ejectment. The question arose whether an appeal lay as a matter of right from the county court judge to the High Court. The court below felt themselves bound by a previous decision of a Divisional Court in the case of *Earl of Shrewsbury* v. *Garfield*. In that case it was decided that "no appeal lies to the High Court, without leave, from the decision of a judge of a county court in actions for the recovery of tenements, whether the parties be landlord and tenant or otherwise, or whether the title to such premises be in question or not, where the yearly rent or value thereof does not exceed £20." The court below, though it appears from their language that they did not altogether assent to the principle of that case, nevertheless felt themselves bound by its authority. They accordingly dismissed the defendant's appeal on the preliminary objection taken by the plaintiff that no appeal lay, and gave the defendant leave to appeal on that point to this court. The contention on the part of the defendant is that throughout the whole course of county court legislation a distinction has always been observed between, on the one hand, actions of ejectment on title or actions in which the title to hereditaments is concerned, and, on the other hand, actions for recovery of small tenements involving disputes between landlord and tenant in cases where either the term has expired, or a half year's rent has become in arrear. The County Courts Act, 1888, repeals all the earlier County Courts Acts, and consolidates the law on the subject. Section 120 is in these terms:—"If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court. Provided always that there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed £20, nor in any action of replevin, where the amount of rent or the damage or value of the goods seized does not exceed £20, nor in any action for the recovery of tenements, where the yearly rent or value of the premises does not exceed £20, nor in proceedings in interpleader where the money claimed or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed £20, unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal." If we have regard to that section alone, which now regulates the right of appeal from the county court, it seems to me that, according to the natural construction of that section, actions of ejectment, and actions in which the title to any hereditament is called in question, are excepted out of legislation, which limits the right of appeal to cases in which more than a certain amount of value is involved. If that exception is created by the words "other than an action of ejectment, or an action in which the title to any corporeal or incorporeal hereditament shall have come in question," what interpretation ought to be put on the subsequent words referring to actions for the recovery of tenements where the yearly rent or value of the premises does not exceed £20? They can only be read as referring to something different from what has been already dealt with as actions of ejectment; for it is obvious that a distinction is intended to be made between the two classes of actions. The statute excepts actions of ejectment from the rule limiting the right of appeal, while with regard to the other class of actions it makes a special provision depending on the amount of the value involved. *Primâ facie*, then, an action of ejectment such as the present, which is simply an action of ejectment on title, is not covered by the words as to actions for recovery of tenements, and in the case of an action of ejectment properly so called there is a right of appeal which is absolute and unfettered by conditions. But the matter does not stop there. We are entitled to look at the earlier County Courts Acts to see if this *primâ facie* view is borne out by any provisions to be found in them, and we may also derive assistance from the County Court Rules, which, though not a part of the Act, are a contemporaneous exposition of the law framed by qualified experts and confirmed by the highest authority. Ord. 5, r. 3, of the County Court Rules, 1903, adopts the distinction I have referred to. It is as follows: "Actions brought to recover possession of tenements under the provisions of section 138 or section 139 of the Act shall be distinguished as actions for the recovery of possession, and actions brought under section 59 of the Act shall be distinguished as actions of ejectment. It was pointed out that section 59 uses the word "tenements" twice. That is true, though lower down it speaks of "lands and hereditaments" only. But at any rate, the rule draws a distinction between the two classes of cases, those under section 59 and those under sections 138 and 139. And, further, when we look at the sections in the Act itself, we see that sections 138 and 139 come under the heading "Replevin: Recovery of Tenements," whereas section 59 is in a group of sections headed "Jurisdiction and Law." If we pass to the earlier legislation, for which the present is a substitute, we find what I have stated to be the *primâ facie* view confirmed. In the County Courts Act of 1846 jurisdiction in ejectment properly so called was excluded altogether, but provision was made for the recovery of possession of small tenements in cases where a tenant held over after the legal determination of his tenancy. The Act of 1856 extended this provision to cases where a landlord had a right by law to re-enter and obtain possession on the ground of non-payment of rent. Ejectment properly so-called was introduced for the first time in the Act of 1867, and the distinction between the two classes of cases was maintained. That Act gave an appeal on a point of law in all actions of ejectment, whereas under the Act of 1856 there was a special provision limiting the right of appeal in actions for the recovery of tenements to cases where the yearly rent or value of the premises exceeded £20. It is not necessary to go in detail through all the provisions of the earlier Acts. But the conclusion seems to me to be clear that, when the Legislature came to enact section 120 of the Act of 1888, they were dealing with what were then two well-known classes of actions—viz., actions of ejectment and actions for recovery of tenements, and that, having at the beginning of the proviso excluded actions of ejectment from the rule limiting the right of appeal, they did not intend by the subsequent words as to recovery of tenements to deal again with the class of actions which they had already excluded. The appeal must therefore be allowed.

STIRLING and MATHEW, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiff, *James White & Leonard.*

Solicitors for the defendant, *Bramall & White.*

From K. B. Div. (Collins, M.R., and Stirling and Mathew, L.JJ.) June 28.

GARBUTT v. STANDING JOINT COMMITTEE, &c., OF DURHAM. (a.)

Police—Pension—"Approved service"—Continuous service—Police Act, 1890 (53 & 54 *Vict. c.* 45), *s.* 1.

By section 1 *of the Police Act,* 1890, "*every constable in a police force* (a) *if he has completed not less than twenty-five years approved service . . . shall . . . be entitled without a medical certificate to retire and receive a pension for life.*"

Held (*by* Collins, M.R., *and* Stirling, L.J., Mathew, L.J., *dissenting*), *that* "*approved service*" *means continuous service, and that, therefore, in computing the period of twenty-five years, separate and broken periods of service cannot be added together.*

Judgment of the Divisional Court (ante, *p.* 527, [1904] 1 *K. B.* 522) *affirmed.*

Appeal from the judgment of a divisional court upon a case stated by the quarter sessions for the County of Durham upon an appeal by the appellant, a retired police constable, against the refusal of the Standing Joint Committee of the County to grant him a pension under the provisions of the Police Act, 1890.

The case is reported *ante*, p. 527, [1904] 1 K. B. 522, where the facts are set out.

The Divisional Court held that the "approved service" of a police constable within section 1 of the Police Act, 1890, to entitle him to a pension, must be continuous service, and they therefore dismissed the appeal.

June 25, 27.—*Pickersgill* and *J. A. Johnston* (*Simey* with them), for the appellant.—Section 1 (*a*) of the Police Act, 1890, gives a constable a right to a pension after "twenty-five years approved service." The section does not say that the service must be continuous. The certificate given under section 4 states that the appellant has had approved service for over twenty-five years. The Legislature could easily have said that the service must be continuous if they had intended it to be so. Words ought not to be imported into statutes (per Patteson, J., in *King* v. *Burrell*, 12 A. & E. 460, at p. (468 unless, without such introduction, something manifestly absurd or repugnant would follow: per Parke, B., in *Williams* v. *Roberts*, 1 Cr. M. & R. 676, at p. 680; *Grey* v. *Pearson*, 5 W. R. 454, at p. 460, 6 H. L. 61, at p. 106; *Hough* v. *Windus*, 32 W. R. 452, at p. 454, 12 Q. B. D. 224, at p. 229. Here nothing absurd or repugnant will follow by not importing into section 2 words which are not there. It is said that other sections of the Act show that service in section 1 must be construed as meaning continuous service. It would be wrong to go through the Act minutely for the purpose of seeing whether there is not some section which is unnecessary if the view contended for the appellant is correct. Any such sections may have been inserted *ex abundanti cautelâ* to meet what was felt to be a very common case. For instance, section 4, sub-section 4, deals with the case of a constable moving from one police force to another; and sub-section 5 with the case of a constable who is in the army reserve and is called out for training or service; and section 5, sub-section 5, deals with the case of a constable being incapacitated for duty. In those cases the Legislature made provision *ex abundanti cautelâ* so as to prevent the right to a pension being affected. Moreover, section 4, sub-section 5, is not merely surplussage, because it says that "on returning to the police force" the constable shall be entitled to reckon his approved service before he was called out, thus giving him a right to return to the force. So also section 5, sub-section 5, is not entirely superfluous, because it entitles a constable to reckon the period of the break as part of his approved service. It would be a dangerous mode of construction to rely upon isolated provisions to control and alter the unambiguous language of the section which confers the right. The decision in *Walker* v. *Simpson*, [1903] A. C. 208, 51 W. R. Dig. 115, supports this view. Under the former Acts—3 & 4 Vict. c. 88, s. 11, as to county police, and 22 & 23 Vict. c. 32, s. 9, as to borough police—continuous service was not necessary to entitle a constable to a pension. This latter Act repealed 11 & 12 Vict. c. 14, s. 2, which made continuous service necessary, the Legislature thus showing that continuous service was unnecessary. Further, even if service must be continuous, the appellant was an "existing constable" within section 30, sub-sections 8, 9, of the Police Act, 1890, whose rights were preserved to him by section 36, sub-section 2. Secondly, the respondents, by placing the appellant in the long and faithful service class (which according to the Durham police regulations means twenty years' service) more than five years before he retired, are estopped from saying that his service is not sufficient to entitle him to a pension. Thirdly, the certificate is conclusive evidence that the appellant's service was diligent and faithful service. Section 4, sub-section 2, says that the certificate is to be "sufficient evidence." That means conclusive evidence: *Board of Trade* v. *Sailing Ship Glenpark* (*Limited*), 51 W. R. 554, [1903] 2 K. B. 324. This point was not decided in the Court of Appeal (1904, 1 K. B. 682). The certificate was the certificate of the police authority, as it was given under a general authority conferred by them. *Barraclough* v. *Greenhough*, 15 W. R. 934, L. R. 2 Q. B. 612, and *Hewitt* v. *Taylor*, 44 W. R. 431, [1896] 1 Q. B. 287, depended upon the special provisions of the Acts there under consideration.

Montague Shearman, K.C., and *Meynell*, for the respondents.—The word "service" in section 1 of the Act of 1890 is capable of meaning continuous or non-continuous service. That being so, one can look at other sections of the Act to see which meaning is the true one: per Lord Herschell in *Colquhoun* v. *Brooks*, 38 W. R. 289, at p. 291; 14 App. Cas. 493, at p. 506. Section 4, sub-section 4, and section 21, allow broken service to count in the case of a police constable removing from one force to another. Section 4, sub-section 5, deals with a meritorious class of constables, namely, those in the army reserve, and makes an exception in their favour. So also section 5, sub-section 5, makes an exception in the case of constables who are incapacitated for duty. The special provisions show that section 1, which is the general enacting action, refers to continuous service. Where the Legislature intended that the service need not be continuous, it said so: see the Political Offices Pension Act, 1869 (32 & 33 Vict. c. 60), s. 4; and the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50) s. 4. Secondly, the certificate is not conclusive. By section 4, sub-section 1, the police authority—which by section 33 and schedule 3 means, in the case of a county, the standing joint committee of the quarter sessions and the county council—has to certify as to the approved service, and by sub-section 2 the chief officer of the police—that is, the chief constable—has merely to certify as to the period of service. The certificate of the chief constable only gives the period of service

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

after making the requisite deductions. He has only to work out the arithmetical calculation. The police authority are the proper persons to give a certificate of "approved service." If the chief constable's certificate were conclusive, then section 10 would be rendered nugatory. The word "sufficient" means *primâ facie* sufficient: *Barraclough* v. *Greenhough*; *Reg.* v. *Fordham*, 22 W. R. 85, L. R. 8 Q. B. 501; *Hewitt* v. *Taylor*. The onus of proof is merely shifted. The decision of Bigham, J., in *Board of Trade* v. *Sailing Ship Glenpark (Limited)*, is the only decision in which the words "sufficient evidence" were held to mean conclusive evidence, and that decision ought not to be followed. When the case was in the Court of Appeal the point was not decided, but the court did not indicate any approval of the decision upon that point. With regard to the former Police Acts, a police constable before the Act of 1890 had no right to a pension. The police authority, if they thought fit, might grant him one. The Police Act, 1890, gave a constable a right to a pension subject to certain conditions. The judgment of the Divisional Court was therefore right.

Pickersgill replied.

June 28.—COLLINS, M.R.—This is an appeal upon a case stated by quarter sessions, and it raises two questions. The first question raised is whether the service, to entitle a constable to a pension, must be continuous service. The second question is whether the certificate is conclusive so as to debar the police authority who wish to impugn it from giving evidence to the contrary of it. The first question turns upon the construction of the Police Act, 1890. The Divisional Court have held that the appellant is not entitled to a pension, upon the ground that the Act contemplates continuous service as a condition entitling a constable to a pension, and that in the present case the service was not continuous. There were several breaks in the appellant's service, but in the aggregate his period of service did extend to that specified in section 1 (*a*) of the Act—namely twenty-five years' service. The question turns, in the first instance, upon section 1 (a) of the Act. It was contended before the Divisional Court, and before this court that that section in itself and upon its face means that the twenty-five years' approved service need not be continuous service, inasmuch as it speaks merely of "twenty-five years' approved service." It was said that twenty-five years' service is, on the face of the section, sufficient, and that it is not a mode of construction to spell out of other sections of the Act some conclusion which will contradict that which is contended to be the proper meaning of the section. Now, in the first place, I cannot assent to that interpretation of section 1. In my opinion the section is at the utmost equally consistent with continuous or non-continuous service. But I go further and say that *primâ facie* continuous service is what is meant. It is, however, not necessary to go so far as that, because it cannot, in my opinion, be properly put higher than this, that the language of the section is consistent with broken service. That being so, I am entitled to look at other provisions in the Act to see if they throw any light upon the section in question. Even without any authority, it is clear that I am so entitled, because the provisions of the Act have to be construed together. But the ingenuity of counsel has found an authority—namely, the opinion of Lord Herschell in *Colquhoun* v. *Brooks*—which shows that one is entitled to look at other sections of the Act in order to see what meaning is to be placed upon the substantive section, if there is any doubt about its meaning. There is a series of other sections in the Act which seem to me to throw light upon section 1. It is not necessary to go through them again and to repeat the arguments derived from them, as that was fully done in the judgment of the Lord Chief Justice in the Divisional Court, which was concurred in by the other members of the court. No doubt Kennedy, J., had some misgivings upon the subject, but at the end of his judgment he states that he is not prepared to dissent from the view expressed by the other members of the court. Putting the matter shortly, there are some four or five sections, all of which, in my judgment, as in that of the court below, start from the standpoint that the service, to entitle a constable to a pension, must be unbroken service—a series of provisions dealing with special conditions under which service that is broken may count for a pension. I am quite unable to explain or to account for that series of provisions by what was suggested—namely, that they were inserted *ex majora cautelâ*, an argument which possibly might be good if there were only one such provision. There are four or five such provisions, all of which start from the standpoint that *primâ facie* a break in the service is fatal, and all of which are framed with the view of mitigating that hardship in particular circumstances. If the primary enactment had contained a clear statement that twenty-five years' broken service was as effective as twenty-five years' continuous service, not one of those provisions would be needed. The only way in which I can account for those sections is that upon its true construction the primary enactment means that that the service, to entitle a constable to a pension, must be continuous service. The Lord Chief Justice went through those sections, and it would be a waste of public time to do it again. I may add one observation as to the argument based upon the former legislation. It seems to me that that argument does not assist us at all. The Police Act, 1890, was a new departure, and for the first time gave a constable a right to a pension which before was in the nature of a gratuity in the discretion of the police authority. The Act of 1890 was a new departure, and must be construed by itself. In my opinion the appeal fails.

STIRLING, L.J.—I am of the same opinion. I confess that I share to a considerable degree the doubts and regrets expressed by Kennedy, J., in the Divisional Court. But I, like him, have come to the conclusion that I ought not to differ from the Divisional Court. I think that the language of section 1 (*a*) of the Police Act, 1890, is consistent with either of the views pressed upon us—that is to say, that the words "not less than twenty-five years' approved service" may mean either continuous or non-continuous service. In that state of things I am entitled, and I think bound, to look at the rest of the Act to see if any light is thrown by the subsequent sections upon the meaning of section 1. That being permissible, section 4, sub-section 5, seems to me to be very important, and it is impossible to explain it except upon the view that the Legislature had in their minds the necessity for the service being continuous. It seems to me that the same is true, though in a less degree, of section 5, sub-section 5, and section 21.

MATHEW, L.J.—I regret that I am unable to agree with the conclusion arrived at both by the Divisional Court and by the Master of the Rolls and my brother Stirling. I am, however, somewhat consoled, if I may use that term, because I gather from the judgment of Stirling, L.J., that he shares the doubts expressed by Kennedy, J., in the Divisional Court. It seems to me that it would be defeating the obvious intention of the Legislature if we were to treat the service specified in section 1 (*a*) of the Act of 1890 as continuous service. If section 1 (*a*) had stood alone, I cannot think that the service must be continuous. If

it stood alone, could it be said that a man who was absent owing to illness would be debarred from claiming a pension by reason of the break? How can a man serve as a constable day and night without rendering himself subject to the ordinary misfortunes of humanity? The Act was framed to afford additional security to police constables in the matter of pensions. Before the Act a police constable was not entitled to a pension, though the police authority, in their discretion, might have awarded him one. No doubt the police authority did their best to exercise their discretion fairly. But it was felt desirable that the matter should be placed on a proper footing, and that their refusal of a pension should be subject to appeal, and the Act gave such an appeal to quarter sessions. The object of the Act was to secure pensions to police constables when they had served the specified time. Why should such service be continuous? In the present case the first break occurred in 1881, when the constable resigned and was reinstated a few months afterwards. He resigned again in 1889, served until 1902, when he resigned as he was entitled to do. Why should he be punished for it? Why should it be imputed to the Legislature that they intended to deprive him of his deferred pay—because a pension was merely deferred pay—upon the ground that his twenty-five years' service was not continuous? The constable may have been a perfectly efficient officer before he resigned, and he may come back again and be an efficient officer afterwards, and serve efficiently for several years. Why should he lose his pension because of the break in his service? I turn to the Act of Parliament. An argument was based upon the later sections of the Act. It seems to me that a critical examination of sections of that kind would not do justice to the object of the Legislature. Section 1 is the first important section. That seems to me to be clear language, requiring approved service and approved service only. It is said that that section should be construed as if it made it a condition that the service should be both approved and continuous. I cannot gather any such intention from the language. It is, however, said that light is thrown upon the section by subsequent sections. I agree that in construing an Act we must try to construe all the sections together. The first material section is section 4. The first part of sub-section 1 does not seem to contemplate the necessity of the service being continuous. Then comes the definition of "approved service," and by sub-section 2, upon receiving the certificate therein specified, the constable can apply for a pension. Reliance was placed upon sub-sections 4 and 5. It was said that those sub-sections ought to be read as a proviso on section 1, and that they show that it is reasonable to introduce the words "if continuous" into the section. I cannot read them thus. It seems to me that they were introduced *alio intuitu* without any intention to affect the substantive enactment. Sub-section 4 deals with the removal of a constable from one police force to another, and provides that service of not less than three years in each police force is to count for a pension. As there is a different police force for each county or district, that provision is absolutely necessary when a constable removes from one police force to another. It ought not to be treated as a proviso on section 1. That is made clear by section 15, sub-section 2. Much the same may be said of sub-section 5. That sub-section provides that a constable who is in the army reserve and is called out for training or permanent service, on returning to the police force after the end of such training or service, may reckon any approved service which he was entitled to reckon at the commencement thereof. That sub-section indicates that the constable will, at the end of the training or service, be entitled to resume his place in the police force subject to all his rights. That sub-section does not seem to me to throw any light upon the question whether the service, to entitle a constable to a pension, must be continuous. It does not, to my mind, qualify section 1. Nor does section 10 seem to me to affect the question whether the service specified in section 1 must be continuous. It must be read with section 11, and does not qualify section 1. Section 5 deals with the case of a constable becoming incapable of performing his duty and the grant to him of a pension in consequence. Sub-section 3 of that section provides that in such a case the police authority shall at stated times satisfy themselves that the incapacity continues; and by sub-section 4, in the event of the incapacity ceasing before the time at which the constable would, if he had continued to serve, have been entitled without a medical certificate to retire and receive a pension for life, the police authority may cancel his pension and require him to serve again in the police force. That is an important provision. Looking at that sub-section alone, is the constable, when he becomes entitled to retire, and has served for a period sufficiently long to entitle him to a pension, to lose his pension because of a break in his service? There is no indication in that sub-section of an intention that such a result should follow. Sub-section 5 deals with the same subject-matter. If a constable is called on under sub-section 4 to serve again, it is obvious that his previous period of service ought to count towards a pension, and accordingly sub-section 5 was inserted to meet that special case. Then section 21 was relied upon by the respondents. That section merely provides for the return to the constable of the rateable deductions which have been made from his pay if he leaves a police force without a pension or gratuity, subject to an exception in the case of a constable who can reckon his approved service in the force from which he is removed. That section does not seem to me to affect the natural construction of section 1. Section 36, sub-section 2, seems to support the view which I take of section 1. Looking at all the sections of the Act I do not think that the "approved service" in section 1 need be continuous service. In my opinion the appeal should be allowed. I will only add that to my mind legislation is needed in view of the construction which is now placed on the Act.

COLLINS, M.R.—I ought to have stated that it is not necessary to express any opinion as to the conclusiveness of the certificate, but I may say that I am not at all satisfied that the words "sufficient evidence" means conclusive evidence.

STIRLING, L.J.—I agree.

MATHEW, L.J.—So do I.

Appeal dismissed.

Solicitors for the appellant, *Bell, Brodrick, & Gray*, for *A. Geipel*, West Hartlepool.

Solicitors for the respondents, *Maude & Tunnicliffe*, for *L. S. Iliff*, Sunderland.

From Chan. Div.
(Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.) June 25.

In re ALLEN AND DRISCOLL'S CONTRACT. (a.)

Local government—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Expenses incurred by local authority—Charge upon premises—Date of charge—Completion of works—Vendor and purchaser.*

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Expenses incurred by a local authority for works executed in a street after notice to the owners of adjoining premises only became a charge on the premises within section 257 of the Public Health Act, 1875, on the completion of the works, and not on the date on which the local authority enter into a binding contract for their execution.

Nor do such expenses, by reason of the notice, constitute an incumbrance on the premises so as to prevent a vendor, who conveys the property after the notice but before the completion of the works, making a good title free from incumbrances.

Decision of Byrne, J. (ante, *p.* 392), *affirmed.*

This was an appeal from a decision of Byrne, J. (reported *ante* p. 392, [1904] 1 Ch. 473) on a vendor and purchaser summons, which raised the question at what date expenses incurred by a local autnority in paving a street adjoining certain houses became "a charge on the premises in respect of which they were incurred" under section 257 of the Public Health Act, 1875.

The material facts were as follows:

By an order of the 22nd of July, 1903, made in an action, *Allen* v. *Driscoll*, the defendants were ordered to pay to the defendants, on or before the 29th of September, 1903, the sum of £4,440 in settlement of the purchase money and interest due in respect of eleven leasehold houses in Rusthall-avenue, Acton, Middlesex, the plaintiffs by their counsel undertaking to make a good title to the said leasehold houses and to assign the same to the defendants, the defendants by their counsel undertaking to accept the leasehold houses so assigned in their present condition; and the plaintiffs were to receive the rents and pay the outgoings in respect up to the said 29th of September, 1903.

In February, 1903, the Urban District Council of Acton had sent notices to the vendors, as owners and occupiers of the said houses in Rusthall-avenue, to sewer, level, and pave the part of the street which adjoined the houses within five weeks of the date thereof.

These notices were not complied with, and on the 13th of July, 1903, the council entered into an agreement with a firm of contractors to execute the paving works in question at a certain sum.

The whole of the work specified in the notices was not completed by the 29th of September, the carriage-way in front of the said eleven houses requiring a further three-inch layer of flints to be laid and rolled, and no apportionment of expenses in respect of the eleven houses had been made at this date or subsequently,

The purchasers took out the present summons asking for a declaration that the vendors were liable to pay and indemnify them against the amount, when apportioned, of the expenses incurred by the local authority.

Byrne, J., held that the expenses were not incurred by the local authority before the completion of the work, and consequently did not become a charge upon the houses under section 257 of the Public Health Act, 1875, till that date. He accordingly dismissed the summons.

The purchasers appealed.

Cozens-Hardy, for the appellants, cited *Tottenham Local Board* v. *Rowell*, 29 W. R. 36, 15 Ch. D. 378; *Mayor of West Ham* v. *Grant*, 40 Ch. D. 331, 37 W. R. Dig. 113; *Bettesworth* v. *Richer's Contract*, 36 W. R. 544, 37 Ch. D. 535; *Stock* v. *Meakin*, 48 W. R. 420, [1900] 1 Ch. 683; *In re Highett and Bird's Contract*, 51 W. R. 227, [1903] 1 Ch 287; *Tubbs* v. *Wynne*, [1897] 1 Q. B. 74, 45 W. R. Dig. 168; *Boor* v. *Hopkins*, 37 W. R. 349, 40 Ch. D. 572.

Norton, K.C., and Ashton Cross, for the respondents, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—The question here is at what date the expenses incurred by the local authority under the Public Health Act, 1875, in the execution of paving and other works required to be done to comply with section 150, first becomes a charge on the premises in respect of which they were incurred within the meaning of section 257. There are other points, but I will deal with these later. This is the first point: Byrne, J., held that this expense first became a charge from the date of the completion of the works, and it has been suggested upon the cases that that judgment of Byrne, J., is wrong.

Now the date which was fixed in this contract for completion was the 29th of September, and in February of the same year notices under the Public Health Act, 1875, s. 150, to pave were served upon the vendors by the Acton Urban District Council. Default having been made in complying with this notice, the urban district council, on the 7th of July, 1903, entered into an agreement with a contractor for the execution of the works specified in the notice. The whole of the works specified in the said notice were not completed by the 29th of September. That is, they were not completed by the date fixed for completion, and that date is important also because it was the date up to which the vendors were to receive the rents and to pay the outgoings. Now, it is common ground here that these works comprised in these notices had not been completed when the time for completion of the contract had arrived. If the rule is that the charge under the 257th section of the Act of 1875 does not arise until the completion of those works, then, apart from any question which was raised as to "outgoings" in this case, it is plain that the vendor is not liable to bear the expenses, but the purchaser must bear them.

I do not propose to go into the cases upon this point. I entirely agree with the judgment of Byrne, J., and it is sufficient to say that I agree with him not only that it was laid down in *Stock* v. *Meakin* that the date when the charge arises is the date of the completion of the works, but I agree with him, further, that there are a series of cases, beginning with the *Tottenham Local Board* v. *Rowell*, agreeing with *Stock* v. *Meakin* and *Surtees* v. *Woodhouse*, 51 W. R. 275, [1903] 1 K. B. 396, in which it is laid down that the date of the arising of the charge is the date of the completion of the works.

Now counsel for the appellants has said, and I think to a certain extent he was right in saying, that the exact point of the date of the arising of the charge did not expressly arise in any one of these cases. It seems to me, in each of the cases, and certainly in *Stock* v. *Meakin*, it clearly was essential to that which the court had to determine to ascertain this; then in *Stock* v. *Meakin* the suggestion was that the charge did not arise until the issue of what was called under the particular Act of Parliament the notice of the urban authority. It was held that that was not so, and that it arose at an earlier period. What was the earlier period at which the charge did arise? That was as stated in that judgment, which was the judgment of the whole court, that the charge did arise upon the completion of the works. We are bound by that decision, and I think the decision was quite right.

It is suggested to us here that when there has been a notice to pave, and that notice has not been complied with, and the local authority, in the exercise of their powers, have entered into a contract for the doing of those works which they are under the statute entitled to do in case the owner of the property upon

whom the notice has been served does not avail himself of the opportunity given to him to do those works, the charge ought to arise from the moment that a contract is entered into by the local authority with the contractor for the execution of the works; now, if for any reason the contractor could not perform the contract, and some one else had been engaged to do it, sometimes it may be at much larger expense, it would be impossible to work out the provisions of the Act of 1875 as to creating a charge if the charge arose at the date when the local authority entered into this contract, or as each portion of the work was done, in other words as each brick was delivered on the ground or put down to make a wall. It seems to me quite impossible that the Legislature could have intended such a thing. I was going on to say that there were two other points. One was a point where it was said that here the vendor had, under this contract, to convey free from incumbrances and could not make a good title unless he had cleared off this incumbrance, because there was an inchoate incumbrance by reason of the notices not having been complied with. I think that the object of the notice is to give the owner an opportunity to do the work himself, and if he does not do it in a limited time, then that the local authority can do it. I think that there is no incumbrance.

Then, as to the last point, it is said that there was an inchoate liability from the moment of the service of the notice to do these paving works. I say again there was no liability, inchoate or otherwise, until the local authority had done the works. Therefore I am of opinion that Byrne, J., was quite right, and that this appeal must be dismissed with costs.

Romer, L.J.—I agree with all that my Lord has said, and what was said by Byrne, J., in the court below, and they have dealt so fully with every part of this case that I do not want to add myself anything to what they have said.

In the course of the argument *In re Highett and Bird's Contract* was cited, and as I was a party to the decision of that case in the Court of Appeal, I wish to say two words about it. The vendor in that case, by his counsel, in the arguments before us, did not call our attention to the precise terms of the contract of sale, and certainly did not call the attention of the court to the fact that in that contract itself there was no express agreement by the vendor to show a good title, and as far as the court was concerned—at any rate I can certainly speak for myself so far as I was concerned—in that case the arguments proceeded on the assumption that the vendor was in the same position as if he had expressly agreed to make a good title, and the case was decided on that footing and is not an authority for any other proposition than a case of such a contract as I have indicated, and is not, I think, to be taken as an authority concerning a contract to sell where there was in the circumstances of that case in other respects an absence of an express contract by the vendor to make a good title.

Cozens-Hardy, L.J.—I agree. It seems to me that it is what *Stock* v. *Meakin* does decide really, for although it is true that the case there was under the Act of 1892, the Private Streets Act, the judgment proceeded upon the footing that there was a charge created like a charge under the Act of 1875. The Court of Appeal, in giving judgment there, said it became necessary to consider from what date the charge took effect, and the decision there was that the charge became effective only as from the completion of the works.

I think the principle is this, that under section 150 of the Public Health Act an option is given to the owner or occupier—either you do it yourself, or the local authority will do it.

I have no difficulty in coming to the same conclusion.

Solicitors, *T. Blanco White; Taylor, Willcocks, & Leman.*

High Court of Justice.

Chan. Div. } Farwell, J. } July 13.

In re Phillimore.
Phillimore *v.* Milnes. (*a.*)

Settled land—Tenant for life—Compound settlement—Trusts to pay annuities—Remainder in trust for settlor—Will of settlor—Confirmation of trusts—Residue in trust for sale—Settlement of proceeds—Settled Land Acts, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 20, 63; *and* 1884 (47 & 48 *Vict. c.* 18), *s.* 7.

P. conveyed and assigned his freeholds and leaseholds to himself and M. in trust, reserving a power of appointment, and by a subsequent deed he appointed that after his death the trustees should hold the same in trust out of the rents and profits to pay certain annuities, and that the surplus—and after the determination of the annuities, the whole—of the rents and profits should be in trust for and belong to himself, his heirs, and executors. By his will P. confirmed the said trusts, and, subject thereto, devised and bequeathed his real and personal estate to other trustees upon trust for sale and conversion, with power to postpone, and directed the proceeds to be held on trusts under which X. was tenant for life in possession.

Held, that the case was undistinguishable from In re The Marquis of Ailesbury and Lord Iveagh, 41 *W. R.* 644, [1893] 2 *Ch.* 345, *and that on the principle of that case, as approved in* In re Mundy and Roper's Contract, 47 *W. R.* 226, [1899] 1 *Ch.* 275, *the two deeds and the will must be regarded as a compound settlement, and that X., as tenant for life thereunder, must be granted leave, under section* 7 *of the Act of* 1884, *to exercise the powers of the Settled Land Acts, and must be let into possession on his undertaking to keep down the annuities.*

Adjourned summons, by the tenant for life under a will, asking for a declaration that a certain indenture and deed-poll, and the said will constituted a settlement, within the meaning of the Settled Land Acts, 1882 to 1890, of the estates comprised in the said indenture, and that the applicant was tenant for life thereof under such settlement; and asking that he might be at liberty to exercise the powers of sale and leasing conferred on tenants for life by the Acts, and that trustees of the said settlement for the purposes of the Acts might be appointed, or that the trustees of the will might be declared to be such trustees. He also asked that he might be let into possession and receipt of the rents, on such terms as might be deemed proper, and that the trustees of the said deeds might be ordered to deliver the title deeds to him.

Captain William Brough Phillimore, by an indenture dated the 3rd of August, 1886, revoked all former appointments made by him, and appointed that the freehold and leasehold hereditaments named therein should thenceforth vest in himself and Robert Milnes, their heirs, &c., as joint tenants, to be held in trust for such person or persons as Captain Phillimore should by deed appoint, and in default of appointment, in trust for himself, his heirs, &c.; and the trust prem-

(*a.*) Reported by R. Hill, Esq., Barrister-at-Law.

ises were by the said indenture conveyed and assigned to Captain Phillimore and R. Milnes accordingly.

By deed-poll, dated the 4th of August, 1886, Captain Phillimore, in execution of the said power, appointed that the trustees of the said indenture should stand possessed of and interested in the trust premises upon trust to permit him to receive the rents and profits during his life, or until a certain event which did not happen, and after his death, or the happening of such event, upon trust, to pay certain annuities to the persons therein named, and also to raise, in a certain event which did not happen, a sum of £5,000 by mortgage or sale of the trust premises, and apply that sum as therein mentioned; and that as to the residue or surplus of the said rents and profits, after paying the said annuities and all succession and other duties payable thereon, and all charges and expenses thereof, the same residue and surplus, and also the whole of the said rents and profits after the determination and satisfaction of the said annuities and all such duties and expenses as aforesaid, should be held in trust for and belong to Captain Phillimore, his heirs, executors, administrators, and assigns respectively.

By his will, dated the 29th of May, 1886, Captain Phillimore devised, bequeathed, and appointed all the real and personal estate to which at his death he should be beneficially entitled, or as to which he should have any general power to appoint by will, and not thereby otherwise disposed of, and which he called his residuary estate (subject, as to any such parts of the said residuary estate as were comprised in any appointment or charge executed by him, to the trusts and charges thereby created, all of which he thereby confirmed and directed his trustees to satisfy), to Montague Bertie Herbert, the said Robert Milnes, and Willie Sheldrake, upon trust for sale and conversion (with full power to postpone) and investment, and the testator directed them, after the death of his wife, and in the events which happened, to stand possessed of his said residuary estate and the net produce and investments thereof (subject and without prejudice to the trusts aforesaid) upon such trusts as his said residuary estate, and the produce thereof, would be held upon if the same were directed to be laid out in the purchase of real estate to be settled upon the trusts thereinafter declared, under which the applicant was the present tenant for life.

Captain Phillimore died in 1887, and R. Milnes duly appointed his son, the defendant, W. H. Milnes, to be a trustee of the indenture of the 3rd of August, 1886, and the latter, on the death of R. Milnes in 1898, duly appointed the defendant Mackenzie to be a trustee of the same indenture. These two defendants were afterwards duly appointed to be trustees of the deed poll by the legal personal representative of R. Milnes. The other defendants were the two surviving trustees of the will and the infant son of the applicant, entitled as for an estate tail in remainder under the trusts of the will.

All the annuitants, with one exception, were still alive.

Upjohn, K.C., and *John Gent*, for the applicant, relied on *In re Marquis of Ailesbury and Lord Iveagh*, 41 W. R. 644, [1893] 2 Ch. 345, and *In re Mundy and Roper's Contracts*, 47 W. R. 226, [1899] 1 Ch. 275, and the Revenue cases founded thereon—namely, *Attorney-General* v. *Owen and Attorney-General* v. *Coulson*, [1899] 2 Q. B. 253, and *In re Campbell*, [1902] 1 K. B. 113, 50 W. R. Dig. 72.

Jenkins, K.C., and *A. à B. Terrell*, for the trustees of the deeds of August, 1886, submitted that in granting the annuities Captain Phillimore had created, not a settlement, but a charge or mortgage or incumbrance, which he had secured, not by a term, but by vesting the fee in trustees with a direction to apply the rents and profits in payment of the annuities. They referred to *In re Du Cane and Nettlefold's Contract*, 46 W. R. 523, [1898] 2 Ch. 96.

Kirby, for the trustees of the will.

Marcy, for the infant remainderman.

FARWELL, J.—In my opinion the points raised here have been already considered in the Ailesbury case, and the decision there has been approved and confirmed by the Court of Appeal, and I think it would be exceedingly undesirable that I should attempt to whittle away by subtle distinctions an authority which Chitty, L.J., has pointed out as taking a broad view of the Act. That was a beneficial decision, and I think I should be wrong to try to find out an omission in the Act which might have a disastrous effect.

In my opinion this case in principle is absolutely undistinguishable from the Ailesbury case. It stands thus: The late Captain Phillimore, being the owner in fee of certain freeholds, and absolutely entitled to certain leaseholds, declares trusts under which he makes himself tenant for life, with trusts in remainder to pay certain annuities, and with the remainder to himself absolutely. To begin with, that is obviously a settlement within the meaning of the Act. He then proceeds to make a will, by which he disposes of his ultimate interests, subject to those annuities which he has voluntarily created by the settlement which he has already made. He deals with property which is left in him under that same settlement, and he proceeds to dispose of that by the will under which he constitutes the present applicant the tenant for life. Inasmuch as in the Ailesbury case, Stirling, J., with the approval of the Court of Appeal in a subsequent case—notwithstanding the comments of conveyancers in the meantime—held that the then tenant for life of the Ailesbury estates, whose title was subsequent to two disentailings and resettlements in 1863 and 1885, could dispose of the land freed from a jointure created under the powers of the deeds of 1796 and 1826, it seems to me that it follows very much more in a case like the present that there is that connection between the deeds which is sufficient. As Chitty, L.J. (*In re Mundy and Roper's Contract*, [1899] 1 Ch. 295), in referring to the judgment of Stirling, J., in the Ailesbury case, put it: "He held that the Savernake estate stood limited to uses in favour of various persons by way of succession under or by virtue of the series of deeds, and that the Marchioness Maria was one of the persons taking under the series of deeds, although she did not take by way of succession to the vendor. This was a broad view of the Act; but I repeat that, in my opinion, it was the right view." In my opinion the present case is very much less strong than that, but is necessarily, in my view, governed by the principle of it, and I am certainly not disposed to attempt to explain it away.

His lordship made the declaration asked by the summons, and an order under section 7 of the Settled Land Act, 1884, allowing the exercise of powers by the applicant, and directed that the trustees of the will should be appointed trustees of the compound settlement on production of a proper affidavit of fitness, that the applicant should be let into possession on his giving an undertaking to the court in respect of the annuities and otherwise, in the form in *In re Wythes*, [1893] 2 Ch. 369, and that the title deeds should be handed over to him on payment of the costs, charges, and expenses of the trustees of the deeds of 1886, those trustees to have liberty to apply to re-enter in case the annuities should not be paid,

and the costs of all parties to come out of the corpus of the residuary estate.

Upjohn, K.C., asked that the applicant's costs should be as between solicitor and client. He had been invested with fiduciary power.

FARWELL, J.—He is not a trustee yet. I cannot grant the application. If I do it now I must do it always, and I should not like to lay down such a rule as that.

Solicitors, *Burgoynes & Greatbach; J. R. Hall; Nicholson, Patterson, & Freeland.*

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) April 27.

WEARDALE AND CONSETT WATER CO. *v.* CHESTER-LE-STREET CO-OPERATIVE CO. (*a.*)

Waterworks company—Gratuitous use of water for extinguishing fire—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 42.

By section 42 of the Waterworks Clauses Act, 1847, *the undertakers shall at all times keep charged with water all their pipes to which fire-plugs shall be fixed, and shall allow all persons at all times to take and use such water for the purpose of extinguishing fire without making compensation for same.*

Held, that this power was confined to take water from the undertakers, pipes to which fire-plugs were fixed, and did not apply to a fire-plug affixed to a private pipe which took water (by agreement) from the defendants' main for agricultural purposes.

Appeal from the county court at Durham.

The plaintiffs in the year 1886, at the request of the defendants, laid a pipe from their main running along a road called Picktree-lane through a field of the defendants for a distance of 180 yards to a cattle trough of the defendants, and water was supplied to the defendants for agricultural purposes at a rent of 16s. a year.

In 1890 the plaintiffs, at the request and expense of the defendants, fixed a plug in the defendants' pipe near the trough for the purpose of protecting the haystack from fire.

In July, 1904, a haystack of the defendants caught fire, and the defendants by means of the fire-plug procured the plaintiffs' water to extinguish the fire.

The plaintiffs brought an action to recover payment for the water so used.

The defendants relied on section 42 of the Waterworks Clauses Act, 1847.

By section 38 of that Act it is provided as follows: The undertakers, at the request of the town commissioners, shall fix proper fire-plugs in the main and other pipes belonging to them at certain distances.

Section 40.—The cost of such fire-plugs and the cost of fixing them shall be defrayed by the town commissioners.

Section 42.—"The undertakers shall at all times keep charged with water, under such pressure as aforesaid, all their pipes to which fire-plugs shall be fixed . . . and shall allow all persons at all times to take and use such water for extinguishing fire without making compensation.

The county court judge gave judgment for the defendants.

(*a.*) Reported by ALAN HOGG, Esq., Barrister-at-Law.

Meynell, for the plaintiffs.—Section 42 only gives power to the public to take water from the company's pipes to which fire-plugs have been attached under section 38, and not a general power to take the company's water at all times gratuitously for the purpose of extinguishing fire.

Simey, for the defendants.—Section 42 is not limited to water taken from pipes specified in the first part of the section, and no good reason has been suggested why it should be. Secondly, the water was taken from the main, and it must be presumed the main was fitted with plugs. Thirdly, the water was used for an agricultural purpose, and was, therefore, covered by the agreement of 16s.

Lord ALVERSTONE, L.C.J.—In my opinion no one reading section 42 of the Waterworks Clauses Act, 1847, could fairly come to the conclusion that it was intended to give a general right to the public under all circumstances to take the undertakers' water for the purpose of extinguishing fire without payment. Section 42 is one of a group of sections relating to fire-plugs, the first of which (33) provides that the "undertakers," at the request of the town commissioners, shall fix proper fire-plugs in the mains of the pipes belonging to them. Section 42 provides that "the commissioners shall at all times keep charged with water, under such pressure as aforesaid, all their pipes to which fire-plugs shall be fixed, and shall allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same." The language of that section plainly says that only such water, that is, water in their—the undertakers'—"pipes to which fire-plugs shall be fixed," is to be taken without payment for extinguishing fire. It has been contended that that cannot be the meaning of the section, because there is no reason why the Legislature should have so limited the class of water to be taken gratuitously for that purpose. Whether a sufficient reason for that limitation can be suggested or not, I feel bound to give the words their ordinary signification, and to hold that the privilege is so limited. To hold otherwise would be to strain the language of the section. Then it is contended that the defendants, by means of their private pipes took the water directly from the defendant's main in Picktree-lane, but there is no evidence that there were any fire-plugs there, and, as the onus lies on the defendants to prove that the pipes from which they did take it is of the kind specified in section 42, we must assume that there were no such plugs; and, therefore, even assuming the defendants' contention to be correct, yet they have failed to bring themselves within the provisions of section 42.

WILLS, J.—I agree. It is clear that under section 42 the water which may be taken gratuitously to extinguish fire must pass through pipes supplied with fire-plugs. If the contention of the defendants is correct, the words "to which fire-plugs shall be fixed" have no meaning. With regard to the contention that water used for putting out a fire in a haystack is water used for agricultural purposes, it seems to me as extravagant as to say that water used for putting out a fire in a house is water used for domestic purposes.

KENNEDY, J.—I agree.

Solicitors for plaintiffs, *Rowcliffes, Rawle, & Co.*, for *Cooper & Goodyer*, Newcastle-on-Tyne; *Dangerfield & Blythe*, for *J. Turnbull*, Durham.

K. B. Div.
(Lord Alverstone, L.C.J., and Wills and Kennedy, JJ.) April 20.

FOSTER v. GREAT WESTERN RAILWAY CO. (a.)

Railway — Carriage of goods — Owner's risk note — Failure to carry goods by route specified.

Fish, in barrels, was consigned by the plaintiff to the defendant railway company to be carried from Brixham to Jersey, viâ *Southampton, upon terms that the plaintiff, in consideration of his being charged a reduced rate, relieved the defendants from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that it arose from wilful misconduct on the part of the company's servants. The defendants, by a mistake, carried the fish past Exeter, the station at which they ought to have transferred the barrels to the London and South-Western Railway Co.'s system, and the mistake was not discovered until the fish arrived at Taunton. It was then sent from Taunton,* viâ *Weymouth, to Jersey, with the object of lessening the damage. In consequence of this mistake the arrival of the fish at its destination was delayed, and the plaintiff suffered damage.*

Held, that the defendants were protected by the terms of the contract.

Mallet *v.* Great Eastern Railway Co., 47 *W. R.* 334, [1899] 1 *Q. B.* 309, *distinguished.*

Appeal from the county court of Devonshire holden at Plymouth.

The action was brought for damages for the breach of a contract to carry certain barrels of fish from Brixham to Jersey, *viâ* Southampton, consigned to the defendants by the plaintiff on the 18th of August, 1902, on a consignment note, which was signed by the plaintiff and was in the following terms: "To the Great Western Railway Co.—Receive and forward the undermentioned merchandize, to be carried at the reduced rate below the company's ordinary rate; in consideration whereof I agree to relieve the Great Western Railway Co., and all other companies or persons over whose lines the merchandize may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay, or detention except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants. . . . This agreement shall be deemed to be separately made with all companies or persons parties to any through rate under which the merchandize is carried."

It was admitted that in the ordinary performance of the contract to carry merchandize by the route mentioned the fish would have been taken out of the waggon of the Great Western Railway Co. train at Exeter and transferred to a London and South-Western Railway truck for carriage by that company's train to Southampton. By an oversight the fish was not transferred at Exeter, and was carried on to Taunton, where the mistake was discovered. It was then too late to send the fish back to Exeter in time for it to catch the boat train for Southampton, and it was thought best, in order to save time, to dispatch to Jersey, *viâ* Weymouth.

The county court judge thought the present case could not be distinguished from that of *Mallet* v. *Great Eastern Railway Co.*, 47 W. R. 334, [1899] 1 Q. B. 309, and although he would, but for that authority, have held that the delay in the delivery due to the negligence of the defendants' servants was within the terms of the condition protecting the company, he considered himself bound by that authority to give judgment for the plaintiff for the amount claimed accordingly.

The defendants appealed.

Schiller (*Cripps, K.C.*, with him).—The decision in *Mallet* v. *Great Eastern Railway Co.* does not govern this case. The company were held liable there because it was said that the delay was not a delay in the performance of the contract, and therefore not covered by the special condition in the consignment note. Unless that supposition was justified by the facts, that decision is at variance with the body of authority on this subject, and cannot be supported. However that may be, the detention of the goods here arose from an act of negligence committed by the servants of the company in the performance of the contract, and comes therefore within the exempting proviso. The delay was caused by an act of negligence at Exeter; that is, at a station on the route by which it was agreed that the goods should be sent. The company would clearly have been freed from liability had they sent back the fish to Exeter and consigned it to the South-Western train there. What they did was certainly in the interest of the customer, and with the sole object of lessening the damage consequent on their previous negligent act. They therefore are not liable: *Sleat* v. *Fagg*, 5 B. & A. 342; *Morrit* v. *North-Eastern Railway Co.*, 24 W. R 235; *Millen* v. *Brasch & Co.*, 31 W. R. 190, 10 Q. B. D. 142.

Duke, K.C., and *J. A. Hawke.*—The damage to the goods not arising during the time that they were being carried on the agreed route, the company are not protected by the special conditions in the consignment note. *Morritt* v. *North-Eastern Railway Co.*, and *Millen* v. *Brasch & Co.*, were cases decided under the Carriers Act, and therefore are not in point here, as the case clearly rests on the construction of the terms of the contract note. Under the contract the exemption from liability was only to apply "during any portion of the transit," and only then if the negligence was less than "wilful." The damage did not occur on the agreed route. Therefore, following *Mallet* v. *Great Eastern Railway Co.*, the exemption did not apply. The defendants therefore are liable for loss caused by the breach of their contract to carry the goods by the route agreed.

Lord ALVERSTONE, L.C.J.—In my opinion the learned county court judge ought to have acted upon what he undoubtedly thought to be the true view of the law; possibly he may have felt more bound by the decision in *Mallet* v. *Great Eastern Railway Co.*, or by what appeared to him to be the principle involved in that case, than we are. With regard to that case I desire to say, with great respect to my brothers Day and Lawrance, JJ., who decided it—that I think the extent of that authority, if it is supposed to lay down a principle that the condition cannot apply if the damage happens, or the injury to the goods happens, upon some part of the route not contemplated by the parties at the time the condition was signed, may require further consideration. I do not wish to say more than this. Certainly, in so far as it lays down any principle which would involve its application to the case before us, I think that it is at variance with more than one decision of co-ordinate jurisdiction, and particularly with the decisions which have held that misdelivery to a wrong person will not render the company liable in the absence of facts which make the condition inapplicable, as, for instance, wilful misconduct. Here the misdelivery happened upon a route that was contemplated by the parties. The question whether

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Mallet's case can be supported upon the ground that it refers to a particular case of an injury occurring upon a route which never formed the basis of the contract, does not arise in this case. Here the defendants undertook to carry the fish from Brixham to Jersey by way of Southampton, which meant that they were to hand over the goods to the South-Western Railway Co. at Exeter. They, by some mistake, and from causes which do not prevent the condition being applicable, carried the goods on to Taunton, and therefore the breach of contract, in my opinion, occurred on the very route contemplated, namely, at Exeter. What happened afterwards? As I have said, if in any way it could be contended that there was a new route set up as between the parties to which the condition did not apply, I could understand it. But it is agreed that the defendants, finding out their mistake at Taunton, instead of sending the fish back to Exeter, and so on to Southampton, which they could have done, in which case there would have been more delay—and the fish would have been quite spoilt—endeavoured to do the best they could for the plaintiff by sending the fish to Weymouth to be forwarded by the next steamer. It seems to me it would be very dangerous to hold that the defendants are liable in this case, in which they did their best to minimise the damage, if they would have been protected had they adopted a course which would have caused more delay and greater risk of damage. It would prevent a company who had broken the contract from doing the best thing they could to save damage to the goods and possibly to prevent damage altogether. Therefore I think their action in sending the fish to Weymouth when they found they had made a mistake was not sending it by a fresh route in the sense of *Mallet's case*, but that they had adopted a reasonable course, and endeavoured on finding out their mistake to do their best to get the goods to their destination as speedily as possible. That brings us back to the question whether this condition protects them in the case of an erroneous carrying on from Exeter to Taunton, instead of delivering to the South-Western Railway Co. at Exeter. That question really, I think, cannot be decided against the railway company without over-ruling the cases which have decided that under such conditions as these they are protected from the consequences of misdelivery. I think that the learned county court judge was not bound by *Mallet's case* to the extent which he thought he was, and ought to have followed the principle which he was disposed to follow. I only wish to say that, while I do not think the Carriers' Act cases are what may be called authorities, because these different considerations apply, the principle of those cases is applicable to show that this condition does protect the defendants. I think, therefore, that the appeal must be allowed.

WILLS, J.—I agree. It seems to me that the facts in the present case are not the same as those upon which *Mallet's case* was decided, and that we are right in holding that it can be distinguished on that ground. I think that the owner's risk clause in the contract meant that the plaintiff agreed to relieve both the Great Western Railway Co. and the South-Western Railway Co. from liability for loss, damage, misdelivery, and delay or detention during any portion of the transit of goods. It might well be that if the defendant company had sent the goods by the Midland Railway, or any other company, that that company would not be protected by the condition. What happened here was that a mistake was made at Exeter and the goods were over-carried over another portion of the defendant's line and were by reason of being perishable goods spoilt. That, in my opinion, was just such a case as it was intended should be covered by the condition, and a loss which the company, by accepting a lower rate, stipulated they should not be made liable for.

KENNEDY, J.—I agree. I only desire to say that with regard to *Mallet's case* different considerations appear to have existed in that case and the present. There it was owing to the goods being sent by a different route that damage was done to the goods. Here the damage was done whilst the goods were journeying on the route intended by the parties. The subsequent forwarding of the goods by a different route had nothing to do with their being damaged, indeed they were sent round *viâ* Weymouth in order to lessen the damage. That fact alone seems to me to distinguish this case from *Mallet's case*. It is one thing for carriers to plead the protection of the condition given in respect to a particular route when the goods were in fact never carried by that route, which was *Mallet's case*, and quite another thing, as was the case here, where the goods were sent by the agreed route, but through a mistake miscarried.

Appeal allowed with costs.

Solicitor for the railway company, *R. R. Nelson.*

Solicitors for the plaintiff, *Church, Rendell, & Co.*, for *Watts, Ward, & Anthony*, Plymouth.

Prob. Div. & Adm. Div. Admiralty. } Feb. 16.

"THE BENMOHR." (*a.*)

Ship—Collision—Compulsory pilotage—Rules 46 and 49 Thames Regulations.

Those who rely on a plea of compulsory pilotage must establish the fact that the fault of the pilot was the fault of the pilot alone, otherwise the court will not act in finding that the fault was that of the pilot.

The Velasquez, 1 *P.* 494, *approved.*

Aspinall, K.C., and *Leck* for the plaintiffs.

Laing, K.C., and *Stephens* for the defendants.

The facts of the case appear sufficiently from the judgment.

BARNES, J., in giving judgment, said: This is a case of collision between the steamship *Banffshire* and the steamship *Benmohr*, which took place at about half-past one in the afternoon of the 5th of February, 1902, in Sea Reach, not very far from Holehaven, in the River Thames. At the time the weather was fine and clear, and the tide was ebb, and about two knots. One of these vessels, *The Banffshire*, was proceeding up the river, and the other, *The Benmohr*, was proceeding down. *The Banffshire* is a large steamer of 5,736 tons gross, and she was bound from Melbourne to London *via* the Cape, with a general cargo, and a crew of 60 hands, and having on board a Trinity House pilot, who had been taken on board at Dungeness. He was what is termed a 14-feet draught pilot, but he was, at the time he was taken on board, the only available pilot. Shortly before this collision took place *The Banffshire* was in Sea Reach, coming up river at a speed of about 9 knots, on a course of W. by N. ½ N. *The Benmohr* is a steamer of about 3,000 tons gross register, and was manned by a crew of 38 hands. She was in course of a voyage from London to ports in the Straits, China, and Japan, with general cargo and some

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law

passengers. She was in charge of a duly licensed Trinity House pilot, and was making a course of E. by S., and a speed of about 9 knots. These vessels came into collision at the place I have mentioned, or thereabouts, and very serious damage was done to both vessels. The actual contact took place between the starboard side of *The Benmohr*, about 60 feet from the stern, and the stem of *The Banffshire*. One difficulty I have in deciding this case is that the collision took place rather over two years ago, and it was tolerably obvious in the course of the evidence given by the witnesses that some of the details were not given with that precision with which they would have been given if the case had been tried, as is usual, a very short time after the accident. But some of the facts are established beyond all question, which enable me to come to a decision about this case. I think it is the fact that the two rules which principally affect the matter are the 46th and the 49th rules of the Thames for the purpose of navigation. The 46th rule is what may be termed the port hand rule, and the 49th is the rule which requires a steamer, when approaching another vessel, so as to involve risk of collision, to slacken her speed or stop and reverse if necessary. I think there is very little doubt that at first, when these two vessels were made out, the one from the other, they were very nearly end on to each other, and that the port hand rule was that which was applicable to the case. The position at the time of the collision is to my mind almost fairly well established. The plaintiffs say, of course, through the mouths of their witnesses, that their vessel had gone off the up-river course somewhere about four points, and although some of the witnesses for the defendants rather minimise the extent which their vessel had gone off—they make out that the plaintiff vessel went off her course rather more than their's—I find that the helmsman of the defendants' vessel said in his evidence in chief that he did not notice the compass, but she was about four points off right down the river. I think the conclusion to draw is that both these vessels were off their respective courses, at the time of the collision, about the same extent, and that the collision took place to the northward of mid-channel. I think there is no doubt about it, because practically both sides have agreed that it took place at a right angle, which is an obvious consequence if both vessels, having been originally on opposite courses, went off those courses about four points. That is the conclusion I have come to about the position of the vessels at the time of the collision. Of course, it follows from what I have been saying that *The Banffshire* went off under port helm, and *The Benmohr* went off under starboard helm. Although the defendants have sought to minimise the extent to which their vessel went off, I should have thought it was more likely that their vessel went off more, if anything, than the other, because the defendants' vessel was at the time going full speed ahead and under hard a-starboard helm. However, I think the general result is that both vessels went off to about the same extent. What is the result from that? Perhaps I ought to mention one further fact. I have already stated that the defendants' ship was going, at the time of the collision, full speed ahead and under hard a-starboard helm. The other vessel was under hard a-port helm, but her engines had been reversed. There is a question as to when they were reversed, but they had undoubtedly been reversed. It follows, almost as a matter of course, from what I have already said, that the defendant vessel must be held to blame for breaking both the rules, unless there is some excuse. There appeared to me to be, from the argument that has been addressed to me, an important question as to whether there was an excuse for the starboarding, but I can find no excuse whatever for the defendants' vessel being kept under hard a-starboard helm, and going at full speed ahead up to the time of the collision, to a vessel which was porting her helm and coming off to the extent which the plaintiffs' vessel did at the time of this collision. Upon that point the Elder Brethren are of the same opinion as myself. I think that latter point would be more a matter for the pilot than for the servants of the ship-owners, because the pilot was in charge; but with regard to the first point, as to the action of the helm of the defendant' ship, it is said by the defendants that that was justified—the starboarding and hard a-starboarding—because a two-blast signal was given on board the plaintiffs' ship. The controversy in the main in the case has been as to whether a two-blast signal was given or not. The plaintiffs' version of the matter is that *The Benmohr* originally blew a short blast, and that *The Banffshire* gave one short blast, and ported a little, and that *The Banffshire* afterwards gave another short blast, after an interval; that is to say, the plaintiffs' case is that they gave two separate port helm signals, the defendants' case is that the plaintiffs' vessel did not give two port helm signals, but did give two short blasts so close together that they really amounted to a starboard helm signal. That has been the main issue of fact in this case, and there is a considerable body of evidence both ways. I have to determine, to put it in the shortest way, whether a port helm signal was given twice over or whether a starboard helm signal was given; because the defendants' case is that they got a starboard helm signal, and, therefore, starboarded, and not until they got a starboard helm signal did they starboard. It is said by the defendants that there could be no reason for acting as they did unless they did get a starboard helm signal, and that, therefore it is a reasonable conclusion to draw that they did have a starboard helm signal given to them. On the other hand, the plaintiffs' countervailing consideration is that as it was a fine clear day, and these vessels were well in sight of each other, and the river was clear to the northward and there was no reason for hurry in blowing signals in the way suggested by Mr. Laing, and as it was undoubtedly the proper thing for both these vessels to port, there was no reason for giving a starboard helm signal. There is, as I say, a good deal of evidence on both sides, and I am left to consider on which side the truth of the matter lies. The conclusion of fact to which I have come, after giving due weight to all the evidence and the probabilities of the matter, is that the two-blast signal relied upon by the defendants was not given on the part of the plaintiffs' vessel; that is to say, I accept the evidence of the plaintiffs' witnesses about this question of the port helm signals. One matter, apart from my view of the witnesses, which influences me is that it seems to me that the defendants attribute too much to the plaintiffs, because they suggest two very stupid things to the plaintiffs' ship. They suggest, first, that the plaintiffs ported two points off their course, and gave a wrong signal, and, secondly, that they ported after doing it. I come to the conclusion that the plaintiffs did not give a starboard helm signal, and that the defendants cannot justify their action of starboarding and hard-a-starboarding in the way they seek to do. That leaves a question of some little difficulty as to what is the result in connection with the blame to be imputed to the defendants' ship. It is said: "Well, but if that is the position of things, the fault was only the fault of the pilot on board the defendants' ship, and that the defendants, their vessel being under the charge of a

compulsory pilot, are not to blame." I have come to the conclusion, on the facts of this case, that that is an argument which I cannot accede to. It appears to me that the defendants are in a difficulty about it. I have said that I have come to the conclusion that the two-blast signal was not given, and therefore it could not have been heard on the defendants' ship, and I do not accept the story which has been told from the defendants' vessel with regard to that matter. Then comes the principle applied in the case of *The Velasquez*, 1 P. C. 494. A short statement of that principle may be thus put: That the persons—in this case the defendants—who rely on the plea of compulsory pilotage, must prove by trustworthy evidence that the fault was the fault of the pilot alone, otherwise the court cannot act in finding that the fault was that of the pilot. It appears to me here that the defendants have failed to satisfy me, by trustworthy evidence, as to what occurred in fact on board the ship, that the fault was that of the pilot alone. But the matter does not quite rest there, because there is this observation to make, that even, it seems to me, if one were to credit—which for reasons I have given I do not—every word said on the defendants' ship about these blasts, and also find as a fact that there was not a two-blast signal given on the plaintiffs' ship, then one must conclude that the pilot was mistaken, and, in my judgment, especially after having seen the pilot, that was not the fault of the pilot alone. Because what took place? I am now proceeding on the assumption of a case which I do not accept. The master said, in his evidence in chief: "I agreed with the pilot she had given a starboard helm signal. I said 'it is a two-whistle blow,' and he said 'it is a two-whistle blow.'" The pilot put it the other way round. He said in his cross-examination: "I never ordered the helm a-starboard until she sounded two short blasts. I told the captain, and he told me she had given two blasts, and I starboarded and went full speed ahead." On the assumption that the pilot was mistaken, it seems to me—especially after having seen the pilot—that he was helped into that mistake by what was said to him by the captain, and it cannot be said this mistake was his fault alone. So the conclusion to which I have come with regard to this matter of compulsory pilotage is that the plea is not made out. There is one other matter to deal with, and that is the suggestion that the plaintiff's ship did not stop and reverse her engines soon enough. That is based partly upon the amount of damage done, and partly upon the evidence. With regard to the evidence, the pilot said he put the engines full speed astern after the first two blasts were heard from the other ship. The master said: "I heard two short blasts twice and it was after the first that we reversed. It must be remembered that these two vessels were each travelling at the outset nine knots, although one stopped for a short time and one reversed. I think way had been taken off the big ship considerably, but the distance between them when they acted for each other was easily traversed in a short space of time, and when it is remembered that this large vessel was probably weighing something like 8,000 or 9,000 tons, it is not surprising that, even though she reversed as soon as any danger was observed from the other ship, very considerable damage should be done by contact at right angles with that other vessel going at full speed. I cannot find any blame on the part of the plaintiffs in connection with this stopping and reversing. It seems to me that their engines were stopped and reversed as soon as any danger was observable. The conclusion I have come to is that *The Benmohr* is alone to blame.

Solicitors for the plaintiffs, *Lowless & Co.*

Solicitors for the defendants, *Cooper & Co.*

[THE END.]

THE

WEEKLY REPORTER DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

FROM THE 24TH OF OCTOBER, 1903, TO THE 12TH OF AUGUST, 1904.

VOL. LII.

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1904.

A DIGEST

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CERTAIN OTHER LEGAL REPORTS DURING THE SAME PERIOD,

TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH.D., the Chancery Division; K.B.D., the King's Bench Division; BKCY., the King's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved.

*** *This Digest will contain at the end thereof a Tabular Index of the Names of all Cases Reported up to the end of August,* 1904, *as well in this Volume* (52) *of the* WEEKLY REPORTER *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports are given in this Digest.*

ACCUMULATIONS:—

Payment of debts—Debts paid out of capital—Provision for recoupment—Accumulations Act, 1800 (*Thellusson Act,* 39 & 40 *Geo.* 3, *c.* 98), *s.* 2.—A provision for accumulating income to recoup capital applied in payment of debts is not a provision for payment of debts within section 2 of the Thellusson Act.

Tewart v. *Lawson* (1874) L. R. 18 Eq. 490, followed. — HEATHCOTE, RE. HEATHCOTE *v.* TRENCH, *Ch.D. Swinfen Eady, J.*; [1904] 1 Ch. 826; 73 L. J. Ch. 543; 90 L. T. 505.

ADEMPTION:—

Will—Legacy—Subsequent gift—Particular purpose.—A testator by his will gave a sum of £10,000 to the trustees of the endowment fund of a hospital. Subsequent to the date of his will he sent a cheque to the trustees for the sum of £10,000.

Held, that the legacy in the will was for a particular purpose, and was adeemed by the subsequent gift of the same sum in the testator's lifetime.—CORBETT, RE, CORBETT *v.* COBHAM, *Ch.D. Farwell, J.*, 74; [1903] 2 Ch. 326; 72 L. J. Ch. 775; 88 L. T. 591.

ADMINISTRATION:—

1. *Costs—Priority — Administrator's costs* — Res judicata.—Where in an administration action an order made on further consideration has directed the payment of the costs of all parties out of a fund which subsequently proves insufficient to pay the costs in full, the administrators are entitled to have the whole of their costs paid in priority to the other parties.

The order having been silent as to the priorities of the parties *inter se* must be assumed to have directed payment according to the strict rights of the parties.

Gaunt v. *Taylor*, (1843) 2 Ha. 413, followed.—

GRIFFITH, RE, JONES *v.* OWEN, *Ch.D. Farwell, J.*; [1904] 1 Ch. 807; 73 L. J. Ch. 464; 90 L. T. 639.

2. *Costs—Trustee—Neglect to account—Costs of taking and vouching account.*—Where owing to the gross neglect and indefensible refusal of trustees to render proper accounts, a summons has been taken out for an account and administration, the trustees can be made liable to bear the costs, including the costs of taking and vouching the accounts.—SKINNER, RE, COOPER *v.* SKINNER, *Ch.D. Farwell, J.*, 346; [1904] 1 Ch. 289; 73 L. J. Ch. 94; 89 L. T. 663.

3. *Insolvent estate—Estate insolvent at date of judgment afterwards found sufficient to pay principal of debts—Interest—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 40, *sub-sections* 4, 5—*R. S. C.*, 1883, *ord.* 55, *rr.* 62, 63.—In the administration of an estate which is insolvent at the date of the judgment, but afterwards realizes enough to pay the principal of all the debts, but not the whole of of the interest allowed by the court, whether on debts which by law carry interest, or on debts which do not, the payment of interest must be governed by the rules of bankruptcy and not those of the Chancery Division.

In re Henley, (1896) 75 L. T. 307, discussed and followed.—WHITTAKER, RE, WHITTAKER *v.* PALMER, *Ch.D. Farwell, J.*; [1904] 1 Ch. 299; 73 L. J. Ch. 166; 90 L. T. 277.

4. *Practice—Common order for administration against executor—Subsequent action by same plaintiff charging wilful default and fraud—No evidence of fresh information acquired since date of common order—Leave of the court.*—A plaintiff who has obtained a common order for administration of an estate against the executor may obtain the leave of the court to bring a fresh action charging (*inter alia*) wilful default against the executor without proving that he did not acquire the information on which he founds his fresh action in time to utilise it in the former proceeding in which he obtained the common order for administration, proof of which was required in the case of *Laming* v. *Gee*, 40 L. T. Rep. 33, 10 Ch. Div. 715, on the plaintiff, who was an undischarged bankrupt, giving security to the satisfaction of the master for the executor's costs of the fresh action.—KURTZ, RE, EMERSON *v.* HENDERSON, *Ch.D. Swinfen Eady, J.*; 90 L. T. 12.

5. *Proof—Secured creditor, proof by against the real estate—Lapse of time—Application to prove against personalty—Fund in court.*—Where in an administration suit there is a fund in court, a creditor for a debt at law, though the appointed time for coming in has long elapsed, is by well-established practice allowed to prove against the general estate, subject to terms as to costs and as to payments already made.

The decision of the Irish Court of Appeal, reported as *Beattie* v. *Cordner*, [1903] 1 I. R. 1, affirmed.—HARRISON *v.* KIRK, *H.L.*; [1904] A. C. 1; 73 L. J. P. C. 35; 89 L. T. 566.

6. *Retainer—Real representative—Proceeds of sale of real estate—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2, *sub-section* 3.—The Land Transfer Act, 1897, does not give an administratrix a right of retainer out of the proceeds of sale of the intestate's real estate for a debt due to her from the intestate.—WILLIAMS, RE, HOLDER *v.* WILLIAMS, *Ch.D. Joyce, J.*, 318; [1904] 1 Ch. 52; 73 L. J. Ch. 82; 89 L. T. 663.

See also Executor, 1; Lunatic, 2; Probate, 1; Receiver, 1; Vendor and Purchaser, 8.

ADULTERATION:—

1. *Food—Milk—Warranty—Addition of preservative by purchaser—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 25.—A purchaser of milk with a written warranty, who has added a preservative to such milk, cannot rely upon section 25 of the Sale of Food and Drugs Act, 1875, even although the addition of such preservative is not complained of as an adulteration.—HENNEN *v.* LONG, *K.B.D.*; 90 L. T. 387.

2. *Food and drugs—Institution of prosecution—Laying of information—Service of summons—Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 19 (1).—A prosecution is instituted within section 19 (1) of the Sale of Food and Drugs Act, 1899, at the date on which the information is laid, and the summons is issued, and not on the date when such summons is served.—BEARDSLEY *v.* GIDDINGS, *K.B.D.*; [1904] 1 K. B. 847; 73 L. J. K. B. 378; 90 L. T. 651.

3. *Food and drugs—Warranty—Notice—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 25—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 20.—An information having been laid by the respondent against the appellant under section 6 of the Sale of Food and Drugs Act, 1875, the appellant's solicitors sent on the 2nd of November to the respondent the following notice: "We beg to give you formal notice that our client purchased the same butter with a written warranty from G. L. (Limited), of 84, C.-st., M. The following is a copy of the warranty in question: 'We guarantee all butters sold by us to be absolutely pure; guaranteed pure butter within the 3rd and 7th sections of the Margarine Act, 1877.' . . . The defendant intends to rely on the foregoing as a defence to this summons."

On the 4th of August the appellant had purchased the butter of the wholesale house, and on the invoice was stated: "We guarantee all butters sold by us to be absolutely pure." The appellant was dissatisfied with this, and, when going to the wholesale house the following week, and after the butter was delivered, took the invoice to the wholesale house, who put on it: "Guaranteed pure butter in accordance with the 3rd and 7th sections of the Margarine Act, 1887. In case of samples being taken for analysis, show this warranty to the inspector."

Held, that the notice of the 2nd of November was a good notice of a defence under section 20 of the Sale of Food and Drugs Act, 1899.—FARTHING *v.* PARKINSON, *K.B.D.*; 90 L. T. 783.

ADVOWSON:—

Charity—Will—Trust to present fit and pious person.—The devise of an advowson on trust to present "such fit and pious person of godly life and conversation, being in holy orders, capable of accepting and holding the same, as the trustees" shall think fit, does not constitute a charitable trust, the trust being only to do that which every owner of an advowson is in all events bound to do.—CHURCH PATRONAGE TRUST, RE, LAURIE *v.* ATTORNEY-GENERAL, *Ch.D. Buckley, J.*, 106; [1904] 1 Ch. 41; 73 L. J. Ch. 77; 89 L. T. 505.

APPEAL:—

1. *Practice—Appeal on question of fact—Concurrent findings of two courts below.*—There is no rule of practice in the House of Lords that the House will not entertain an appeal on a question of

fact where there have been concurrent findings in the courts below.

Dictum of Lord Herschell, in *The P. Caland*, 68 L. T. Rep. 469, [1893] A. C. 207, explained by Lord Davey.

Judgment of the court below reversed on the facts and evidence.—MONTGOMERY & Co. *v.* WALLACE-JAMES, *H.L.*; [1904] A. C. 73; 73 L. J. P. C. 25; 90 L. T. 1.

2. *Reference of action to master—Practice—R. S. C., ord.* 14, *r.* 7.—Where an action is referred to a master under ord. 14, r. 7, he is in the position of an arbitrator, and no appeal lies from his decision.—FRASER *v.* FRASER (No. 2), *K.B.D.*; [1904] 2 K. B. 245; 90 L. T. 709.

See also Practice, 1-4.

APPORTIONMENT:—

1. *Mortgage—Deficient security—Tenant for life and remainderman—Capital and income—Apportionment—Settled fund—Authorized investment.*—The correct principle of apportionment is that stated in *In re Moore*, (1885) 54 L. J. Ch. 432, which had since been followed in *In re Barker*, (1897) W. N 154, *Lyon* v. *Mitchell*, (1899) W. N. 27, *In re Alston*, [1901] 2 Ch. 584, and *Stewart* v. *Kingsale*, [1902] 1 I. R. 496.

In re Foster, (1890) 45 Ch. D. 629, and *In re Phillimore*, [1903] 1 Ch. 942, overruled.—ATKINSON, RE, BARBERS COMPANY *v.* GROSE-SMITH, *C.A.*; [1904] 2 Ch. 160; 73 L. J. Ch. 585; 90 L. T. 825.

ARBITRATION:—

1. *Costs—Discretion of arbitrator—Award fees—Costs of reference—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 14, 15 (2).—Costs left to the discretion of the arbitrator, but not dealt with by him, only follow the event when the matter is referred by the court under section 14 of the Arbitration Act, and not when the action is stayed and arbitration is directed by the court under the submission of the parties, for to such a reference section 15 (2) does not apply.—WARBURG *v.* MCKERROW, *K.B.D.*; 90 L. T. 644.

2. *Ouster of jurisdiction of the court—Deficiency in pleading—Waiver of right to object—Manchester Ship Canal Act*, 1885 (48 & 49 *Vict. c. lxxxviii.*), *s.* 88, *sub-sections* 14, 22; *s.* 202—*Manchester Ship Canal Act*, 1896 (59 & 60 *Vict. c. clxxxii.*), *s.* 43, *Schedule.*—Where by private Acts of Parliament and a scheduled agreement regulating the rights and duties of the co-plaintiffs (traders and manufacturers at W. and the corporation of W.) and the defendants, it was in fact provided that any difference arising between the parties as to the statutes and agreement should be determined by arbitration, an action brought by the co-plaintiffs against the defendants in respect of a certain dispute between them arising under the statutes was ordered to be dismissed as between the corporation of W. and the defendants, and stayed until the determination by arbitration of the dispute as between the traders and manufacturers at W. and the defendants, the jurisdiction of the court being ousted, and no deficiency in pleading and no waiver by the parties could give such jurisdiction.

So held by Vaughan Williams and Stirling, L.JJ. (*dissentiente* Cozens-Hardy, L.J.), reversing the decision of Byrne, J.—CROSFIELD *v.* MANCHESTER SHIP CANAL CO., *C.A.*, 635; [1904] 2 Ch. 123; 73 L. J. Ch. 345; 90 L. T. 557.

ASSIGNMENT:—

Debt—Absolute assignment in writing—Notice—Written request to debtor to pay third party—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.—The plaintiffs sued the defendants to recover £3 263, which the plaintiffs claimed had been assigned to them by K. & Co. K. & Co. who owed money to the plaintiffs, sold goods to the defendants for £369 and £3,263 respectively. On the 6th of January, 1903, K. & Co. wrote to the plaintiffs enclosing a document which the plaintiffs were to forward to the defendants. This document was written on one sheet of paper which consisted of two detachable parts, and was as follows: "To D. & Co. (the defendants). Dear Sirs,—Kindly sign the attached letter and forward the same to Messrs. B., Sons, & Co. (the plaintiffs).—Yours truly, K. & Co." "To Messrs. B., Sons, & Co. (the plaintiffs). Dear Sirs,—Herewith we beg to confirm that we shall remit, subject to the approval of goods, the amount of invoice—£369 for eight, and £3,263 for seventy-five, packages raw rubber received to-day from K. & Co. When due, direct to your good selves for account of K. & Co." This part was intended to be signed by the defendants. The plaintiffs, on the 7th of January, forwarded this document to the defendants to their local works at Birmingham, and the letter attached was signed by the local manager of the defendants at Birmingham, who returned it to the plaintiffs. The local manager of the defendants had no authority from the defendants to sign the document on their behalf, and he omitted to notify the defendants that he had signed it. The defendants being unaware of the letter so signed, paid the sum of £3,263 to K. & Co. direct, who subsequently became bankrupt. The plaintiffs thereupon brought the present action.

Held, that the document above referred to was not an assignment of the debt due by the defendants to K. & Co., and that the action should be dismissed. Decision of Walton. J. (8 Com. Cas. 174), reversed. —BRANDTS *v.* DUNLOP RUBBER CO., *C.A.*, 501; [1904] 1 K. B. 387; 73 L. J. K. B. 247; 90 L. T. 106.

See also Contract, 2; Mortgage, 1; Patent, 1.

AUCTIONEER:—

Sale of goods—Exceeding authority—Sale without reserve—Personal liability.—The defendant, an auctioneer, at a public auction held by him, put up a pony for sale, stating that it was to be sold without reserve, and giving the name of the owner. The plaintiff was the highest bidder, and the pony was knocked down to him. There was in fact a reserve price placed upon the pony, but this had escaped the notice of the defendant until after the sale to the plaintiff. The defendant made no note or memorandum of the sale in his book. In an action brought by the plaintiff for the delivery up of the pony, or, alternatively, for damages for breach of warranty of authority by the defendant to sell it without reserve.

Held, first, that, the value of the pony being more than £20, section 4 of the Sale of Goods Act, 1893, afforded an answer to the first part of the claim; and secondly, that there had been no breach of warranty of authority to sell the pony without reserve, inasmuch as there was—apart from the provisions of that section—a contract of sale which was binding upon the defendant's principal.—RAINBOW *v.* HOWKINS, *K.B.D.*; [1904] 2 K. B. 322; 73 L. J. K. B. 641.

AUSTRALIA, LAW of:—

Customs Act, 1901, *ss.* 127, 192—*Ship's stores in bond—Seals broken beyond limit of jurisdiction—Penalties.*—By the Australian Customs Act, 1901 (Act No. 6 of 1901), ships bringing into Australian

ports dutiable articles carried as ships' stores are not liable to pay duty on such stores if they are sealed up by a revenue officer on arrival at the first port in Australia, and not used until after the departure of the ship from her last port of departure in Australia. A penalty is imposed for entering any port in Australia with such seal broken. Where the seal had been broken, and the stores used, by order of the master of a ship during a voyage between two ports in Australia, but on the high seas beyond the limit of Australian territorial jurisdiction,

Held (affirming the judgment of the court below), that the master was liable to the penalty imposed by the Act.—PENINSULAR AND ORIENTAL STEAM NAVIGATION CO. *v.* KINGSTON, *P.C.*; [1903] A. C. 471; 72 L. J. P.C. 123; 89 L. T. 222.

BAILMENT:—

Bailor and bailee—Carriage lent to bailee—Negligence of bailee's servant—Scope of employment—Liability of bailee for damage caused to carriage by his servant.—The plaintiff, a coachbuilder, lent the defendant a dog-cart for use while he repaired the defendant's trap. The defendant's coachman without his master's knowledge or permission, took out the dog-cart one night for a drive on his own account and damaged the dog-cart by negligently driving it into a tramcar.

Held, that the plaintiff could not recover damages from the defendant for the damage done to the dog-cart.

Decision of the Divisional Court (Lord Alverstone, L.C.J., and Wills and Channell, JJ., 51 W. R. 558) reversed.—SAUNDERSON *v.* COLLINS, *C.A.*, 354; [1904] 1 K. B. 628; 73 L. J. K. B. 358; 90 L. T. 243.

BANKER:—

Stolen cheques—Payment for a customer—Collecting agents — Holders for value — Special crossing — "Holder"—Addition to crossing—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 77, *sub-section* 3; *ss.* 78, 82.—An account was opened by N. with stolen cheques at the defendant bank, and stolen cheques were paid in from time to time. N. knew at the time of opening the account that the bank's practice was not to discount bills, and that cheques paid in would not be paid against until cleared. On paying in the counter-clerk entered the amount in a book and handed the cheque and paying-in slip to a clerk, who entered the particulars in the waste-book. The cheque was put in a box, the paying-in slip was then given to the ledger clerk, who posted then and there the amount in the ledger to the credit of N.'s account. The cheque was crossed generally. The bank specially crossed the cheque to W. D. & Co., and impressed on the cheque the words "account Economic (defendant) Bank." From time to time the cheques were forwarded to W. D. & Co. for clearance. If no notice of dishonour from W. D. & Co. was received by 9 a.m. on the day following the defendant bank entered the amount of the prior day's cheques to the credit of N. in his pass-book, but under the date of the paying in of the cheque. The defendant bank had a current account, which was in credit, and a loan account, which was in debit, with W. D. & Co. W. D. & Co. held securities exceeding in value the debit to the loan account, specifically deposited by the defendant bank. There was no negligence or want of good faith on the part of the defendant bank.

Held, that the ledger entries did not constitute the bank holders for value. The bank was an agent to collect, and received payment for their customer. The clearing agents had no lien on the cheques by reason of the debit to the loan account. The impressed words did not amount to an addition to the crossing. The defendant bank could cross specially the cheques crossed generally: section 77 (3). "Holder" does not necessarily mean "holder for value."—AKROKERRI (ASHANTI) MINES (LIMITED) *v.* ECONOMIC BANK, *K.B.D.*, 670; [1904] 2 K. B. 465.

See also Mistake, 1.

BANKRUPTCY:—

1. *Act of bankruptcy—Bankruptcy notice—Stay of execution—Judgment summons—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g)—*County Court Rules*, 1889, *ord.* 25, *rr.* 17, 25, 26, 27.—A creditor having obtained judgment in the High Court issued a judgment summons in the county court against the debtor, and also a bankruptcy notice, under which an act of bankruptcy became completed before an order was made on the judgment summons. After the order had been made another creditor presented a bankruptcy petition founded on the above act of bankruptcy.

Held, that as there was a completed act of bankruptcy before the making of an order on the judgment summons, a receiving order ought to be made.—A DEBTOR, RE, ROCK RED BRICK CO., EX PARTE, *Bkcy.*, 302; 90 L. T. 64.

2. *Agreement for balance payable by instalments—Default—Garnishee order nisi—Bankruptcy notice—Judgment creditor—Judgment debtor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g).—A debtor entered into an agreement with his creditor that he should pay a certain sum down, and by way of collateral security consent to judgment for the remainder, payable by certain instalments. Judgment having been signed against him for the balance yet due, the creditor obtained a garnishee order *nisi* to attach all debts due to the debtor from his bankers. Shortly afterwards, two instalments being still owing on the judgment, the creditor issued a bankruptcy notice for these overdue instalments, after deducting the amount which had been garnished. The registrar set aside the bankruptcy notice on the ground that the creditor having issued a garnishee order, the proceedings on which were still pending, was not entitled under section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, to issue the notice.

Held, on appeal, that the decision of the registrar was right; and that the notice was bad, as being one which required the debtor to pay in accordance with the provisions of the agreement and not in accordance with the terms of the judgment.

In re Feast, 31 SOLICITORS' JOURNAL, 286, 4 Morell 37, discussed.—JUDGMENT DEBTOR, A, RE, *C.A.*, 178.

3. *Appeals from county courts—Leave to appeal—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 104—*Bankruptcy Appeals (County Courts) Act*, 1884 (47 *Vict. c.* 9), *s.* 2—*Bankruptcy Rules, rr.* 129 (2), 134 (a).—Except by leave of the county court judge no appeal lies to the Divisional Court from any order relating to property when it is apparent on the face of the proceedings that the money or money's worth involved does not exceed £50 in value. A refusal of leave to appeal is not an "order subject to appeal" within the meaning of section 104 (2) of the Bankruptcy Act, 1883.—EVERSON, RE, OFFICIAL RECEIVER, EX PARTE, *Bkcy.*, 656.

4. *Discharge—Conditional order—Failure to comply with terms—Modification of order—"No reasonable probability" of complying with terms—Bankruptcy*

Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-section* 2—*Bankruptcy Rules*, *r.* 244.—An application, under the proviso at the end of section 8, sub-section 2, of the Bankruptcy Act, 1890, for the modification of the terms of a conditional order of discharge, ought to be made by the bankrupt himself, not by the trustee in the bankruptcy.

Upon such an application, what the court has to consider is whether there is "no reasonable probability" of the bankrupt's being able to comply with the terms of the order of discharge.

The fact that the bankrupt has failed to comply with the requirements of rule 244 of the Bankruptcy Rules is not a bar to his making an application for the modification of the conditions imposed by the order of discharge.—JOHN ROBERTS & Co., RE, BONZOLINE MANUFACTURING Co, EX PARTE, *C.A.*; [1904] 2 K. B. 299; 73 L. J. K. B. 724.

5. *Discharge conditional on bankrupt consenting to judgment—Refusal to consent—Re-hearing.*—The bankrupt was a captain in the army with no means but his pay, and his insolvency was due to damages given against him in an action for breach of promise, the plaintiff being the only creditor. The registrar made an order for the bankrupt's discharge on condition of his consenting to judgment for £600 being entered against him, to which he refused his consent. On a re-hearing of his application for a discharge the registrar substantially repeated his former order. The bankrupt appealed and asked for an order suspending his discharge for two years only.

Held, that though the bankrupt was not entitled to such an order as of right, it was a proper order to make under the circumstances.—GASKELL RE, GASKELL, EX PARTE, *C.A.*; [1904] 2 K. B. 478; 73 L. J. K. B. 656.

6. *Discharge—Misdemeanour of bankrupt—"Special reasons"—Discharge suspended—Application for re-hearing refused—Right of bankrupt to apply—Practice—Debtors Act*, 1869 (32 & 33 *Vict. c* 62), *s.* 11, *sub-sections* 9, 10, 12—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-sections*, 1, 2.—Upon an application for a discharge under section 8 of the Bankruptcy Act, 1890, by a bankrupt who has been convicted of an offence against section 11 of the Debtors Act, 1869, the court has a discretion, and may take into consideration as "special reasons" for granting the discharge, the circumstances under which the offence was committed.—SOLOMONS, RE, THE BANKRUPT, EX PARTE *C.A.*, 473; [1904] 1 K. B. 106; 73 L. J. K. B. 55; 89 L. T. 637.

7. *Execution—Payment to creditor—Withdrawal by sheriff—Bankruptcy of debtor—Completion of execution—Title of trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11.—On the 22nd of July, 1903, the sheriff levied on the goods of the debtor at the Alexandra and Adelphi Hotels. On the 27th of July he withdrew, on the instructions of the judgment creditor, from the Alexandra Hotel on part payment.

On the 28th of July the debtor sold to the execution creditor goods at the Alexandra Hotel which had been seized, and on the 29th of July he also sold to the execution creditor goods at the same place which had not been seized. On the same day an arrangement was made by which the debtor received credit for the amount in the hands of the sheriff and for the goods sold, and he paid the balance direct to the execution creditor.

The sheriff withdrew, and on the 12th of August he paid over the amount in his hands to the execution creditor, having received no notice of a bankruptcy petition.

On the 20th of August a receiving order was made against the debtor on his own petition.

Held, that the trustee in bankruptcy had no title against the execution creditor to the money or the goods.

In re Pollock and Pendle, 87 L. T. Rep. 238, distinguished.

In re Ford, Ex parte Official Receiver, 81 L. T. Rep. 648, [1900] 1 Q. B. 264, applied.—JENKINS, RE, THE TRUSTEE, EX PARTE, *Bkcy.*; 90 L. T. 65.

8.—*Jurisdiction—County Court—Claim arising out of the bankruptcy—Lease—Disclaimer—Mortgages by demise—Option to take vesting order or be excluded—Application by landlord—Question of merger—Intention—Evidence—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 102, *sub-section* 1.—Where a lessee is adjudicated bankrupt in a county court, and his trustee disclaims the lease, an application by the landlord for an order putting mortgagees by demise to their election to take a vesting order of the lease *cum onere*, or be excluded from all interest, is an application to enforce a claim arising out of the bankruptcy which could not have been enforced by action in the High Court prior to the Bankruptcy Act, 1883, and therefore by virtue of s. 102, sub-section 1, the county court has jurisdiction, without any consent of the parties, to decide all questions of law or fact arising on the application, including the question whether the lease is subsisting, or whether it was merged by a temporary coalescence of the freehold and leasehold estates in the lessee.

The lessee's intention to prevent merger may be gathered (*inter alia*) from his dealings with the property subsequent to the date of coalescence.—LEA *v.* THURSBY (No. 2), *Ch.D. Swinfen Eady, J.*; [1904] 2 Ch. 57; 73 L. J. Ch. 518; 90 L. T. 667.

9.—*Marriage settlement—Covenant for future settlement of property—Transfer of property to trustees of settlement after act of bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47, *sub-section* 2.—In construing s. 47, sub-section 2, of the Bankruptcy Act, 1883, "Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy," the words "on his becoming bankrupt" must be interpreted to mean on his committing an act of bankruptcy within three months of the presentation of a bankruptcy petition on which he is subsequently adjudicated a bankrupt.—REIS, RE, THE TRUSTEE, EX PARTE, *Bkcy.*, 302; [1904] 1 K. B. 451; 90 L. T. 62.

10. *Notice—Creditor's address for service—Power of the Bankruptcy Court to go behind the judgment—Irregularity—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g); *s.* 7, *sub-section* 3; *s.* 143—*Bankruptcy Rules*, 1886 to 1890, *Appendix, Form No.* 6—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.—The Court of Bankruptcy possesses the power, on the hearing of a bankruptcy petition founded on a judgment debt, to go behind the judgment to inquire into the consideration for the debt. But the judgment is conclusive unless the consideration can be questioned. If a creditor who issues a bankruptcy

notice occasionally leaves the address which he has given in the notice, this will not of itself render the notice bad if the address is such either that he can be found, or the debtor is able to pay or compound for the debt, there during the seven days limited by the notice. Nor does it matter if this address is only a temporary address, such as an hotel, if the creditor has no permanent home, or that he left that address on the last of the seven days limited by the notice. But if he abandons such an address this will render the notice inefficient.

In re Stogdon, Ex parte Leigh, [1895] 2 Q. B. 534, 44 W. R. Dig. 13, discussed.

If at the date of the trial of an action for tort a female defendant is unmarried, a judgment can be obtained against her creating a personal debt.—BEAUCHAMP, RE, BEAUCHAMP, EX PARTE, *C.A.*, 545; [1904] 1 K. B. 572; 73 L. J. K. B. 311; 90 L. T. 594.

11. *Notice—Notice based on two judgment debts—Irregularity—Right of court to amend—Practice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (*g*); *s.* 143.—If a bankruptcy notice is founded on two judgment debts, and objection is taken to it on that account, leave to amend such notice will not be given by the court.

In re Collier, Ex Parte Dan Rylands (*Limited*), 8 Morr. 80, 40 W. R. Dig. 21, followed.—O. C. S. (A DEBTOR), RE, THE DEBTOR, EX PARTE, *C.A.*, 595; [1904] 2 K. B. 161; 73 L. J. K. B. 585

12. *Notice—Procedure—Judgment debt—Agreement to pay judgment debt by instalments—Arrears of instalments—Act of bankruptcy—Bankruptcy notice for overdue instalments—Notice to pay "in accordance with the terms of the judgment"—Validity of notice.*—Section 4, sub-section 1, of the Bankruptcy Act, 1883, specifying acts of bankruptcy, must be strictly interpreted. Therefore, a bankruptcy notice which requires payment of a judgment debt "in accordance with the terms of the judgment" is not a good notice within sub-section 1 (*g*) if founded, not on the judgment according to its terms, but on the judgment as modified by some collateral agreement.

A creditor and his debtor agreed in writing that the debt should stand at a certain sum, and that the debtor should consent to a judgment against him for that sum, but that the amount should be payable by instalments. Judgment was accordingly signed for the whole sum, but without any reference to payment by instalments. The debtor failing to pay some of the instalments as they fell due, the creditor served him with a bankruptcy notice requiring payment, not of the whole judgment debt, the final instalment of which had not yet become due, but of the total amount of the instalments then in arrear, as being "the amount due on the judgment."

Held, that the notice was bad in that it did not require payment of the debt "in accordance with the terms of the judgment" within the above sub-section.—H. B., RE, *C.A.*; [1904] 1 K. B. 94; 73 L. J. K. B. 1; 89 L. T. 592.

13. *Partnership—Consolidation of proceedings in bankruptcy with administration of the estate of a deceased debtor in bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 106, 112, 125.—The court has power to consolidate proceedings in the bankruptcy of one partner with the administration of the estate of a deceased partner under section 125 of the Bankruptcy Act, 1883. — GREAVES, RE, OFFICIAL RECEIVER, EX PARTE *Bkcy.*, 633; [1904] 2 K. B. 493.

14. *Proof—Amendment—Omission to value security—Inadvertence—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Schedule I.*, *r.* 10; *Schedule II.*, *rr.* 13, 14.—A limited company presented a proof against a bankrupt's estate for calls on partly-paid shares, stating that the company held no security for their debt. After the proof had been admitted the company altered its articles of association so as to give itself a lien for calls upon fully-paid shares, a large number of which had been held by the bankrupt and were still held by his trustee. The company applied for leave to amend their proof by inserting such lien upon the fully-paid shares as security for the debt and valuing the same.

Held, that the company had not omitted to value their security through inadvertence and could not be allowed to amend their proof and rely on their security, which they must be deemed to have surrendered to the trustee.—ROWE, RE, WEST COAST GOLD FIELDS, EX PARTE, *Bkcy.*, 608; [1904] 2 K. B. 489.

15. *Proof—Gambling debt—Gaming Act*, 1892 (55 & 56 *Vict. c.* 9).—The debtor had been sued by a creditor for a gambling debt, and successfully pleaded the Gaming Act of 1892. After the decision against him the creditor wrote to the debtor's club informing them of his conduct. The debtor thereupon agreed to pay the creditor £100 in cash and to give bills for the remainder of the debt, in consideration of the creditor withdrawing those letters, which agreement was carried out. Upon the debtor becoming bankrupt the creditor proved in the bankruptcy for the amount of the bills then due, but his proof was rejected by the trustee.

Held, that the bills had not been given for an illegal consideration, and that the proof was wrongly rejected on that ground.—BROWNE, RE, MARTINGELL, EX PARTE, *Bkcy.*, 384; [1904] 2 K. B. 133; 73 L. J. K. B. 446; 90 L. T. 291.

16. *Proof—Withdrawal—Substitution of fresh proof—Voluntary payment by third party for loss incurred—Right of proof for the whole debt.*—A creditor who has received a voluntary payment from a stranger in consideration of the fact that the creditor has sustained a loss by the acts of the bankrupt, even although such payment only represents a part of the debt due to the creditor, and the creditor gives the stranger credit for it in proving his debt, nevertheless is entitled to enter an amended proof, claiming the whole amount of the debt, as against the trustee in bankruptcy.

Decision of Buckley, J., (*ante*, p. 336, W. N. 1904, p. 64), affirmed.—ROWE, RE, DERENBERG, EX PARTE, *C.A.*, 628; [1904] 2 K. B. 483; 73 L. J. K. B. 594.

17. *Receiving order—Bankrupt presenting his own petition—Creditors—Right to annul adjudication—Abuse of process of the court—Rescission of receiving order—Adjudication not for benefit of creditors—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 7, 8 (1), 35.—A debtor, having had various committal orders made against him on judgment summonses, presented his own petition in bankruptcy, upon which a receiving order was made. The only creditors were a firm of solicitors, to whom he was indebted for a little over £200. They applied under section 35 of the Bankruptcy Act, 1883, that the adjudication made on the debtor's petition should be annulled, as being an abuse of the process of the court.

Held, that the presentation of such a petition by the debtor under the circumstances of the case was not an abuse of the process of the court, and did not entitle the court to annul the adjudication.

In re Roberts, 48 W. R. 132, [1900] 1 Q. B. 122, approved.

Ex parte Painter, In re Painter, 43 W. R. 144, [1895] 1 Q. B. 85, and *In re Betts, Ex parte Official Receiver*, 49 W. R. 447, [1901] 2 K. B. 39, distinguished.—HANCOCK, RE, HILLEARYS, EX PARTE, *C.A.*, 546; [1904] 1 K. B. 585; 73 L. J. K. B. 245; 90 L. T. 389.

18. *Right of trustee to books of bankrupt—Books of underwriter at Lloyd's—Underwriting as agent in the names of other persons—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 50—*Bankruptcy Rules*, 1886-1890, *r.* 349.—An underwriter at Lloyd's entered into agreements with other persons to act as their agent to carry on the business of an underwriter at Lloyd's in accordance with the custom of Lloyd's, and it was a term of the agreements that he should provide and keep books which the other parties should at all times be allowed to inspect. The agent in fact kept one set of books only in which his accounts with the other persons were entered. On the bankruptcy of the agent the other persons set up a claim to joint property in the books, and refused to hand them over to the trustee in his bankruptcy.

Held, on appeal (reversing the decision of Buckley, J.), that the other persons had a joint property in the books with the bankrupt, and that the trustee in the bankruptcy was not entitled to have the books handed over to him, but had merely the right to inspect them.—BURNAND, RE, THE TRUSTEE, EX PARTE, *Bkcy.*, 437; [1904] 2 K. B. 68; 73 L. J. K. B. 413; 90 L. T. 292.

19. *Settlement—Avoidance of voluntary settlement—Purchase for valuable consideration—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.—A bankrupt, within two years of his bankruptcy, in consideration of the trustees of a former settlement consenting to the partial revocation of the same, executed a new settlement with the same trustees, settling further property, and giving the trustees power to pay or withhold the income of the settled funds at their discretion.

Held, that the trustees of the settlement were not purchasers or incumbrancers for valuable consideration, and that the new settlement must be declared void as against the trustee in the bankruptcy.—PARRY, RE, THE TRUSTEE, EX PARTE, *Bkcy.*, 256; [1904] 1 K. B. 129; 73 L. J. K. B. 83; 89 L. T. 612.

20. *Settlement of settlor's own property—Limitation of life interest to settlor determinable on bankruptcy—Second bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.—In 1893 the bankrupt had settled property on trustees who were to pay him the income, but upon bankruptcy his rights to the income were to cease, and the trustees were left with the power to apply the income to his support or accumulate it as they thought fit. In 1900 he became bankrupt; the trustees raised enough out of the settled funds to pay the debts in full, but the bankruptcy was not formally annulled. In 1902 he again became bankrupt, and the trustee in bankruptcy claimed the life income.

Held, that the trustee could not succeed, as the bankrupt's interest in the income had determined upon his bankruptcy in 1900, and passed to the trustees of the settlement.—JOHNSON, RE, MATTHEWS, EX PARTE, *K.B.D.*, 304; [1904] 1 K. B. 134; 73 L. J. K. B. 220; 90 L. T. 61.

21. *Transfer by the bankrupt of his own and another business to a limited company—Relation back of trustee's title—Rights of debenture-holders—Bankruptcy Act*. 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (b); *ss.* 43, 44, 49—13 *Eliz. c.* 5.—The bankrupt transferred all his own assets and a business which he had agreed to purchase from another trader named Melinsky, within three months of his bankruptcy, to a limited company in consideration of shares and debentures, leaving himself saddled with debts amounting to over £13,000 and no means of paying for them.

Held, that the transfer was void as an act of bankruptcy, and that the trustee was entitled to the assets of the company, subject to the rights (if any) of the debenture-holders.

The debentures in the company had, by direction of the bankrupt, been allotted as follows: 18 to the debtor; 30 to one Nevill, who had assisted the bankrupt in transferring his assets to the company; 30 to Melinsky, in payment for his business; 7 to Brodsky, a creditor; and 15 to Zisselman, another creditor of the bankrupt. After the bankruptcy the two last debenture-holders sold their debentures to Bernstein and Levartofsky for sums far below their face value. Bernstein and Levartofsky knew of the bankruptcy, but made no inquiries.

Held, that Melinsky's debentures were a charge upon the property of the company now vested in the trustee, but that Nevill was not entitled to any charge because he had notice of the bankrupt's fraud, nor Bernstein and Levartofsky, because, knowing what they did, they ought not to have purchased their debentures at an undervalue without inquiry.—SLOBODINSKY, RE, MOORE, EX PARTE, *Bkcy.*, 156; [1903] 2 K. B. 517; 72 L. J. K. B. 883; 89 L. T. 190.

See also Criminal Law, 1, 2.

BILL OF LADING.—See Ship.

BRITISH COLUMBIA, LAW of:—

Income tax — Income — Fluctuating earnings — Assessment Act (*Rev. Stat. of Brit. Col.*, 1897, *c.* 179).—The respondent, an engine-driver in the employment of the Canadian Pacific Railway Co., was not paid fixed wages, but received pay according to the number of miles which his engine was driven.

Held (reversing the judgment of the court below), that his earnings, though fluctuating and uncertain, were "income" within the meaning of the Assessment Act, and were liable to taxation.—ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* OSTRUM. *P.C.*; [1904] A. C. 144; 73 L. J. P. C. 11; 89 L. T. 509.

BUILDING AGREEMENT:—

Architect's certificate—Defective work—Damages.—By a building agreement it was provided, *inter alia*, that the architect, who was appointed by the employer for the purposes of the agreement, should have power (*a*) to order the removal of any materials which were not in his opinion in accordance with the specification, and the re-erection of any work done with improper materials; (*b*) to direct the contractor to make good at his own expense, unless the architect should decide that he ought to be paid, any defects appearing within twelve months from the completion of the works, and arising in the opinion of the architect from defective materials or workmanship. The agreement also provided that the contractor should be paid under certificates to be issued by the architect, and that no such certificate should be conclusive evidence as to the sufficiency of any work or materials to which it related so as to relieve the contractor from his liability to make good all defects as provided by the agreement.

The plaintiff, the contractor, claimed payment under the architect's certificates for work done. The defendant, the employer, counterclaimed for damages in respect of defective work and materials and the cost of re-executing such defective work.

Held, that, in the absence of any order by the architect, as provided by the agreement, directing the contractor to make good defects, the court had no jurisdiction, and that the counterclaim could not be sustained.—ROBINS *v.* GODDARD, *K.B.D.*, 587; 73 L. J. K. B. 712; 90 L. T. 772.

BUILDING SCHEME:—

Mutual covenants—Waiver—Highway—Cul de sac—*Dedication to the public.*—A corporation having acquired land to widen a street sold surplus land by auction under conditions requiring the purchasers to observe the bye-laws as to building.

The corporation reserved the right to waive or alter any stipulations as to any land not sold at the sale or, with the consent of the purchaser, as to any land so sold. The corporation consented to alter the plans of a purchaser so that the air space required by the bye-laws was provided out of a square, and not out of the land sold at the sale. The square was a *cul de sac*, but not separated by any bar from the highway. It had never been paved or repaired by the local authority.

Held, that there was under the circumstances no building scheme which the corporation was not at liberty to alter, and that, although a *cul de sac* may be a highway, no dedication of the square to the public had been proved, and that the user proved was only that of private rights of way to the houses in the square.—ATTORNEY-GENERAL AND LONDON PROPERTY INVESTMENT TRUST *v.* RICHMOND CORPORATION, *Ch.D. Swinfen Eady, J.*; 89 L. T. 700.

See also Covenant.

CANADA, LAW of:—

1. *Appeal—Special leave.*—Special leave to appeal from a decree of the Supreme Court of Canada will not be granted to a petitioner who has elected to appeal to that conrt and not to his Majesty direct, unless a question of law is raised of sufficient importance to justify it. — CANADIAN PACIFIC RAILWAY *v.* BLAIN, *P.C.*; [1904] A. C. 453.

2. *Criminal law—Powers of Provincial Legislature.*—A Lord's Day Observance Act, which imposes penalties for the infringement of its provisions, is a matter of criminal law reserved by section 91 (27) of the British North America Act, 1867, for the exclusive legislative authority of the Parliament of Canada, and it is therefore *ultra vires* of a Provincial Legislature to pass such an Act.—ATTORNEY-GENERAL FOR ONTARIO *v.* HAMILTON STREET RAILWAY CO., *P.C.*; [1903] A. C. 524; 72 L. J. P. C. 105; 89 L. T. 107.

3. *Goods imported into Canada—Ship—Registration.*—A foreign-built ship brought to Canada comes under the head of "goods imported into Canada" within the meaning of the Customs Tariff Act, 1897, and the imposition of a duty upon such ship under the Act prior to registration in Canada is not repugnant to the provisions of the Imperial Merchant Shipping Act, 1894.—ALGOMA CENTRAL RAILWAY CO. *v.* THE KING, *P.C.*; [1903] A. C. 478; 72 L. J. P. C. 108; 89 L. T. 100.

4. *Husband and wife—Wife binding herself for husband—Civil Code, art.* 1301.—By article 1301 of the Civil Code of Lower Canada "a wife cannot bind herself with or for her husband otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect."

Held, that the words "for her husband" meant generally in any way for his purposes, and should not be restricted to the case of a wife becoming surety for her husband; and, if it was proved that she had in fact bound herself for her husband, the ignorance of the obligee as to the real facts did not affect the operation of the article.

Therefore where a wife borrowed money upon the security of real estate which was her separate property, and handed the money to her husband to be applied by him to his own purposes, at his discretion,

Held, that the security was void.

Judgment of the court below affirmed.—TRUST AND LOAN CO. OF CANADA *v.* GAUTHIER, *P.C.*; [1904] A. C. 94; 73 L. J. P. C. 5; 89 L. T. 453.

5. *Law of Yukon Territory—Practice—Right of appeal—Judgment whether final or interlocutory—Jurisdiction—Promissory note—Yukon Territory Act,* 1899.—In an acton upon a document alleged by the plaintiffs to be a promissory note the judge at the trial ordered that, "as to the alleged note or paper writing mentioned in paragraph 2 of the plaintiff's statement of claim," the plaintiff's action be dismissed.

Held, that this was a final judgment that the sum of money represented by the alleged note was not due, and, notice of appeal not having been given within the time limited by the Yukon Territory Act, 1899, no appeal lay to the Supreme Court of British Columbia, and consequently a further appeal from that court to the Supreme Court of Canada was incompetent.

Judgment of the court below reversed.—MCDONALD *v.* BELCHER, *P.C.*; [1904] A. C. 429; 90 L. T. 735.

6. *Mining royalties—"Placer" mining grant—Renewal—Conditions—Publication of regulations.*—Under the regulations made under the Dominion Lands Act (Rev. Stat. Can. 1886, c. 54) and in force in the Yukon Territory, a miner who has obtained a "placer" grant has no absolute right to a renewal of his grant, and on renewal holds under an annual grant in substitution for, not in continuation of, his original grant, and subject to all such regulations as may be in force when the renewal grant comes into operation, though they may not have been in force at the date of the original grant.

By section 91 of the Act regulations made by the Governor in Council under the Act have force and effect only after they have been published for four successive weeks in the *Gazette.*

Held, that the regulations did not take effect till the expiration of a period of four weeks from the date of the first publication.

Judgment of the court below affirmed.—CHAPPELLE *v.* REX, *P.C.*; [1904] A. C. 127; 73 L. J. P. C. 18; 89 L. T. 513.

7. *Practice — Leave to appeal — Multiplication of appeals.* — Where an appellant in Canada has appealed from the Court of Appeal for the province to the Supreme Court of Canada, the Judicial Committee will not give leave for a further appeal except in a very strong case.

More latitude will be given to a respondent wishing to appeal from a judgment of the Supreme Court.

Rule laid down in *Prince* v. *Gagnon*, 8 App. Cas. 103, followed.—CLERGUE *v.* MURRAY, *P.C.*; [1903] A. C. 521; 72 L. J. P. C. 99; 89 L. T. 373.

CAPE of GOOD HOPE, LAW of:—

Martial law regulations—Review of martial law—Convictions by Supreme Court—Jurisdiction.—The Supreme Court of the Cape of Good Hope has no jurisdiction to review judgments of martial law courts.

Where a deputy administrator of martial law was also a resident magistrate, and by mistake used in proceedings relating to acts contravening martial law regulations the printed forms of his magistrate's court with headings appropriate thereto,

Held, that his convictions could not on that account be quashed as irregular; it appearing that they were in fact made in the administration of martial law.—ATTORNEY-GENERAL FOR THE CAPE OF GOOD HOPE *v.* VAN REENAN, *P.C.*; [1904] A. C. 114; 73 L. J. P. C. 13; 89 L. T. 591.

CARRIER:—

1. *Contract—Exemption—Negligence of servants—"Loss of goods which can be covered by insurance."*—Goods were shipped at a jetty on the River Thames in the defendants' barge for carriage by them to a place higher up the river. The carriage was subject to the following clause: "The rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance. The terms of the marine or other policy should stipulate that insurance is effected without recourse to lighterman." After shipment the goods were lost, owing to the negligence of the defendants' servants.

Held, that, though the loss was one which would be covered by an ordinary marine policy on goods, the clause did not in sufficiently clear and unambiguous terms exempt the defendants from liability for loss arising from the negligence of their servants.

Judgment of Walton, J. (51 W. R. 477, [1903] 1 K. B. 750), affirmed.—PRICE *v.* UNION LIGHTERAGE Co., *C.A.*, 325; [1904] 1 K. B. 412; 73 L. J. K. B. 222; 89 L. T. 731.

2. *Railway company—Liability—Inherent unfitness of thing carried.*—A railway company contracted with the plaintiff to carry an engine from the plaintiff's premises to a station on their line. The engine was on wheels and fitted with shafts, but one of the shafts contained a latent flaw. The railway company had it carried by horses, that being the mode of carriage contemptated by both parties. While the engine was on the road the shaft which contained the flaw broke, the horses bolted, and the engine was upset and damaged.

Held, that the railway were not liable for the damage caused, as it arose from an inherent vice in the thing contracted to be carried.—LISTER *v.* LANCASHIRE AND YORKSHIRE RAILWAY Co., *K.B.D.*, 12; [1903] 1 K. B. 878; 72 L. J. K. B. 385; 88 L. T. 561.

CHARGING ORDER:—

Debentures—"Stock or shares"—Ord. 46, *r.* 1—*Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 14.—The court has no power, under section 14 of 1 & 2 Vict. c. 110, to make an order charging debentures in a company with the payment of a judgment debt.—SELLAR *v.* CHARLES BRIGHT & Co., *C.A.*, 563; [1904] 2 K. B. 446; 73 L. J. K. B. 643.

See also Receiver, 2.

CHARITY:—

1. *Charitable gift—Ambiguity—Uncertainty of object—Erroneous recital in codicil.*—A testatrix by will made in 1897, among other legacies to charitable institutions, bequeathed to the British Home for Incurables, Streatham, S.W., mentioning accurately the name of its secretary and address of its office, £250. By codicil made in 1902, after reciting twice incorrectly that she had given by will £500 to the British Home for Incurables, Streatham, S.W. . . . and amongst others, to St. M.'s Orphanage, Bayswater, £100, she revoked all the legacies, "and instead thereof" bequeathed £500 each to the Royal Home for Incurables, Streatham, S.W., and to St. M.'s Orphanage.

The legacy of £500 was claimed by the Royal Hospital for Incurables and by the plaintiff institution, founded in 1861 by the name of the British Home for Incurables, and in 1899 incorporated by Royal Charter by its present name.

Held, that, having regard to entries in a book kept by the testatrix containing particulars of her charitable contributions, she distinguished the two institutions as the "Royal" and the "British," and, therefore, on the true construction of the codicil, the Royal Hospital for Incurables was entitled to the legacy.

Decision of Kekewich, J. (89 L. T. Rep. 495) reversed.—BRITISH HOME AND HOSPITAL FOR INCURABLES *v.* ROYAL HOSPITAL FOR INCURABLES, *C.A.*; 90 L. T. 601.

2. *Charitable gift—Bequest for "Home of Rest for Lady Teachers"—Validity.*—A testator bequeathed money and two leasehold houses to establish a Home of Rest for Lady Teachers.

Held, that the bequest was a valid charitable gift as being beneficial to the community.—ESTLIN, RE, PRITCHARD *v.* THOMAS, *Ch.D. Kekewich, J.*; 72 L. J. Ch. 687; 89 L. T. 88.

See also Advowson, 1.

CHARTER-PARTY.—See Ship.

COMPANY:—

1. *Articles of association—Construction—Transfer—"Usual common form"—Address of transferor—Number of share—Immaterial details.*—A provision in the articles of association of a limited company that transfers of shares shall be in writing and in the usual common form, means that the transfer shall be in that form in all material respects; and a transfer which omits details usually inserted, such as the address of the transferor or the number of the share, but which details are, under the circumstances of the case, immaterial, may, nevertheless, comply with the provision. — LETHEBY & CHRISTOPHER, RE, *Ch.D. Buckley, J.*, 460; [1904] 1 Ch. 815; 73 L. J. Ch. 509; 90 L. T. 774.

2. *Articles of association—Contract by company not to alter articles of association—Shares issued not* bonâ fide—*Control of voting—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 50.—A company cannot validly by contract deprive itself of its statutory right under section 50 of the Companies Act, 1862 (25 & 26 Vict. c. 89), to alter its articles of association.

Where directors issue shares not *bonâ fide* for the advantage of the company, but for the purpose of altering the voting power of the company and of controlling the holders of the greater number of shares, an injunction will be granted for the purpose of restraining them from employing the votes of the shareholders so created for such purpose.

The principle in *Fraser* v. *Whalley*, 2 H. & M. 10, 13 W. R. Ch. Dig. 42, applied. — PUNT *v.* SYMONS & Co., *Ch.D. Byrne, J.*, 41; [1903] 2 Ch. 506; 72 L. J. Ch. 768; 89 L. T. 525.

3. *Contract—Specific performance—Contract made before existence of company.*—A company cannot by adoption or ratification obtain the benefit of a con-

tract purporting to have been made on its behalf before the company came into existence.

Kelner v. *Baxter*, 15 L. T. Rep. 213, L. R. 2 C. P. 174, approved.

But the facts may show that a new contract was made with the company after its incorporation on the terms of the old contract.

Judgment of the court below reversed, on the ground that no such facts were proved in this case. —NATAL LAND AND COLONIZATION CO. *v.* PAULINE COLLIERY SYNDICATE, *P.C.*; [1904] A. C. 120; 73 L. J. P. C. 22; 87 L. T. 678.

4. *Debentures—Covering deed before* 1900—*Specifically mortgaged property—Leasehold acquired after* 1900 *upon trusts of covering deed—Assignment to company—Sub-demise to trustees of covering deed—Registration of sub-demise—"Charge"—Companies Act*, 1900 (63 *&* 64 *Vict. c.* 68), *s.* 14.—Trustees for the debenture-holders of a limited company were empowered by their trust deed, which was executed in 1897, to sell certain property thereby specifically mortgaged and to hold the proceeds upon trust (amongst other things) at the request of the company to purchase or acquire leasehold hereditaments, which were to be held upon the trusts of the specifically mortgaged property. In 1902 a portion of the proceeds of sale of the specifically mortgaged property was, at the request of the company, employed in the purchase of a leasehold public-house. The company took an assignment of the house and then sub-demised the property to the trustees for the whole term except the last day.

Held, that the sub-demise was a specific mortgage or charge upon the property within section 14 of the Companies Act, 1900, and must be registered under its provisions.

Decision of Byrne, J. (51 W. R. 508, [1903] 2 Ch. 527), affirmed.—CORNBROOK BREWERY CO. *v.* LAW DEBENTURE CORPORATION, *C.A.*, 242; [1904] 1 Ch. 103; 73 L. J. Ch. 121; 89 L. T. 680.

5. *Debentures—Deficient security—Principal or interest—Appropriation—Income tax.*—By a debenture trust deed it was provided that the trustees should appropriate the proceeds of realization of the securities in the first place towards payment of all arrears of interest on the debentures; and, secondly, towards payment of the principal. The company made default; a debenture-holder's action was brought, and the trusts of the deed were ordered to be carried into execution. The securities were gradually realized. Orders were from time to time made under which certain sums were also paid on account of interest after deducting income tax, and under other orders payments were made on account generally of what was due for principal and interest. The securities had now all been realized, and the trustees had in their hands a sum of money which they proposed to pay to the debenture-holders. It was admitted that if the whole of the payments were attributed to principal they would be insufficient to discharge the full amount due. The Inland Revenue authorities claimed that all the payments on account generally ought to be attributed to interest in the first place, and that income tax should be deducted from them.

Held, that the provision in the trust deed for payment of interest in the first place was inserted for the benefit of the debenture-holders, and could be waived by them in the absence of opposition by the debtors; that, as between themselves and the trustees, the debenture-holders must elect whether they would take the money as principal or interest, without prejudice to the question whether in their hands it would afterwards be treated differently; and that income tax would be payable only out of such part of the funds as the debenture-holders elected to take as interest.—SMITH *v.* LAW GUARANTEE AND TRUST SOCIETY, *Ch.D. Byrne, J.*; [1904] 1 Ch. 500; 73 L. J. Ch. 233; 90 L. T. 659.

6. *Debentures—Deposit of deeds—Priority—Constructive notice.*—A company issued debentures, one of the conditions of which prohibited the creation of any mortgage or charge having priority over the debentures.

The company deposited title deeds to secure an overdraft with a bank. The bank manager knew that the company had issued debentures, but was not aware of the conditions. Subsequently a second debenture specifically referring to the first debentures was deposited with the bank to secure a further overdraft.

Held, that the bank was not affected with constructive notice of the conditions indorsed on the debentures, and was entitled to priority over the debentures. — VALLETORT SANITARY STEAM LAUNDRY CO., RE, *Ch.D. Swinfen Eady, J.*; [1903] 2 Ch. 654; 72 L. J. Ch. 674; 89 L. T. 60.

7. *Debentures — Floating security — Execution—Agreement by company with sheriff to pay off judgment debt by instalments to avoid sale—Right to money.*—Under a writ of *fi. fa.* the goods of a limited company were seized in execution of a judgment debt. In order to avoid a sale the company agreed with the sheriff, with the assent of the judgment creditor, that in consideration of his not selling the goods they would pay the sheriff out of the daily takings £3 5s. a day—£3 to go towards the paying off of the debt and 5s. for sheriff's charges. A receiver was subsequently appointed in a debenture-holders' action, and he claimed the sum of £75, the net amount in the hands of the sheriff.

Held, that the judgment creditor was entitled to retain the moneys.

Robson v. *Smith*, 43 W. R. 632, [1895] 2 Ch. 118, discussed.—ROBINSON *v.* BURNELL'S VIENNA BAKERY CO., *K.B.D.*, 526.

8. *Debentures—"Floating charge"—Mortgage—Assignment of present and future book debts—Debenture-holders—Priority—Registration of mortgages—Companies Act*, 1900 (63 *&* 64 *Vict. c.* 48), *s.* 14, *sub-section* 1 (d).—In October, 1902, a company, having to give security to certain guarantors, by deed assigned all its present and future book and other debts, with the benefit of all securities for the same, to a trustee, subject to redemption, in trust for the guarantors. The deed contained no express provision against possession being taken by the trustee, but contained a declaration that the trustee should at any time, if required by the guarantors, give notice of this assignment to the debtors of the company, with a proviso that it should not be incumbent on the trustee to give notice; there were also provisions that the trustee might at any time give notice, appoint a receiver, and exercise the statutory power of sale, but meantime he was not to be answerable for allowing the company to receive the book debts. A receiver having been subsequently appointed in a debenture-holder's action, the trustee now applied by motion in that action to enforce his security.

Held, that upon the true construction of the deed it was clearly intended that the company should carry on its business in the ordinary way and that the deed was a floating charge and void for want of registration in a question between the trustee and a creditor of the company.—ILLINGWORTH *v.* HOULDSWORTH, *H.L.*; [1904] A. C. 355.

9. *Debentures—Floating security—Set-off—Second debenture-holders, right of—Liberty of company to carry on business.*—A debenture issued by a trading company to their bankers and payable on the 1st of August, 1900, provided that the debenture should be a first charge upon all the company's undertaking and property present and future; that such charge was to be a floating security, but so that the company were not to be at liberty to create any mortgage or charge in priority to, or upon an equality with, that debenture; that the company should be at liberty to carry on their business until default should be made in payment of the principal sum secured, or until a receiver should be appointed, and that from and after such default, or the appointment of a receiver, the liberty of the company to carry on their business should forthwith cease and determine, and the charge created by the debenture should be immediately enforceable. The company subsequently issued to the defendants, with whom they had been and were trading, a debenture payable on the 1st of October, 1900, and expressed to be subject to the debenture held by the bankers. The company made default in payment both of the debenture issued to the bankers and of that issued to the defendants. The bankers took no steps to stop the company carrying on their business until the 2nd of October, 1901, when they appointed a receiver. In an action brought by the company and the bankers to recover from the defendants the balance of the price of goods sold and delivered by the company to the defendants between the 1st of July, 1900, and the 1st of October, 1901,

Held, that the defendants were entitled to set off the sum which on the 1st of October, 1900, became due under their debenture against the sum due to the plaintiffs for the goods.—NELSON & Co. *v.* FABER & Co., *K.B.D.*; [1903] 2 K. B. 367; 72 L. J. K. B. 771; 89 L. T. 21.

10. *Debentures—Registration—Prior agreement—Date of creation of security—Limit of time for registration—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.—The fact of an agreement having been entered into by a limited company to issue debentures and to give them to one who advances money to the company as security for his advance, does not prevent debentures subsequently issued for the purpose being duly registered under section 14 of the Companies Act, 1900, more than twenty-one days after the date of the agreement, so long as they are registered within twenty-one days after the time of their being sealed and issued.

A limited company on the 1st of March, 1903, resolved to issue certain debentures, and in order to obtain an advance from the plaintiff, the company at the same time agreed to give him debentures of £1,000 as a security for the advance. These debentures were sealed but not registered, and were, on the 6th of April, cancelled and fresh ones were, on the 7th of April, sealed, and to the amount of £1,000 issued to the plaintiff. These latter debentures were registered on the 11th of April.

Held, that these debentures were duly registered within the twenty-one days limited by section 14 of the Companies Act, 1900.—DEFRIES & Co., RE, BOWEN *v.* DEFRIES & Co., *Ch.D. Buckley, J.*, 253; [1904] 1 Ch. 37; 73 L. J. Ch. 1.

11. *Debenture-holders' action—Debentures held by a trustee for creditors of lenders—Debt owed by lenders to company—Right of participation in fund available for debenture-holders.*—P. was general assignee of the property of a firm, S., for the benefit of its creditors. As such assignee P. was entitled to certain debentures issued by a company, and was registered as holder thereof. The firm S. was indebted to the company in a sum which formed part of the property secured by the debentures. The debentures were indorsed with a condition that the moneys secured should be paid without regard to any equities between the company and the original or any intermediate holder. A debenture-holders' action having been brought against the company, and the usual judgment given, there was a fund in court in the action available for distribution among the debenture-holders.

Held, that P., not being a *bonâ fide* purchaser for value of the debentures, could not claim to share in the fund until the debt due from the firm to the company had been paid or brought into account, notwithstanding that he was the registered holder.

In re Goy & Co. (*Limited*), 48 W. R. 425, [1900] 2 Ch. 149, distinguished.—BROWN & GREGORY (LIMITED), RE, *Ch.D. Byrne, J.*, 412; [1904] 1 Ch. 627; 73 L. J. Ch. 430.

12. *Debenture-holders' action—Insufficient assets—Cost of second mortgage debenture-holders made defendants.*—In an action by first mortgage debenture-holders of a limited company, in which the company and the second mortgage debenture-holders were made defendants, the assets proved insufficient to satisfy the claims of the first mortgage debenture-holders.

On the further consideration of the action the question was raised whether the second mortgage debenture-holders made defendants ought to be allowed their costs.

Held, that the second mortgage debenture-holders made defendants were not entitled to costs.—CLAYTON ENGINEERING, &c., Co., RE, *Ch.D. Swinfen Eady, J.*; 90 L. T. 283.

13. *Directors—Payment of* interim *dividend out of capital*—Ultrà vires—*Mistake—Acquiescence by shareholders—Shareholder's action—Form—Proceeds of* ultrà vires *act in plaintiff's possession—Right to maintain action.*—A shareholder in a limited company, who has received an unearned *interim* dividend paid by the directors out of capital under a *bonâ fide* mistake, knowing full well that it was an *ultrà vires* payment, and that the directors would eventually repay the amount, cannot afterwards, suing either individually or on behalf of all the other shareholders, maintain an action against the directors for the repayment of this dividend into the coffers of the company, if at the time of bringing the action he had the proceeds of the *ultrà vires* act in his pocket.

Decision of Byrne, J. (reported 20 Times L. R. 28), reversed.

Dictum of Brett, L.J., in *Flitcroft's case*, 31 W. R. 174, on p. 176, 21 Ch. D. 519, on pp. 534, 535, approved.—TOWERS *v.* AFRICAN TUG Co., *C.A.*, 530; [1904] 1 Ch. 558; 73 L. J. Ch. 395; 90 L. T. 298.

14. *Directors—Quorum of directors—Resolution—Interested director—Validity of resolution—Articles.*—The articles of a company provided that any director might enter into a contract or be interested in any business with the company; that no director should vote on any matter relating to the contract or business with the company in which he was interested; and that two directors should be a quorum for the transaction of business.

Held, that a quorum of directors meant a quorum competent to transact and vote on the business before the board; and, therefore, that a resolution passed at a meeting of three directors,

two of whom were interested in the subject-matter of the resolution, was invalid.—GREYMOUTH POINT ELIZABETH RAILWAY AND COAL CO., RE, *Ch.D. Farwell, J.*; [1904] 1 Ch. 32; 73 L. J. Ch. 92.

15. *Life assurance—Deed of settlement—Participating policy-holders—Terms in prospectus—Bye-laws by company—Profits divisible among policy-holders—Power reserved to company to alter bye-laws—Part of profits to form a reserve fund—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62) —*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 50, 51, 196, *and* 209.—A life and fire insurance company, constituted under a deed of settlement, and afterwards registered under the Companies Acts, 1862, cannot—after issuing prospectuses to the public pointing out its advantages over other mutual societies, chief among which was the distribution of the entire profits in the mutual department without any deduction for a reserve fund, and on the strength of which prospectus a person took out a policy in the mutual department—afterwards, even though purporting to act in pursuance of section 1 of the Companies (Memorandum of Association) Act, 1890, by substituting a memorandum and articles of association for the deed of settlement, deprive the participating policy-holders of the profits which they previously enjoyed, by setting aside a certain amount, until a fixed sum should be reached, to form a reserve fund.

A company was constituted by a deed of settlement of 1854 to carry on, amongst other matters, that of life and fire assurance. It was afterwards registered under section 209 of the Companies Act, 1862, as an unlimited company. By their deed of settlement it was provided that the profits of the company should be ascertained as directed by the bye-laws, and it was further provided that any provisions of the deed and even bye-laws might be altered by a bye-law or bye-laws. In the mutual life insurance department, by virtue of a bye-law, the policy-holders were entitled to a division of any profits made in that department of the company's business. The plaintiff took out a policy in that department on his own life on the faith of certain statements contained in the company's prospectuses, that no profits should be set aside to form a reserve fund. Afterwards it was proposed, with the object of substituting a memorandum and articles for their deed of settlement, to register the company under the provisions of the Companies (Memorandum of Association) Act, 1890. The proposed articles set aside out of the profits a certain percentage until a fixed sum should be reached to form a reserve fund. The plaintiff's policy was taken subject to the indorsed conditions, which referred to the deed of settlement and the bye-laws and to any documents deposited with the company in relation to the assurance.

Held, that the company could not, either by altering its bye-laws or by altering its articles, justify a breach of contract; that there was a contract for value between them and the plaintiff relating to the future profits of a particular branch of the company's business, and that the company could not therefore, by special resolution or otherwise, alter the contractual right of the plaintiff.—BAILY *v.* BRITISH EQUITABLE ASSURANCE CO., *C.A.*, 549; [1904] 1 Ch. 374; 73 L. J. Ch. 240; 90 L. T. 335.

16. *Memorandum of association — Alteration—Jurisdiction—Company under Joint Stock Companies Acts*, 1856, 1857 (19 & 20 *Vict. c.* 47; 20 & 21 *Vict. c.* 14)—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 175, 176—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-section* 1; *s.* 3, *sub-section* 2.—The Companies (Memorandum of Association) Act, 1890, applies to a company formed and registered under the Joint Stock Companies Acts, 1856, 1857, so that the court has jurisdiction to confirm an alteration of its memorandum.

In re Nitrophosphate and Odams Chemical Manure Co. (Limited), (1893) W. N. 141, *In re Hong Kong and China Gas Co. (Limited)*, (1898) W. N. 158, and *In re Copiapo Mining Co.*, (1899) W. N. 25, followed.

In re General Credit Co., (1891) W. N. 153, not followed. — EUPHRATES AND TIGRIS STEAM NAVIGATION CO., RE, *Ch.D. Swinfen Eady, J.*; [1904] 1 Ch. 360; 73 L. J. Ch. 175; 90 L. T. 56.

17. *Memorandum of association—Different classes of shareholders—Rights of shareholders defined by memorandum—Power in memorandum to modify rights—Validity of power.*—A provision in a memorandum of association of a limited company, which memorandum provides for the division of the capital into different classes of shares and prescribes for the rights and privileges of the different classes of shareholders *inter se*, that the rights thus attached to the different classes of shares may from time to time be modified as provided by the articles of association, is valid; and consequently a scheme for the reduction of the capital of the company, which involves such a modification, will be sanctioned by the court, provided that it involves no unfairness to the shareholders whose rights are thereby affected.—WELSBACH INCANDESCENT GAS LIGHT CO., RE, *C.A.*, 327; [1904] 1 Ch. 87; 73 L. J. Ch. 104; 89 L. T. 645.

18. *Mortgage security—Dissolution of company—Purchaser of assets—Vesting order—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 26, *sub-section* (ii.); *s.* 36, *sub-section* 1, *clause* (ii.) (*c*); *and s.* 36.—Where a company entitled to a mortgage debt and to leasehold premises comprised in the mortgage has been dissolved under section 143 of the Companies Act, 1862, a purchaser from the company can, under the Trustee Act, 1893, obtain an order vesting in him the right to sue and recover the mortgage debt, and vesting in him the leasehold premises comprised in the mortgage.—GENERAL ACCIDENT ASSURANCE CORPORATION, RE, *Ch.D. Farwell, J.*, 332; [1904] 1 Ch. 147; 73 L. J. Ch. 84; 89 L. T. 699.

19. *Prospectus—Material contract—Omission from prospectus—Damages, measure of—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3, *sub-section* 1.—The House affirmed the decision of the Court of Appeal (reported as *Broome* v. *Speak*, [1903] 1 Ch. 586), holding that while the appellant was certainly not in fact fraudulent he was liable for the omission of the documents from the prospectus.—SHEPHEARD *v.* BROOME, *H.L.*; [1904] A. C. 342.

20. *Prospectus—Untrue statements—Omission of contracts—Liability of directors—Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.—Upon the faith of the statements contained in a prospectus issued by the defendants and their co-directors, the plaintiffs became shareholders in a company.

The prospectus contained certain untrue statements, and also omitted to specify the dates and names of the parties to a certain contract that had been entered into by or on behalf of the company.

Held, as regards the untrue statements, that even though they constituted material misrepresentation

and remained untrue to the date of the notice of allotment, yet, the defendants having reasonable ground to believe that the statements were true, the plaintiffs were not entitled to compensation from the defendants under section 3 of the Directors' Liability Act, 1890; and, as regards the omission to specify the dates and names of the parties to the contracts, that, the contracts being material to be known, the prospectus was to be deemed to be fraudulent on the part of the defendants within the meaning of section 38 of the Companies Act, 1867, and that the plaintiffs were entitled to damages accordingly.—DE LA COUR *v.* CLINTON, *Ch.D. Joyce, J.*; 90 L. T. 615.

21. "*Reconstruction*"—"*Amalgamation*"—*Bonus to preference shareholders—Bonus to debenture-holders—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 161.—Neither the word "reconstruction" nor the word "amalgamation" with reference to limited companies bear any definite legal meaning. These words are commercial expressions having no exact meaning.

The reconstruction of a limited company involves the desire to preserve the undertaking of the company otherwise than by selling it; that in some altered form the undertaking will be continued so that the persons carrying it on shall substantially continue to carry it on, and that substantially the same business shall be continued, although all the assets of the company may not pass to the new or resuscitated company, and all the shareholders of the old company may not become the shareholders of the new company. It does not necessarily involve that the new or reconstituted company should take over the liabilities of the old company. It is not vital, either, that the whole assets or that the liabilities should be taken over.

Amalgamation of two companies involves the blending of the two undertakings instead of the continuance of either one. It is not necessary that the whole of the two undertakings should become blended or that all the corporators should be parties to the transaction so long as that is what substantially takes place. It may take place either by a transference of undertakings A. and B. to a new corporation C., or by the continuance of undertakings A. and B. by B. upon the terms that the shareholders of A. shall become shareholders of B. It is not necessary that there should be a new company. There may be a continuance of one of the two companies upon the terms that the undertakings of the corporators of both companies shall be substantially merged in one.

S. company, by its memorandum of association, declared that its preference shareholders should, in the event of a winding up for the purpose of reconstruction or amalgamation, have a bonus of 15 per cent. It issued debentures upon the terms that in the event of a winding up for the same purpose the debentures should be redeemed at a percentage over the par value. The memorandum of association of A. company and the terms of its debentures contained similar provisions. S. company sold its business and most of its assets to A. company for shares in A. company. A. company subsequently sold the business and assets it had bought of S. company to I. company for a sum equivalent to its share capital and debenture issue and a further sum. Subsequently S. company sold to a new company C. S. T. its shares in A. company and its remaining assets. S. company and A. then went into voluntary liquidation for the purpose of carrying out these agreements and thus enjoying their assets, and not for the purpose of realizing and dividing their assets.

Held, that the companies were being wound up for the purpose of reconstruction or amalgamation, and that consequently the events upon which the bonuses to the preference shareholders and the debenture-holders became payable had occurred.—SOUTH AFRICAN SUPPLY AND COLD STORAGE CO., RE, *Ch.D. Buckley, J.*, 649.

22. *Security for costs—Liquidator—Misfeasance summons—Companies (Winding-up) Act*, 1890 (53 *&* 54 *Vict. c.* 63), *s.* 10.—On the principle of *Cowell* v. *Taylor*, (1885) 31 Ch. D. 34, it is not the practice of the court to order a liquidator to give security for the costs of a misfeasance summons.—STRAND WOOD CO., RE, *C.A.*; [1904] 2 Ch. 1; 73 L. J. Ch. 550; 90 L. T. 800.

23. *Shares—Call for amount remaining unpaid—Forfeiture—Re-sale by company—Certificate stating that purchaser is discharged from prior calls—Subsequent call—Liability for future calls—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *Table A, art.* 22.—A limited company, as authorized by its articles of association, declared forfeited a number of partly paid-up shares for non-payment of calls and resold them to the appellants upon terms embodied in the certificate which followed the terms of article 22 of Table A, Schedule I., of the Companies Act, 1862. This provided that the purchasers of the shares should be held discharged from all calls then due. A new call was subsequently made upon the appellants in respect of these shares to the extent of the amount still outstanding and unpaid.

Held, that the appellants were liable, since, as the certificate stated, they were holders of shares not paid up in full.

Decision of the Court of Appeal (51 W. R. 391, [1903] 1 K. B. 461) affirmed. — NEW BALKIS EERSTELING v. RANDT GOLD MINING CO., *H.L.*, 561; [1904] A. C. 165; 73 L. J. K. B. 384; 90 L. T. 494.

24. *Shares—Forged share certificate—Issue by secretary—Liability of company—Estoppel.*—A certificate of shares in a limited company was delivered by the secretary of such company at their offices, such certificate in form being perfectly regular. In fact the certificate was a forgery, and was made and delivered by the secretary acting fraudulently and not for or on behalf of or for the benefit of the company, but solely for himself and for his own private purposes and advantage.

Held, that the company were estopped from denying the title of the transferees of the shares, and that they were liable in damages for refusing to place the names of the transferees on their list of shareholders.

Shaw v. *Port Phillip and Colonial Gold Mining Co. (Limited)*, 50 L. T. Rep. 685, 13 Q. B. D. 103, considered and followed.—RUBEN *v.* GREAT FINGALL CONSOLIDATED (LIMITED), *K.B.D.*; [1904] 1 K. B. 650; 73 L. J. K. B. 299; 90 L. T. 163.

25. *Shares—Indemnity—Forged transfer of stock—Innocent transferee—Loss incurred by company—Liability as between company and transferee to bear loss.*—The transferee of a forged transfer of corporation stock innocently and without negligence presented such transfer to the corporation requesting them to register the transfer. The corporation, acting without negligence, accepted and registered the transfer, and in due course issued certificates to the transferee, one of the defendants, as holder and owner of the stock, thereby incurring liability to the real owner of the stock, whose name had been forged, and in an action subsequently brought against them by the latter they were ordered to make good the loss sustained by him.

Held, that the corporation having registered the transfer in pursuance of a statutory obligation, and not voluntarily, at the request of the transferee, no contract by the transferee to indemnify the corporation against any loss sustained in consequence of their acting on his request could be implied.

Decision of Lord Alverstone, L.C.J. (51 W. R. 204, [1903] 1 K. B. 1), reversed.—SHEFFIELD CORPORATION *v.* BARCLAY, *C.A.*, 54; [1903] 2 K. B. 580; 72 L. J. K. B. 777; 89 L. T. 227.

26. *Shares—Issue of shares at a discount—Issue of debentures at a discount—Option to exchange debentures for fully-paid shares.*—The defendant company proposed to issue a series of debentures at a discount of 20 per cent. The principal moneys secured by the debentures were to be repaid by the 1st of November, 1909, or such earlier date as the sum might become payable in accordance with the conditions indorsed thereon. Condition 8 made these principal moneys immediately payable in the event (among others) of the registered holder giving to the company a direction in writing under condition 10. Condition 10 provided that the registered holder of any debenture might at any time prior to the 1st of May, 1909, direct the company in writing to allot and issue to him in exchange for and in satisfaction of this debenture fully-paid shares of the company's capital at the rate of one share of £1 for every £1 of the nominal amount of the debenture, and that the company should, after the surrender of this debenture, comply with such direction.

Held, that, in the event of the debentures being exchanged for shares immediately after the issue of the debentures, the practical result would be the issue of shares of the nominal value of £100 in consideration of £80—a transaction which was prohibited by the Legislature; and if in fact the shares were issued at a discount, the honesty or good intentions of the contracting parties would not avail them. Injunction granted restraining the defendants from issuing debentures in pursuance of the scheme.—MOSELEY *v.* KOFFYFONTEIN MINES (LIMITED), *C.A.*; [1904] 2 Ch. 109; 73 L. J. Ch. 569.

27. *Shares — Transfer — Registration—Consideration not truly stated—Insufficient stamp—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 14, *sub-section* 4; *s.* 17. —Where, in a transfer of shares in a company, the consideration is not truly stated, and the stamp, though sufficient for the consideration as stated, is insufficient for the true consideration, the company are not bound to register the transfer.—MAYNARD *v.* CONSOLIDATED KENT COLLIERIES CORPORATION, *C.A.*, 117; [1903] 2 K. B. 121; 72 L. J. K. B. 681; 88 L. T. 676.

28. *Shares—Transfer—Refusal to register transfer —Lien on shares — Director concerned in contract—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *Table A* (57)—*Vacation of office* ipso facto—*Re-election—Director's share of total remuneration—Extra sum voted*—Ultrà vires—*Money had and received—Mistake or failure of consideration—Right to recover.*—A company refused to register a transfer of shares executed by W., late a director, alleging that they had a lien on the shares for money owing by him. W., when a director, had become concerned in a contract with the company not disclosed to and authorized by the board, in contravention of an article of association, which was a modified copy of clause 57 in Table A of the Companies Act, 1862. The fact remained unknown for over two years from the date of contract, during which time, according to the custom of the board, W. had twice retired, being on each occasion re-elected for twelve months. The board's remuneration was fixed at a lump sum, divisible among its members at the will of the majority, and the share received by W. was £39 a month. On discovering the facts the company claimed repayment of the said monthly sums received by W. since the date of the contract, and also a sum of £400 voted to W. by the board "for his special and constant services during the past year."

Held, (1) (distinguishing *Turnbull* v. *West Riding Athletic Club*, 70 L. T. Rep. 92) that W. vacated his office *ipso facto* on becoming concerned in the contract, and without any act being necessary to remove him; (2) that he was not necessarily disqualified from re-election, and that the re-elections were in fact good, since before their date the contract was complete and required no exercise of discretion by W. as director; (3) that, consequently, the only fees repayable were those for the period between the date of the contract and the first re-election; (4) that either the company or the board could recover those fees as money had and received, and as paid in mistake or for a consideration which had failed; (5) following *In re Geo. Newman & Co.*, 43 W. R. 483, [1895] 1 Ch. 674, that the payment of £400 to W. was *ultrà vires*, and that sum with interest must be refunded; (6) that on repayment of the moneys so found due, and not before, the company must register the transfer. —BODEGA CO., RE, *Ch.D. Farwell, J.*, 249; [1904] 1 Ch. 276; 73 L. J. Ch. 198; 89 L. T. 694.

29. *Vesting order—Agreement for sale of letters patent by liquidator—No assignment—Dissolution of company*—Bonâ vacantia—*Trustee Act,* 1893 (56 & 57 *Vict. c.* 53), *ss.* 25, 35 (1) (*ii.*) (c), 36.—The liquidators of a limited company in process of winding up contracted to sell certain letters patent to a purchaser. The purchase-money was paid, but, by inadvertence, the company was dissolved before the letters patent were assigned. A petition was presented asking for an order under the Trustee Act, 1893, vesting the letters patent in the purchaser for all the estate of the company therein.

Held, that the legal estate in the letters patent having vested in the Crown, the court had no jurisdiction to make such an order.

In re General Accident Assurance Corporation (Limited), ante, p. 332, [1904] 1 Ch. 147, not followed.—TAYLOR'S AGREEMENT TRUSTS, RE, *Ch.D. Buckley, J.*, 602; 73 L. J. Ch. 557.

30. *Voluntary liquidation—Extraordinary general meeting—Resolution to distribute sums of money among officers and servants—Validity*—Ultrà vires.—A company, having sold its undertaking and property, the directors sent out to the shareholders notices of an extraordinary general meeting to consider a resolution for the voluntary winding up of the company with the directors as liquidators, and another resolution determining what sum should be distributed among the officers and servants of the company. The directors also issued circulars inviting shareholders to send them their proxies.

At the meeting the resolution for voluntary winding up was duly carried, and the chairman and managing director then proposed a resolution that a sum equal to five years' salary should be paid to himself and the secretary and accountant, and a further sum be distributed among the servants. This was lost on a show of hands, but carried on a poll.

The directors then sent out notices of a second

meeting to confirm these resolutions, and again issued circulars inviting proxies.

At the second meeting the resolution for the payment to the officers and servants was again lost on a show of hands, but carried at a poll.

A dissentient shareholder then brought an action to restrain the directors from giving effect to the resolution on the grounds that its carrying and confirmation were improperly obtained, and that it was *ultrà vires* of the company and invalid.

Held, without deciding the first point, that the case fell within the principle of *Hutton* v. *West Cork Railway Co.*, 49 L. T. Rep. 420, 23 Ch. D. 654, and that the resolution was therefore *ultrà vires* and invalid.—STROUD *v.* ROYAL AQUARIUM (LIMITED), *Ch.D. Joyce, J.*; 89 L. T. 243.

31. *Voluntary liquidation—Scheme of arrangement—Assets insufficient—Meeting of members in classes—Dissent of class—No interest in assets—Sanction of court—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161—*Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 24.—Where the assets of a company in liquidation would, if distributed, be insufficient to do more than satisfy the creditors and those preference shareholders who are entitled to rank first in respect of capital, the ordinary shareholders have no interest in the assets, even if a scheme of reconstruction gives them a prospective advantage. Therefore their assent to the scheme is not required, the advantage it offers them being in the nature of a gift.—TEA CORPORATION, RE, SORSBIE *v.* TEA CORPORATION, *C.A.*, 177; [1904] 1 Ch. 12; 73 L. J. Ch. 57; 89 L. T. 516.

32. *Voluntary winding up — Debts — Duty of liquidator—Negligence—Liability—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 107, 133 138, 143—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 25.—The liquidator of a company, knowing of a debt due by the company and having sufficient assets in his hands, did not, on the winding up of the company, pay the said debt. The creditor, upon hearing of the dissolution of the company and the distribution of assets, brought an action against the liquidator for breach of his statutory duty in not providing for the claims of the creditors, and, further, claimed damages against him.

Held, that the liquidator was liable.—PULSFORD *v.* DEVENISH, *Ch.D. Farwell, J.*, 73; [1903] 2 Ch. 625; 73 L. J. Ch. 35.

33. *Winding up—Appeal—Order made by registrar—Practice—Application to judge.*—When a matter in the winding up of a company has been heard by the registrar and he has made an order either granting or refusing the application, the proper course for those who wish to reverse his decision is to move before the judge and not to appeal to the Court of Appeal.—PRETORIA PIETERSBURG RAILWAY, RE, *C.A.*; [1904] 2 Ch. 170; 73 L. J. Ch. 551.

34. *Winding up—Costs—Order dismissing petition—Costs of contributories opposing—Copies of evidence filed by petitioner—Charges of fraud against contributories—Taxation.*—The common order dismissing a winding-up petition and giving to contributories opposing one set of costs does not include the usual charges consequent on taking copies of evidence filed by the petitioner and the company, even though serious charges of fraud are made in the petition against the contributories; if these extra costs are to be allowed, sufficient and special grounds must be shown at the time the petition is dismissed, and a special direction must be given in the order.

Practice as to costs and position of contributories on a winding-up petition discussed.—IBO INVESTMENT TRUST (LIMITED), RE, *Ch.D. Byrne, J.*; [1904] 1 Ch. 26; 73 L. J. Ch. 71; 90 L. T. 373.

35. *Winding up—Damages owed company for misfeasance—Debenture debt owed by company—Cross-claims—Set-off—Proper administration of assets.*—T. Co. was promoted by F. Co., and was in liquidation. T. Co. owed F. Co. £5,100 upon a debenture. It was owed by F. Co., which was also in liquidation, £4,323 under the following circumstances: F. Co. had been held liable to pay T. Co. £12,000 as damages for misfeasance, and, having at the time no other creditors, it was ordered to pay, and did pay, all its assets, which amounted to £7,677, to T. Co., without prejudice to its rights to prove in the liquidation of that company. Subsequently other persons established claims against F. Co. The liquidator of T. Co. out of this £7,677 distributed about £3,900 among its creditors other than F. Co. as a dividend of 16s. 8d. in the £, but refused to pay any dividend to F. Co. until that company had paid it the £4,323 still owing of the £12,000.

Held, that until the dividend due to the F. Co. exceeded the £4,323 owing by it, no dividend was payable to it, and that the proper way of administering the assets of the T. Co. was notionally to add the £4,323 to its assets, and, calculating the dividends upon that total sum, only pay the F. Co. the excess (if any) of the dividend thus appearing due to it over the £4,323.—LEEDS AND HANLEY THEATRES OF VARIETIES (LIMITED), RE, *Ch.D. Buckley, J.*, 506; [1904] 2 Ch. 45; 73 L. J. Ch. 553.

36. *Winding up—Liquidator—Invalid appointment of liquidator—Claim for remuneration.*—A company which had resolved on voluntary winding up by a resolution which was set aside by the court as invalid appointed the appellant to be liquidator. On a compulsory winding up, the appellant sought to prove as a creditor for work done and expenses incurred while purporting to act as liquidator and before he knew of the invalidity of his appointment.

Held, that he was not entitled to be paid anything for services rendered as liquidator, but so far as work done had been useful to the company or had been used by the official receiver with full knowledge of the facts he was entitled to reasonable remuneration.—ALLISON, RE, JOHNSON *v.* FOSTER (LIMITED), *K.B.D.*; [1904] 2 K. B. 327.

37. *Winding up—Liquidator—Official receiver—Duty as to giving information to outside liquidator—Companies (Winding-up) Rules*, 1903, *rr.* 53, 144.—Information obtained by the official receiver from officers of the company under rule 53 of the Companies (Winding-up) Rules, 1903, is not "property" of the company within rule 144 (1), or "information respecting the estate and affairs of the company . . . necessary or conducive to the due discharge of the duties of the liquidator" within the meaning of rule 144 (3), which it is the duty of the official receiver to produce to a liquidator superseding him as liquidator.

Quære, whether the court on sufficient evidence may not direct the official receiver, as its officer, to disclose the information to an outside liquidator.—LAKE GEORGE MINES (LIMITED), RE, *Ch.D. Byrne, J.*; [1904] 1 Ch. 803.

38. *Winding up—Proof—Solicitor's lien—Sale of company's property—Secured creditor—Amendment or withdrawal of proof—Inadvertence—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8—*Companies (Winding-*

up) Act, 1890 (53 & 54 *Vict. c.* 63), *Schedule I., clause* 8.—A solicitor to a company in course of being wound up was a creditor of the company to a large amount for costs, for which he proved in the company's winding up, but without disclosing any security held by him against the company. At the time he held a lien for this amount upon certain documents and title deeds belonging to the company. On the sale by the liquidator of a portion of the company's property, the solicitor, who was employed for the purpose, and to whom the purchase-money had been paid, handed over the title deeds to the purchaser without informing the liquidator that he did so without prejudice to his lien, retained the sum due to him from the company and handed over the balance. No arrangement of any kind had ever been made between the parties, but the liquidator was aware that the documents were in the solicitor's possession. On an application by the solicitor to be allowed to withdraw or amend his proof,

Held, that, under the circumstances, he was not entitled to do so, as he had not proved inadvertence, and also had allowed the liquidator to alter his position on the assumption that the solicitor had no lien.—SAFETY EXPLOSIVES (LIMITED), RE *C.A.*, 470; [1904] 1 Ch. 226; 73 L. J. Ch. 184; 90 L. T. 331.

39. *Winding up—Shares—Transfer—Registration—Special resolution for reconstruction before registration of transfer—Delay of company—Application for registration* nunc pro tunc—*Notice of dissent from resolution—Liquidation proceedings—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 98, 131, 161, *and* 162.—Two transferees of two sets of fully paid-up shares in a company, transferred at different times, repeatedly applied to the secretary that they should be registered. The secretary replied that these transfers would be submitted at the next meeting of the company. Before these shares were registered in the names of the transferee, however, the company was voluntarily wound up, and a special resolution for reconstruction passed. The transferees thereupon sent in notices of dissent to the resolution, under section 161 of the Companies Act, 1862; and as the liquidator refused to register their names, applied to have these transfers registered *nunc pro tunc*, and the certificates sent them.

Held, that, as unnecessary delay had taken place, the court had power under section 35 of the Companies Act, 1862, even after liquidation, to make an order *nunc pro tunc*, if it did not work injustice to anyone, but such order was not *ex debito justitiæ*, but only at the discretion of the court.

Judgment of Buckley, J., varied.

In re Joint Stock Discount Co., Nation's case, 15 W. R. 143, L. R. 3 Eq. 77, discussed and followed.—SUSSEX BRICK CO., RE. *C.A.*, 371; [1904] 1 Ch. 598; 73 L. J. Ch. 308; 90 L. T. 426.

40. *Winding up—Statute of Limitations—Arrears of dividends—Sums due as return of capital in pursuance of reduction of capital — Specialty or simple contract debts.*—The right of a shareholder in a limited company to sue for dividends on ordinary shares in arrear for more than six years, but less than twenty years, is not barred by the Statute of Limitations, as such arrears are in the nature of specialty, and not simple contract, debts. The same principle applies to sums due for capital returnable to the shareholders in pursuance of a resolution for reduction of capital sanctioned by the court.—ARTIZANS LAND AND MORTGAGE CORPORATION, RE, *Ch.D. Byrne, J.*, 330; [1904] 1 Ch. 796; 73 L. J. Ch. 581.

41. *Winding up—Supervision order—Service of liquidator — Costs — Companies Winding-up Rules*, 1890, *r.* 35.—In rule 35 of the Companies Winding-up Rules, 1890, the words "unless presented by the company" govern the rule throughout, and not merely the first paragraph, and therefore, where a company in course of voluntary winding up presents a petition for a supervision order, it is not necessary to serve the petition upon the liquidator, and the costs of doing so will not be allowed.—CHESTER & CO., RE, *Ch.D. Buckley, J.*, 189.

COMPROMISE:—

Practice—Power to bind absent parties—Time-limit for absent parties to come in—R. S. C., 1883, *ord.* 16, *r.* 9a.—In an action brought by certain bond-holders of a railway company against their trustees and the company claiming the enforcement of the trusts under which the moneys subscribed in respect of the bonds were held, the court in 1894 sanctioned a scheme for compromise under which all the bond-holders were to receive a certain sum in respect of each bond. The scheme was sanctioned by the Court of Appeal, and, under ord. 16, r. 9a, made binding on all the bond-holders of the company. A small minority of bond-holders failed to claim their rights within six years from the sanctioning of the compromise, and the railway company applied for an order limiting the time within which the outstanding bond-holders must accept the scheme or be excluded therefrom.

Held, that the court had jurisdiction to make such an order.

Decision of the Court of Appeal (*sub nom. Collingham v. Sloper*, 49 W. R. 404, [1901] 1 Ch. 769) reversed.—SARAGOSSA AND MEDITERRANEAN RAILWAY *v.* COLLINGHAM, *H.L.*, 609; [1904] A. C. 159; 73 L. J. Ch. 568; 90 L. T. 212.

See also Executor, 2.

CONFLICT of LAWS:—

1. *Contract made and to be performed abroad—Contract obtained by moral coercion—Agreement to stifle prosecution—Validity according to law of foreign country—Enforcement in England.*—The defendant's husband having misappropriated money which had been entrusted to him by the plaintiff in France for a specific purpose, the parties being all domiciled in France, the plaintiff induced the defendant, by threats to prosecute her husband and thus to dishonour her name and that of her children, to sign an agreement to pay the money by instalments out of her own property. The agreement was made in France, and was intended to be performed there, and, according to the evidence, was valid according to the law of France. The defendant paid some of the instalments due under the agreement, and having come to reside in England an action was brought against her in England to recover further instalments under the agreement.

Held, that, as the agreement was obtained from the defendant by moral coercion, it was not enforceable in England, even though it might be valid according to the law of France.

Judgment of Wright. J. (51 W. R. 683, [1903] 2 K. B. 114), reversed.—KAUFMAN *v.* GERSON, *C.A.*, 420; [1904] 1 K. B. 591; 73 L. J. K. B. 320; 90 L. T. 608.

2. *Scotch law—Scotch marriage contract made in Scotland—*Lex loci*—Intention of parties—Life interest by way of alimentary provision—Inalienable life interest in domiciled Englishman—Fraud upon creditors*

tors—Public policy.—As a general rule the law of the matrimonial domicil is applicable to a contract in consideration of marriage, but this rule yields to the intention of the parties that some other law shall be applied, in which case effect will be given in the courts of the country of the matrimonial domicil to the provisions of the contract in accordance with the foreign law, so long as the provisions are not contrary to public policy.

By a Scotch marriage contract a domiciled Scotchwoman settled property upon trust to pay the income to her intended husband, a domiciled Englishman, for his life, and the contract contained a declaration that all payment to the husband should be "strictly alimentary," and "not assignable nor liable to arrestment nor other legal diligence at the hands of his creditors." The trustees of the settlement were English, and the trusts had been administered in England. The husband purported to charge his life estate.

Held (by Vaughan Williams and Cozens-Hardy, L.JJ., Stirling, L.J., *dissentiente*), that the intention of the parties being that the Scotch law should apply to the marriage contract, the husband could take no greater interest than the Scotch law would allow him, and as the nature of the interest given by the contract ought not to vary with the domicil of the husband, the English courts would give effect to the Scotch law, the gift of an inalienable life interest to a man not being contrary or repugnant to the public policy of English law.

Decision of Joyce, J. (51 W. R. 586), reversed.—FITZGERALD, RE, SURMAN *v.* FITZGERALD, *C.A.*, 432; [1904] 1 Ch. 573; 73 L. J. Ch. 436; 90 L. T. 266.

CONTEMPT:—

1. *Married woman—Right to be heard—Costs—Separate estate—Restraint on anticipation—"Proceeding instituted"—Summons in divorce suit—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.—If an appellent, who is in contempt of court, alleges that the order from which he is appealing was made without jurisdiction, the court will not refuse to hear him on account of his contempt, although the order appealed from was made after the contempt had been committed.

In a divorce suit, in which the husband was the petitioner, a decree was made for dissolution of the marriage and that the child of the marriage should be delivered up to the custody of the petitioner by the respondent. The respondent (the wife) applied that the decree might be varied by entrusting the custody of the child to herself, and gave an undertaking not to remove the child out of the jurisdiction. On the 10th of March, 1903, the wife's application was dismissed, and it was ordered that the husband's costs of and incident to this application should be payable out of the separate property of the wife, notwithstanding that such property was subject to a restraint on anticipation; and it was further ordered that the child be forthwith delivered up by the wife to the custody of the husband "until further order." The wife, however, in breach of her undertaking, secretly sent the child out of the jurisdiction shortly before the 10th of March, and went out of the jurisdiction herself on that day. On the 12th of March an order was made declaring the wife in contempt for breach of her undertaking. On the 12th of May the wife gave notice of appeal against so much of the order of the 10th of March as directed the payment of the costs of her application (dismissed on that day) out of her separate property, notwithstanding the restraint on anticipation. The wife was still in contempt at the time her appeal came on for hearing.

Held, that, notwithstanding her contempt, the appellant was entitled to be heard.

Held, further, that the wife's application to have the decree in the divorce varied—which application was dismissed on the 10th of March—was merely a step in the divorce suit, and not a "proceeding instituted by" the wife within the meaning of section 2 of the Married Women's Property Act, 1893; and consequently that so much of the order of the 10th of March as directed payment of the costs out of the separate property restrained from anticipation of the married woman was void for want of jurisdiction, and should be discharged.

Decision of Jeune, P. ([1903] P. 141, 51 W. R. Dig. 63), reversed.—GORDON *v.* GORDON AND GORDON, *C.A.*, 389; [1904] P. 163; 73 L. J. P. 41; 90 L. T. 597.

2. *Practice—Offence triable at assizes only—Power of High Court to commit for contempt—Judicature Act*, 1873, *ss.* 16, 29.—Where preliminary proceedings having been begun in a petty sessions court for an offence which was only triable at assizes, and before the person charged was committed for trial, there was published comment in a newspaper tending to interfere with the fair trial of the charge, it is within the power of the High Court to commit the publisher for a contempt of court, the assize court being by sections 16 and 29 of the Judicature Act, 1873, constituted a part of the High Court.—REX *v.* PARKE, *K.B.D.*, 215; [1903] 2 K. B. 432; 72 L. J. K. B. 839; 89 L. T. 439.

CONTRACT:—

1. *Agreement with a borough council to do scavenging work as might be required—Implied obligation on council to provide employment.*—In an agreement between a contractor and a municipal corporation, whereby the contractor agreed to supply horses, carts, &c., as might be required for the scavenging of a certain district for one year at certain agreed rates, the court, upon consideration of all the terms of the contract, held that no term could be implied imposing on the corporation the duty of giving employment to the contractor so as to enable him to earn payment under the contract.

Observations on *dicta* of Cockburn, C.J., in *Churchward* v. *The Queen*, 14 L. T. Rep. 57, L. R. 1 Q. B. 173.—MOON *v.* CAMBERWELL CORPORATION, *C.A.*; 89 L. T. 595.

2. *Assignability — New company — Action by assignee.*—By a contract between T., the owner of a chalk quarry, and a cement manufacturing company, who were owners and occupiers of neighbouring land, it was agreed that T. should supply so much chalk during a period of fifty years (as therein provided) as the company should require for the manufacture of cement on the said land.

Held, that the company were entitled to assign the benefit of this contract to a new company, who could enforce it against T.

Decision of the Court of Appeal (51 W. R. 81, [1902] 2 K. B. 660) (Lord Robertson dissenting) affirmed.—TOLHURST *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS, *H.L.*, 143; [1903] A. C. 414; 72 L. J. K. B. 834; 89 L. T. 196.

3. *Consideration—Agreement to accept debt by instalments—Subsequent agreement for payment by instalments after death—Right to claim whole debt—Appropriation of payments—Rule in* Clayton's case.—A deceased testator had been accustomed for many years to pay moneys to the defendant, who had out of such moneys made all necessary pay-

ments for the deceased; and a balance was struck every quarter, and on such balance the defendant allowed interest at 10 per cent. per annum.

By an agreement in February, 1897, in consideration of the defendant making use of certain moneys of the deceased and paying interest for the same at 10 per cent., the deceased agreed to accept £25 every quarter in part payment of the principal that might be due from the defendant to the deceased; and some months afterwards another agreement was made whereby the deceased agreed that in the event of his death all his moneys in the possession of the defendant at the time of his death should be repaid in quarterly payments of £25, to include principal and interest, until the whole should be paid, and that no person should be entitled to enforce payment of any larger sum.

No instalments as such had been paid by the defendant under the first agreement, but the defendant had continued to make payments on the deceased's behalf as requested out of the moneys from time to time paid to him by the deceased.

The deceased died some years afterwards, the defendant then having a considerable sum belonging to the deceased.

In an action brought by the executors of the deceased to recover the whole sum due to the deceased at the time of his death,

Held, giving judgment for the defendant, that there was sufficient consideration to support both agreements, which were therefore good, and that under the second agreement the defendant was not bound on the death of the deceased to pay the whole sum then due; and, further, that as to the instalments alleged to be due under the first agreement, the payment made by the defendant from time to time to the deceased, must, according to rule in *Clayton's case*, be taken to have been appropriated to and paid in respect of these instalments, which were therefore satisfied.—EGG *v.* CRAIG, *K.B.D.*; 89 L. T. 41.

4. *Duration, fixed period of—Construction—Implied term—Necessary implication.*—By a contract made between the plaintiffs, who were wholesale dealers in tobacco, and the defendant, a retail tobacconist, it was agreed that, in consideration of the defendant undertaking to become a customer of the plaintiffs and to purchase goods direct from them, and not to sign any agreement with any other firm in the tobacco trade which should prevent him from dealing with the plaintiffs, the plaintiffs would for the next four years distribute as an annual bonus among their customers, including the defendant, and in proportion to the purchases made by them respectively, a certain fixed annual sum, and also the expected net profits on goods sold by the plaintiffs in the United Kingdom during that period. Before the four years had expired the plaintiffs sold their business to third persons. In an action for the price of goods sold to him the defendant counterclaimed against the plaintiffs for damages for breach of contract.

Held, affirming the judgment of Lord Alverstone, L.C.J. ([1903] 2 K. B. 287), that upon the true construction of the contract there was an absolute undertaking on the part of the plaintiffs to distribute for a period of four years among their customers the fixed annual sum and expected net profits, and that a term must necessarily be implied that the plaintiffs would not during that period do any act which would put it out of their power to carry out their contract to distribute these sums, and that the defendant was entitled to damages.—OGDENS (LIMITED) *v.* NELSON. THE SAME *v.* TELFORD, *C.A.*; [1904] 2 K. B. 410; 90 L. T. 656.

5. *Impossibility—Contract to supply refreshments for steamer for Coronation Naval Review—Cheque given in part payment—Review abandoned—Condition in contract that if review was cancelled before caterer incurred expense there should be no liability on charterers.*—The plaintiff and the defendants entered into a contract whereby the former was, in consideration of £300, to be paid in advance, to supply refreshments on board a pleasure steamer chartered by the latter for the purpose of taking passengers to see the Coronation Naval Review. In the letter accepting the contract the defendants wrote, "It is, of course, understood that in the event of the cancellation of the review before any expense is incurred by the caterer there shall be no liability on our side." Enclosed in this letter was a cheque for £300 in part payment of the contract. The review was on the next day cancelled before any refreshments were supplied or the cheque presented for payment, and the defendants stopped payment of the cheque.

Held, that upon the true construction of the contract, the parties had agreed that if the review was cancelled there was not merely to be a release of both from any further performance thereunder, but as nearly as possible a *restitutio ad integrum*, and therefore the plaintiff was not entitled to recover the value of the cheque.

Semble, the fact that the part payment was made by cheque, which had not been cashed before the review had been officially announced as cancelled, did not alter the rights of the parties.

Chandler v. *Webster*, *ante*, p. 290, [1904] 1 K. B. 493, distinguished.—ELLIOTT *v.* CRUTCHLEY, *C.A.*, 499; [1904] 1 K. B. 565; 73 L. J. K. B. 406; 90 L. T. 497.

6. *Impossibility—Coronation procession—Hire of room to view—Abandonment of procession—Money payable before abandonment—Recovery back of money paid.*—The plaintiff hired from the defendant a room in a house in Pall Mall to view the Coronation procession on the 26th of June for the sum of £141 15s., payable immediately. The plaintiff paid £100 to the defendant, and subsequently, in consequence of the illness of the King, the procession on the 26th of June was abandoned. The plaintiff sued to recover back the £100 which he had paid to the defendant, on the ground of total failure of consideration, and the defendant counterclaimed for £41 15s., the balance of the £141 15s.

Held, that the further performance of the contract having been rendered impossible by an event which happened without the default of either party, upon the doctrine of *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826, the contract was not avoided *ab initio*, but remained good and valid up to the ascertainment of the impossibility of performance, and anything done and any rights acquired under it up to that time remained good, the parties being merely relieved from the further performance of the contract; that therefore the doctrine as to total failure of consideration was not applicable; and that the plaintiff could not recover back the £100, and that, as the whole sum of £141 15s. accrued due before the abandonment, the defendant was entitled to recover the £41 15s., the unpaid balance of that amount.—CHANDLER *v.* WEBSTER, *C.A.*, 290; [1904] 1 K. B. 493; 73 L. J. K. B. 401; 90 L. T. 217.

7. *Impossibility—Hire of ship—Purpose of hirer—Failure of consideration—Breach of contract—Damages.*—The fact that in a contract for hire of a vessel the objects of the hirer are stated does not constitute those objects the basis of the contract so

as to discharge the parties in the event of the performance of those objects becoming possible. A ship was hired by agreement in writing "for the purpose of viewing the naval review and for a day's cruise round the fleet." On the postponement of the naval review the hirer declined to proceed with the contract.

Held, that this was not a joint speculation by the hirer and the owners of the ship, but that the risk was the hirer's alone; nor was the taking place of the review the basis for the performance of the contract. Consequently the hirer was not discharged from the contract, and was liable in damages for its breach.—HERNE BAY STEAMBOAT CO. *v.* HUTTON, *C.A.*, 183; [1903] 2 K. B. 683; 72 L. J. K. B. 879; 89 L. T. 422.

8. *Impossibility—Hire of ship for Coronation Naval Review—Money payable and paid before review postponed—Right to recover money so paid—Practice—Costs—Depriving successful defendant of costs—Discretion of judge—Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.—In an action the plaintiffs sued to recover £1,500, the amount paid by them for the hire of a steamer belonging to the defendants for the naval review at Spithead on the occasion of his Majesty's coronation, which was fixed to take place on the 28th of June, 1902, but was postponed.

Held, that, although the money had been paid before it was known that owing to the King's illness the review could not take place, the defendants were entitled to retain the whole of the £1,500 which had been paid to them by the plaintiffs.

Held, also, that there were no materials before the judge at the trial upon which he could exercise any discretion with regard to depriving the defendants of their costs merely because, in his opinion, it was a case for compromise, and his offer to act as arbitrator had been declined by the defendants, and the order on that point was accordingly reversed.

Blakeley v. *Muller*, 19 Times L. R. 186, 88 L. T. 90, 51 W. R. Dig. 40, approved.—CIVIL SERVICE CO-OPERATIVE SOCIETY *v.* GENERAL STEAM NAVIGATION CO., *C.A.*, 181; [1903] 2 K. B. 756; 72 L. J. K. B. 933; 89 L. T. 429.

9. *Impossibility—Implied term—Substance of contract—Surrounding circumstances.*—By a contract in writing the defendant agreed to hire from the plaintiff a flat in Pall Mall for the 26th and 27th of June, 1902, on which days it had been announced that the Coronation processions would pass along Pall Mall. The defendant paid a deposit at the time of the contract. The contract contained no reference to the processions or to any particular purpose for which the flat was hired. The processions not having taken place, the defendant declined to pay the balance of the agreed rent.

Held, that the plaintiff could not recover the balance of the rent, inasmuch as the taking place of the processions must in the circumstances be held to have been the foundation of the contract, and the parties had not at all in their contemplation the risk that the processions might not take place on the dates fixed.—KRELL *v.* HENRY, *C.A.*, 246; [1903] 2 K. B. 740; 72 L. J. K. B. 794; 89 L. T. 328.

10. *Option for six months—Lunar or calendar months—Expiry of period—Agreement for extension implied from conduct and correspondence—Option duly exercised by dispatch of telegram or letter within extended period.*—M., an inventor, granted to B. an option to purchase prospective patents during "six months" from the 29th of September, 1902. The option had not been exercised on the 16th of March, 1903, when six lunar months expired, but later correspondence contained casual mention of the 1st of April as the date of its expiry. M., who was travelling about, informed B., who was in London, that he would be at Genoa on the 27th of March and in Paris on the 30th. On the 28th B. exercised his option by a telegram to Genoa and a letter to Paris—the latter due in course of post to arrive on the 29th—but through a misunderstanding neither of these reached M. till the 30th.

Held, that the option was for six lunar months; but that an agreement to extend it to the end of March was to be implied from the correspondence and conduct of the parties; and that even if the option expired on the 29th it was duly exercised by the posting of the letter and sending of the telegram before that date.—BRUNER *v.* MOORE, *Ch.D. Farwell, J.*, 295; [1904] 1 Ch. 305; 73 L. J. Ch. 377; 89 L. T. 738.

11. *Restraint of trade — Covenant — Validity—Reasonableness—Province of judge—Province of jury.*—The old rule that the question of the reasonableness of a covenant in restraint of trade is for the judge and not for the jury has not been altered by recent decisions.

A contract whereby the plaintiffs agreed to employ the defendant as the manager of their cider business contained a covenant by the defendant not to carry on the business of a cider merchant for the term of five years after leaving the plaintiffs' service. The capital invested in the plaintiffs' business was not more than £9,000. Most of their customers resided in the South of England, though there were also some in Scotland and Ireland. The plaintiffs intended to extend their business, and had opened agencies in various places. In an action to enforce the covenant,

Held, that, having regard to the nature and condition of the plaintiffs' business, the covenant, being unlimited as to space, was unreasonable, and therefore void as being in restraint of trade.—DOWDEN *v.* POOK, *C.A.*, 97; [1904] 1 K. B. 45; 73 L. J. K. B. 38; 89 L. T. 698.

12. *Written agreement—Land—Parol variation—Specific performance—Defence.*—Although a parol waiver of a written agreement concerning land, amounting to a complete rescission of the original contract, may be a good defence to an action for specific performance, yet variations verbally agreed upon cannot be relied upon by way of defence, and the original agreement may, notwithstanding, be ordered to be specifically performed.—VEZEY *v.* RASHLEIGH, *Ch.D. Byrne, J.*, 442; [1904] 1 Ch. 634; 73 L. J. Ch. 422; 90 L. T. 663.

See also Conflict of Laws, 1; Frauds, Statute of, 1.

COPYHOLD:—

Fine on admittance—Colourable purchase—Amount of reasonable fine.—A. having to purchase a copyhold property in the Manor of Richmond, in order to avoid payment of the fine on admittance subsequently purchased a smaller copyhold property. The agreement for purchase provided that the vendor should retain the rents and remain liable for the repairs. A. was admitted in respect of this property, and paid the fine on admission. Subsequently he was also admitted in respect of the larger property, paying (by the custom of the manor) a nominal fine only.

Held, that the Crown, as lord of the manor, was entitled to the fine on the larger property, as the sale of the smaller property was a colourable sale,

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and the Crown was entitled to be placed in the same position as if the admission had never taken place.

Held, also, that the rule that an arbitrary fine ought not to exceed two years' improved value does not apply when the admission exempts from fines in cases of future purchases.—ATTORNEY-GENERAL *v.* SANDOVER, *K.B.D.*, 573; [1904] 1 K. B. 689; 73 L. J. K. B. 478; 90 L. T. 480.

See also Vendor and Purchaser, 8.

COPYRIGHT:—

1. *Fine arts—Pictures—United Kingdom—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68).—The Fine Arts Copyright Act, 1862, confers on British subjects and persons resident in the British dominions copyright in pictures, drawings, and photographs in the United Kingdom, but not beyond that area. Nor is this altered by the Canada Copyright Act, 1875.

Printing such copyright pictures in Canada is, therefore, in no way prohibited by the Fine Arts Copyright Act; to obtain protection the pictures must be registered under the Canadian laws.—GRAVES *v.* GORRIE, *P.C.*, 113; [1903] A. C. 496; 72 L. J. P. C. 95; 89 L. T. 111.

2. *Literary copyright—Encyclopædia—Separate articles—Writer and publisher—Ownership of copyright—Separate publication—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 18.—Where an author agrees with publishers to write for payment certain articles for an encyclopædia to be published and paid for by them, and the articles are published and paid for, then, there being no express agreement as to copyright, or evidence to the contrary, the natural and true inference of fact is that the copyright in the contributed articles belongs to the publishers.

Sweet v. *Benning*, 3 W. R. 519, 16 C. B. 459; *Lamb* v. *Evans*, 41 W. R. 405, [1893] 1 Ch. 218, approved.

Decision of Court of Appeal (51 W. R. 360, [1903] 1 Ch. 318) reversed.—LAWRENCE & BULLEN *v.* AFLALO, *H.L.*, 369; [1903] A. C. 17; 73 L. J. Ch. 85; 89 L. T. 569.

3. *Narrative contributed to newspaper—Publication of paragraph containing the facts in abbreviated form—Reprinting of paragraph by another newspaper—Authorship of paragraph—Copyright Act*, 1845 (5 & 6 *Vict. c.* 45), *s.* 3.—S., a journalist, contributed to a London morning newspaper an article containing an account of the escape from drowning of a distinguished ophthalmologist. The newspaper did not publish the article as written by S., but from the information contained in it the sub-editors of the newspaper compiled a paragraph containing the facts in an abbreviated form, and this paragraph was published in the newspaper. It was reprinted with slight alterations in an evening newspaper of the same day. S. having demanded payment from the publisher of the evening newspaper, which was refused, commenced an action against him claiming an injunction restraining him from selling copies of S.'s article, or substantial parts of it, and a declaration that S. was the owner of the copyright. S. had meanwhile registered himself as the owner of the copyright in the paragraph.

Held, that the paragraph was in substance a different statement of the facts in the plaintiff's article or some of them; that the true authors of the paragraph were the sub-editors of the morning newspaper; and that the action therefore failed.—SPRINGFIELD *v.* THAME, *Ch.D. Joyce, J.*; 89 L. T. 242.

4. *Photograph—Made "for or on behalf of" another—"Good or valuable consideration"—Photograph taken at request of sitter—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *s.* 1.—Where a photographer takes a photograph of a person at the latter's request in circumstances which raise an implied promise on the part of the sitter to pay for the photograph, the negative of the photograph is "made or executed for or on behalf of" the sitter "for a good or valuable consideration" within the meaning of section 1 of the Fine Arts Copyright Act, 1862, and the copyright in the photograph belongs to the sitter, though he may not have bought the negative from the photographer.

Pollard v. *Photographic Co.*, 37 W. R. 266, 40 Ch. D. 345, approved.

Melville v. *Mirror of Life Co.*, [1895] 2 Ch. 531, 44 W. R. Dig. 45, commented on.—BOUCAS *v.* COOKE, *C.A.*, 99; [1903] 2 K. B. 227; 72 L. J. K. B. 741; 88 L. T. 760.

CORPORATION:—

Municipal corporation—Borough councillor—Election of bankrupt—Disqualification—Quo warranto—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 87—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 32—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 9.—Section 32 of the Bankruptcy Act, 1883, provides that "Where a debtor is adjudicated a bankrupt he shall . . . be disqualified for . . . (*d*) being elected to or holding or exercising the office of mayor, alderman, or councillor," and by section 9 of the Bankruptcy Act, 1890, such disqualification shall not exceed five years from the date of discharge.

B., the defendant, was elected a borough councillor, and subsequently to the time prescribed for presenting a petition against his election it was discovered that prior to the date of his election he had been adjudicated a bankrupt, and that he had received his discharge less than five years previous to the election.

Held, that in order to oust the defendant from his office as councillor he must be proceeded against by an information in the nature of a *quo warranto*, calling upon him to show by what authority he claimed to hold and exercise the office, and not by way of *mandamus*.

The remedy by way of *quo warranto* is not taken away by section 87 of the Municipal Corporations Act, 1882, where a disqualified person is *de facto* "holding" the office.—REX *v.* BEER, *K.B.D.*, 221; [1903] 2 K. B. 693; 72 L. J. K. B. 608; 89 L. T. 412.

See also Election Law, 1, 2.

COSTS.—See Practice, 5-21.

COUNTY COURT:—

1. *Appeal—Action of ejectment—Action for recovery of tenements—Premises of annual value not exceeding £20—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 59, 120, 138, 139.—An appeal lies from the county court to the High Court in all actions of ejectment on title, as distinguished from actions by landlords against tenants for the recovery of tenements under sections 135 and 139 of the County Courts Act, 1888, even though the annual value of the premises does not exceed £20.

Earl of Shrewsbury v. *Garfield*, 60 L. J. Q. B. 765, 40 W. R. Dig. 63, overruled.—MILLETT *v.* BALLARD, *C.A.*, 675.

2. *Costs—Money paid into court—Cross judgments in separate actions—Right of set-off—Solicitor's lien for costs—County Court Acts*, 1888 (51 & 52 *Vict. c.*

43), *ss.* 113, 150.—Section 150 of the County Courts Act, 1888, provides that "if there shall be cross judgments between the parties and the execution has been taken by that party only who shall have obtained judgment for the larger sum, and for so much only as shall remain after deducting the smaller sum, and satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum; and if both sums shall be equal, satisfaction shall be entered upon both judgments."

Held, that this section applied to judgments in separate actions as well as to judgments upon a claim and a counterclaim in the same action, and that a defendant who had obtained judgment in an action was entitled to set off the amount of the taxed costs in that action against the amount for which judgment had been given against him in another action, and which amount he had paid into court, and that the plaintiff's solicitor had no lien for his costs on the amount paid into court as against this right of set-off.—WARD *v.* HADDRILL, *K.B.D.*, 398; [1904] 1 K. B. 399; 73 L. J. K. B. 277; 90 L. T. 232.

3. *Costs—Money paid into court—Remitted action—Defendant successful as to remainder of claim—Scale of costs applicable—Power of county court judge to give defendant costs—County Courts Act,* 1888 (51 *& 52 Vict. c.* 43), *s.* 65—*County Court Rules, ord.* 14, *r.* 12; *ord.* 53, *r.* 18.—The plaintiffs brought the action to recover the sum of £71 for goods sold and delivered. An order was made under order 14 that, as regards £23 18s. 10d. of that amount, judgment should be entered for the plaintiffs unless that sum was paid into court, and the action was then remitted to the county court. The defendants gave notice that they consented to judgment being entered for the plaintiffs as regards the sum paid into court. At the trial the defendants succeeded as regards the rest of the claim with costs, and their bill was taxed by the registrar on Scale C, "when the subject-matter or sum recovered exceeds £50." The county court judge reversed this decision, and taxed defendants' costs on Scale B, "when the subject-matter or sum recovered exceeds £20 and does not exceed £50."

Held, that the action was an action for over £50, and that the defendants were therefore entitled to have their costs taxed on Scale C.—ASTON TUBE WORKS *v.* DUMBELL, *K.B.D.*, 444; [1904] 1 K. B. 535; 73 L. J. K. B. 208; 90 L. T. 315.

4. *Distress—Sale—Power of bailiff to give title to goods—County Courts Act,* 1888, *s.* 156.—A piano, the property of A., was seized by the bailiff of the county court in execution of a judgment against B., and was sold at auction to C. A. had no notice of, and made no claim to the goods prior to, the sale.

Held, that A. was entitled to recover the piano from C., as the bailiff of the county court could only give to C. by a sale made without any claim on the part of A., a title to the goods of the judgment debtor.

Goodlock v. Cousens, 45 W. R. 367, [1897] 1 Q. B. 508, distinguished.—CRANE *v.* ORMEROD, *K.B.D.*, 11; [1903] 2 K. B. 37; 72 L. J. K. B. 507; 89 L. T. 45.

5. *Equitable jurisdiction—Agreement to purchase house property worth more than £500 subject to a mortgage—Price for equity of redemption agreed at £75—Specific performance—Jurisdiction—County Courts Act,* 1888 (51 *& 52 Vict. c.* 43), *ss.* 67, 126.

Held, that the county court had jurisdiction under section 67, sub-section 4, of the County Courts Act, 1888, to hear an action brought on a contract for the sale of an equity of redemption agreed at the value of £75 although the value of the property would, but for the charge upon it, have exceeded £500.—REX *v.* BIRMINGHAM COUNTY COURT JUDGE, *K.B.D.*, 524; [1904] 1 K. B. 827; 73 L. J. K. B. 344; 90 L. T. 514.

6. *Execution—High bailiff's fees—Bankruptcy Act,* 1890 (53 *& 54 Vict. c.* 71), *s.* 11, *sub-section* 1—*County Courts Act,* 1888 (51 *& 52 Vict. c.* 43), *s.* 146—*County Court Rules,* 1889, *ord.* 25, *r.* 120—*Order as to County Court Fees,* 1901, *Schedule B, Part I., r.* 35.—Where the high bailiff of a county court seizes separate sets of goods of the same debtor, and in the same house, under separate warrants of execution, he is entitled to a separate possession fee on each set of goods so seized.—MORGAN, RE, BOARD OF TRADE, EX PARTE, *Bkcy.*, 79; [1904] 1 K. B. 68; 72 L. J. K. B. 948; 89 L. T. 452.

7. *Remitted action—Claim in contract exceeding £100—Amendment of writ by claiming a sum not exceeding £100—Jurisdicton to remit—County Courts Act,* 1888 (51 *& 52 Vict. c.* 43), *s.* 65.—In an action of contract in the High Court for the amount indorsed on the writ exceeded £100. Subsequently the plaintiff obtained leave to amend the writ by claiming a sum not exceeding £100.

Held, that the amended writ must be taken as the writ originating an action in which a sum not exceeding £100 was claimed, and that there was therefore jurisdiction to remit the action to the county court under section 65 of the County Courts Act, 1888.—SNEADE *v.* WOTHERTON BARYTES AND LEAD MINING CO., *C.A.*, 225; [1904] 1 K. B. 295; 73 L. J. K. B. 170; 90 L. T. 53.

See also Bankruptcy, 3, 8; Practice, 18; Ship, 23.

COVENANT:—

1. *Restrictive covenant—Assignment of lease—Covenant by assignees to observe covenants of lease—Action by assignees—Injunction—Indemnity—Negative or positive covenant—Construction.*—The usual covenant in an assignment of leaseholds on the part of the assignees to observe and perform the covenants and conditions of the lease, and keep the lessees, their assignors, indemnified against all claims and demands on account of the same, is to be construed as one of indemnity only, and the lessees are not entitled as of right to have the negative covenants specifically enforced against the assignees by injunction. And, if the lessor had not sued them or threatened them with proceedings in respect of the breaches of the covenants in the lease by the assignees, the lessee cannot obtain either an injunction against or damages from the assignees.

Semble, that the covenant by the assignees being affirmative in form, although to perform other covenants of a negative kind, is not a covenant which the court is bound to enforce by injunction.

A. let premises to B. for thirty years at a rent, B. covenanting (among other things) not, during the term, to make any alteration or addition to the premises. B. assigned the premises to C. (a company), which covenanted with him during the residue of the term "to observe and perform the covenants and conditions contained in the lease, and which henceforth on the lessees' part ought to be observed and performed, and keep indemnified" B. against claims and demands on account of the same. C., without B.'s leave, made certain alterations in the premises which were required for the convenience of the business carried on there. B. thereupon sued C. for an injunction to restrain it from altering, and for a mandatory injunction to

restore the premises to their former condition. The lessor had not objected to the alteration or threatened B. with legal proceedings.

Held, that the covenant by C. was one of indemnity only, and that B. could not enforce it as of right against C. by injunction; and that, as B. was not threatened by his lessor, and had himself suffered no damage, he had no cause of action.—HARRIS *v.* BOOTS CASH CHEMISTS (LIMITED), *Ch.D. Warrington, J.*, 668.

2. *Restrictive covenant—Building restrictions—One house—Double-tenement house.*—A building structurally divided into two tenements on different floors, with no internal communication, common staircase, or common front door, constitutes two houses within the meaning of a covenant not to erect more than one house on the site.

Grant v. *Langston*, [1900] A. C. 383, 399, followed.

Kimber v. *Admans*, [1900] 1 Ch. 412, distinguished.—ILFORD PARK ESTATES (LIMITED) *v.* JACOBS, *Swinfen Eady, J.*; [1903] 2 Ch. 522; 72 L. J. Ch. 699; 89 L. T. 295.

3. *Restrictive covenants—Loss of deeds—Defective copy—Indemnity—Deed found—Breach of covenant contained in lost deed—Action—Costs—Liability under indemnity—Natural and proximate result of difference in deeds.*—Certain lands were subject to a building scheme, the provisions of which were contained in a deed of 1854. The purchaser of a plot was informed by the vendor in good faith that the original deed was lost or destroyed, and what purported to be a true copy was produced. This copy subsequently proved to be defective. An action was brought by an adjoining owner to restrain the purchaser from erecting or allowing to remain upon his land certain buildings which contravened the provision as to a building line in the deed of 1854. The property in respect of which he was entitled to sue had certain erections upon it contravening another building stipulation, which provided that no erection should be built within four feet of a boundary fence.

At the trial of the action it was held that the defendant was affected with notice of the building stipulations, and that the plaintiff had only committed a trivial breach of a trivial covenant, and that such a breach did not disentitle the plaintiff from having the building stipulations strictly enforced, and judgment was given for the plaintiff, with costs, the defendant being directed to remove certain buildings erected by him on the land.

The third party to the action had sold the property to the defendant, and upon such sale had written a letter agreeing to indemnify the defendant, as purchaser, against all "costs, damages, and expenses" which the defendant might suffer or incur "by reason of the building stipulations and conditions being other than those set out in the copy."

Held, that the third party was liable to pay the defendant the difference in the value of the plot in consequence of the amount of land available for building under the provisions of the deed of 1854 being less than under the supposed copy; and also of the defence that the plaintiff was disentitled to sue in consequence of his having broken one of the covenants.

Held, also, that the defendant, having had actual notice of the provisions of the deed of 1854 before he commenced to build, the third party was not liable for the cost of building or removing the buildings.

Held, also, that the defendant was not entitled to recover from the third party the costs of the plaintiff incurred in the action and paid by the defendant, or the defendant's own costs so far as they related to the following defences set up by the defendant—viz., a denial that the provisions of the deed of 1854 applied to the plot purchased by him or that he had notice of such provisions; that the liquidator of the company formerly owning the land to which the deed of 1854 applied, had, under a power given by that deed to the "vendors, their heirs or assigns," by an agreement in writing, approved of by the court, released or waived the covenant which it was alleged had been broken; that no building scheme was contained in the deed of 1854, and if there was it had come to an end by mutual consent of the various purchasers of the land comprised in it.

Decision of Farwell, J. (89 L. T. Rep. 37), varied as to the costs payable by the third party under the indemnity.—HOOPER *v.* BROMET, *C.A.*; 90 L. T. 234.

4. *Restrictive covenant—Object of covenant—Building scheme—Implied covenants with other purchasers—Alteration of character of neighbourhood—Acquiescence in breaches—Injunction.*—Alteration in the character of a neighbourhood is no defence to an action on a covenant restricting user unless it is proved, by the existence of a building scheme or otherwise, that the covenant was entered into with the object either of securing the common advantage of a number of purchases, or of protecting other property of the covenantee, and that the covenantee has, by his own acts or acquiescence, made it impossible to attain that object.

The court will not imply mutual covenants between a number of purchasers unless the persons and the plots of land which are to be bound are in some way defined.

O. sold a plot of land to B., and took from B. a covenant, among others, that houses erected thereon should be used as private residences only. The covenants were contained in a printed form of agreement which O. used in the sale of many plots; it contained a power for the vendor to waive or vary the covenants with regard to unsold lots. There had been no sale or attempted sale by auction. No plan was produced to B. showing what plots were affected by the restrictions. O. afterwards himself built, or allowed to be built, a number of shops on the adjoining plots, and acquiesced in some slight breaches of covenant in respect of B.'s land. The defendant, who purchased from B. and had notice of the covenant, began to alter two houses erected on the plot into shops. O. brought an action to restrain him.

Held, that no building sheme had been proved to exist, and, in the absence of such a scheme and of proof that the covenant was entered into merely for the protection of O.'s property, the change in the character of the neighbourhood, though caused by his own acts, did not, nor did his acquiescence in minor breaches, disentitle him to an injunction.—OSBORNE *v.* BRADLEY, *Ch.D. Farwell, J.*; [1903] 2 Ch. 446; 73 L. J. Ch. 49; 89 L T. 11.

5. *Sale of medical practice—Covenant not to set up in practice within certain distance—Residence beyond distance—Attending former patients within distance.*—Where on the sale of a medical practice the vendor covenants not to "set up in practice" within the distance of two miles from the house at which he carried on the practice sold, he does not commit a breach of that covenant by attending at their request for remuneration two or three of his former patients within that distance, though it is not

essential to the breach of such a covenant that the vendor should reside within the prohibited area; he may reside beyond the distance and yet commit a breach of the covenant by acts done within it.

Decision of Joyce, J. affirmed.—ROBERTSON *v.* BUCHANAN, *C.A.*; 90 L. T. 390.

See also Landlord and Tenant, 1-6, 10, 11; Restraint of Trade, 1, 2; Vendor and Purchaser, 1, 3.

CRIMINAL LAW:—

1. *Bankruptcy—Property divisible amongst creditors—Execution of deed of arrangement—Debtor absconding with property—Whether property of trustee or debtor—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 12.—The prisoner being in difficulties, on the 24th of April, 1903, voluntarily assigned all his property for the benefit of his creditors. The assignment was expressed to be as between the debtor, the trustee, and the creditors, but was not communicated to his creditors, and it was executed by the trustee and the prisoner only. The trustee took possession of the business on the 25th of April. On the 28th of April the prisoner left England with £120, which he ought to have handed over to the trustee. On the 13th of May a receiving order was made against him, and on the 30th of May he was declared a bankrupt.

Held, that he was rightly convicted under section 12 of the Debtors Act, 1869, for having within four months next before the presentation of a bankruptcy petition against him quitted England and taken with him a part of "his" property—*viz.*, £120, which ought by law to be divided amongst his creditors, as no irrevocable trust of that sum had been created, the trustee never having got possession of the money.

Reg. v. *Creese*, 22 W. R. 375, 2 C. C. R. 105, distinguished.—REX *v.* HUMPHRIS, *C.C.R.*, 591; [1904] 2 K. B. 89; 73 L. J. K. B. 464; 90 L. T. 555.

2. *Bankruptcy—Undischarged bankrupt—Obtaining credit to extent of £20 or upwards—Misdemeanour—Maximum punishment—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 11, 13, 14—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 31.—By the Bankruptcy Act, 1883, *s.* 31, it is provided that "Where an undischarged bankrupt, who has been adjudged bankrupt under this Act, obtains credit to the extent of £20 or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section."

Held, that the maximum punishment for an offence under the above section is imprisonment with hard labour for one year, as the section refers to the class of misdemeanours mentioned in section 13 of the Debtors Act, 1869, and not to the class mentioned in section 11 of that Act.—REX *v.* TURNER, *C.C.R.*, 214; [1904] 1 K. B. 181; 73 L. J. K. B. 46; 89 L. T. 676.

3. *Evidence—Obtaining credit by fraud—Evidence of criminal acts other than those charged—Evidence tending to show system—Admissibility.*—Upon the trial of a prisoner who was indicted for unlawfully obtaining credit by false pretences and fraud from a person who let apartments, evidence was admitted showing that the prisoner had shortly before obtained apartments at other houses and had left without payment.

Held, that the evidence was relevant and admissible, as tending to show a system of fraud and negativing accident or mistake or any honest motive on the part of the prisoner.—REX *v.* WYATT, *C.C.R.*, 285; [1904] 1 K. B. 188; 73 L. J. K. B. 15.

4. *Evidence—Statement by prisoner that prosecutor is a liar—"Imputations on the character of the prosecutor"—Cross-examination of prisoner as to character—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (*ii.*).—At the trial of a prisoner upon an indictment he was called as a witness, and in his cross-examination counsel for the prosecution asked him whether a statement made by the prosecutor was the truth or an invention. In reply, the prisoner said: "No; it is a lie, and he is a liar."

Held, that the answer of the prisoner was not such as to "involve imputations on the character of the prosecutor" within the meaning of section 1 (*f*) (ii.) of the Criminal Evidence Act, 1898, so as to render the prisoner liable to be asked in cross-examination, and be required to answer, questions as to any previous convictions or as to his bad character.—REX *v.* ROUSE, *C.C.R.*, 236; [1904] 1 K. B. 184; 73 L. J. K. B. 60; 89 L. T. 677.

5. *Intoxicating liquor, sale of, to child under fourteen—Delivery in vessel not corked and sealed—Sale by servant without master's knowledge and in disobedience to his orders—"Knowingly allows any person to sell"—Intoxicating Liquors (Sale to Children) Act*, 1904 (1 *Ed.* 7, *c.* 27), *s.* 2.—Section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, provides that "every holder of a licence who knowingly sells or delivers, or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in cork and sealed vessels in quantities not less than one reputed pint for consumption off the premises only," shall be liable to certain penalties.

B., acting within the general scope of his employment as a barman to a person licensed to sell intoxicating liquors, in breach of his master's express orders and without his knowledge, knowingly sold to a child under fourteen years of age a pint of porter in a bottle neither corked nor sealed. The licence-holder had not delegated the charge or control of his licensed premises to B.

Held, that the licence-holder could not be convicted under the above section of "knowingly allowing" the sale.—EMARY *v.* NOLLOTH, *K.B.D.*, 107; [1903] 2 K. B. 264; 72 L. J. K. B. 620; 89 L. T. 100.

6. *Shooting at dog—Malicious intention*—Bonâ fide *belief that act was necessary—Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 41.—The test of whether a person is liable to conviction, against whom an information under 24 & 25 Vict. c. 97, *s.* 41, has been laid, is whether he acted under a *bonâ fide* belief, right or wrong, that it was necessary for him to do the act complained of in order to protect his own or his master's property.

Daniel v. *Janes*, (1877) L. R. 2 C. P. 351, 25 W. R. Dig. 91, considered.—MILES *v.* HUTCHINGS, *K.B.D.*, 284; [1903] 2 K. B. 714; 72 L. J. K. B. 775; 89 L. T. 420.

CROWN:—

1. *Prerogative—Exemption—Prison Commissioners—Local board—Bye-laws—Prison Act*, 1877 (40 & 41 *Vict.* c. 21), *s.* 5.—The questions were whether there was evidence that the part of the plot in question and the buildings thereon formed part of the prison

as defined by the Prison Act, 1865, s. 4, and the Prison Act, 1877, s. 60, and whether the land and buildings being vested in the Prison Commissioners for the use of the Secretary of State for public prison purposes, the bye-laws were applicable thereto, and whether, under the circumstances, penalties for breach of the bye-laws could be enforced against the Prison Commissioners.

Held, on the facts, that the buildings were not part of the prison and were not exempt from the bye-laws on that ground, but that the plot of ground was State property, and property therefore over which the local authority had no control whatever.—GORTON LOCAL BOARD *v.* PRISON COMMISSIONERS, *K.B.D.*; [1904] 2 K. B. 165, n.

2. *Prerogative—Highways—Locomotives—Speed of—Locomotives Act*, 1865 (28 & 29 *Vict. c.* 83), *s.* 4.—The Crown is not bound by an Act of Parliament, unless it is expressly or by necessary implication named therein.

Held, that a driver of a locomotive belonging to the Crown, and acting under the orders of the Crown, was not subject to the Locomotives Act, 1865, and was not liable to a penalty for exceeding the rate of speed fixed by section 4.—COOPER *v.* HAWKINS. *K.B.D.*, 233; [1904] 2 K. B. 164; 73 L. J. K. B. 113; 89 L. T. 476.

CY-PRES:—

Power—Testamentary power—Excessive execution.—A *cy-près* estate cannot be implied in lieu of excessive limitations of real estate under a testamentary power, unless it will include all persons intended to take under those limitations, and no others.

Monypenny v. *Dering*, (1852) 2 D. M. & G. 145, and *Hampton* v. *Holman*, (1877) 5 Ch. D. 183, followed.—RISING, RE, RISING *v.* RISING, *Ch.D. Swinfen Eady, J.*; [1904] 1 Ch. 533; 73 L. J. Ch. 455; 90 L. T. 504.

See also Will, 8.

DAMAGES:—

Measure of—Sale of goods—Disclaimer of responsibility for bad workmanship—Costs of action by sub-vendee against purchaser reasonably defended.—The plaintiffs having undertaken the repairs of a steamship for the owners, employed the defendants, an engineering company, to construct a new crank shaft. The defendants agreed to do so, upon the terms of their not being responsible for failure of material or workmanship beyond the replacement of faulty work supplied by them.

In an action by the plaintiffs against the shipowners to recover the price of the shaft which had been supplied by the defendants, the shipowners counterclaimed for damages for breach of contract in consequence of the shaft having broken down on a voyage.

The plaintiffs, after communicating with the defendants, who thereupon repudiated all responsibility, defended the counterclaim.

The shipowners succeeded on their counterclaim, the shaft being found to have been of faulty workmanship.

In an action by the plaintiffs to recover from the defendants the cost of the shipowners' counterclaim, as damages resulting from the defendants' breach of contract,

Held, that the terms on which the defendants had supplied the shaft did not relieve them from paying these costs; and that the plaintiffs were entitled to recover the costs of the counterclaim except so far as they were increased by any issue other than the faultiness of the material or workmanship of the shaft.—PRINCE OF WALES DOCK CO. *v.* FOWNES CO., *C.A.*; 90 L. T. 527.

DEED:—

Construction—Use of garden—Grant to lessees, sub-lessees, and tenants, being occupiers of houses, and their friends—User by members of residential club.—A. granted by deed to B., his heirs, executors, administrators, and assigns, and his and their lessees and sub-lessees or tenants, being occupiers of certain houses, and their families and friends, the right to enter and use an adjacent ornamental garden. A limited company which was the owner of some and the lessee of another of these houses, established in them a proprietary residential club for ladies. Under the rules of the club bedrooms might be allotted to the members at a weekly rent, payable in advance, but subject to many restrictions as to user.

Held, that, under the circumstances, the resident members, though occupiers of the houses, were occupiers as licensees of the company, and not as lessees, sub-lessees, or tenants, and that they were not, therefore, entitled as of right to enter into and use the garden.

Held, further, that the members of the club were not "friends" whose entry on to and user of the garden the company could authorize.—KEITH *v.* TWENTIETH CENTURY CLUB (LIMITED), *Ch.D. Buckley, J.*, 554; 73 L. J. Ch. 545; 90 L. T. 775.

DEFAMATION:—

Slander—Special damage—Remoteness—Damage not reasonable and probable consequence of words.—The plaintiff, who was a barman, claimed damages from the defendant for slander, the words complained of, which were alleged to have been spoken to the plaintiff's employer, being: "You have a barman in your employ named S., who has removed from his landlord's house leaving £2 owing for a month's rent, and I cannot get the money from him"; and he alleged as special damage that his employer had in consequence dismissed him from his employment.

Held (dismissing the appeal), that the dismissal of the plaintiff could not be the natural and probable consequence of the words complained of, and that, therefore, the alleged special damage could not support the action.—SPEAKE *v.* HUGHES, *C.A.*; [1904] 1 K. B. 138; 73 L. J. K. B. 172; 89 L. T. 576.

See also Libel, 1, 2; Slander, 1.

DENTISTRY:—

Unregistered person—Supply of false teeth—Fitting set in patient's mouth—Right to recover fee—"Dental operation, dental attendance or advice"—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *s.* 5.—A person who was carrying on the practice of a dentist, but who was not registered under the Dentists Act, 1878, made for the defendant and fitted to the defendant's mouth a set of false teeth which were taken by the defendant and kept and used by him. The defendant having refused to pay for the same.

Held, that section 5 of the Dentists Act, 1878, which prevented an unregistered person from recovering any fee or charge for "the performance of any dental operation, or for any dental attendance or advice," did not prevent the unregistered person from recovering the price of the set of teeth so supplied, as distinguished from the fitting of the same.—HENNAN *v.* DUCKWORTH, *K.B.D.*; 90 L. T. 546.

DESIGN:—

Registration—Infringement—Patent and registered design for same invention—Second registered design

similar to previous design—Marking goods—Registration of design not known to infringer—Injunction—Damages—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 51, 58, 59, 60, 61. —The plaintiffs registered a design for improvements in motor cycles between the time when they applied for and the time when they obtained letters patent for a similar invention. Subsequently they registered a new design, which in fact was similar to the originally registered design, and sold machines marked with the registration number only. The fact of the registration was unknown to the defendants prior to the issue of the writ in an action against them for infringement, but they sold some machines after the writ was issued, and on an application for an *interim* injunction they offered to keep an account.

Held, that a patent and a registered design for the same invention might co-exist, the rights conferred did not clash, and the registration was valid; that the first registration was not forfeited; and that want of knowledge was not a reason why an injunction should not be granted, but that it protected the defendants from payment of damages in respect of sales effected by them before writ.—WERNER MOTORS *v.* GAMAGE, *Ch.D. Byrne, J.*; [1904] 1 Ch. 264; 73 L. J. Ch. 266; 90 L. T. 342.

DISTRESS:—

1. *Poor law—Rating—Recovery—Costs—Charges of taking, keeping, and selling the distress—Distress (Costs) Act*, 1817 (57 *Geo.* 3, *c.* 93)—*Distress (Costs) Act*, 1827 (7 & 8 *Geo.* 4, *c.* 17)—*Distress for Rates Act*, 1849 (12 & 13 *Vict. c.* 14), *s.* 1.—The provisions contained in the Distress (Costs) Acts, 1817 and 1827, limiting the costs and charges of distresses for poor rates and certain other rates, where the amount due does not exceed £20, are impliedly repealed as regards poor rate, by the Distress for Rates Act, 1849, section 1 of which authorizes in connection with the levy of distress for such rates, the levy of the "reasonable charges of the taking, keeping, and selling of the said distress."—HILL *v.* PANNIFER, *K.B.D.*, 588; [1904] 1 K. B. 811; 73 L. J. K. B. 556; 90 L. T. 511.

2. *Sale of goods—Purchase by landlord—2 W. & M., Sess.* 1. *c.* 5, *s.* 2—*Practice—Appeal to Court of Appeal—County court appeal—"Right of appeal to the High Court"—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120—*Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 5.—A landlord who has distrained goods for rent in arrear cannot himself purchase them.

King v. *England*, 12 W. R. 308, 4 B. & S. 782, approved and followed.

Section 1, sub-section 5, of the Judicature Act, 1894, which empowers the Court of Appeal to give leave to appeal from the High Court in all cases "where there is a right of appeal to the High Court from any court," includes cases in which there is an appeal to the High Court with the leave of the county court judge as well as cases where there is an appeal without leave.

Judgment of the Divisional Court (51 W. R. 699, [1903] 2 K. B. 168) affirmed.—MOORE, NETTLEFOLD, & CO. *v.* SINGER MANUFACTURING CO., *C.A.*, 385; [1904] 1 K. B. 820; 73 L. J. K. B. 457; 90 L. T. 469.

See also County Court, 4.

DIVORCE:—

1. *Adultery of petitioner—Discretion of court—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.—The court has full discretion as to granting a decree *nisi* in favour of a petitioner who has been found guilty of adultery under section 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), where the misconduct of the petitioner is more or less pardonable or can be excused, but in order that it may exercise this discretion the misconduct of the petitioner must have been caused by the misconduct or the offences of the respondent.

Constantinidi v. *Constantinidi and Lance*, [1903] P. 246, distinguished.—WYKE *v.* WYKE, *P.D. & Ad.D.*; [1904] P. 149; 73 L. J. P. 38; 90 L. T. 172.

2. *Adultery of petitioner—Statutory discretion—Conduct conducing—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.—The court held that if a wife leaves her husband because she has transferred her affections to another man, and her husband is aware that that is the cause, and he thereafter commits adultery, such conduct in the wife is conduct conducing to the husband's adultery; and exercising its discretion under section 31 of the Divorce Act, 1857, it further held that, in the circumstances of the case, it was justified in granting the husband a decree *nisi* for dissolution of marriage. — CONSTANTINIDI *v.* CONSTANTINIDI, *P.D. & Ad.D.*, 190; [1903] P. 246; 72 L. J. P. 82; 89 L. T. 340.

3. *Cruelty—False charge against wife—Injury to health.*—A husband left his wife and children without any means of support, and afterwards filed a petition against his wife for dissolution of his marriage on the ground of her adultery, alleging that she had given birth to a child after he had left her, of which he was not the father. Upon proof being given that the allegation had had the effect of injuring the health of the wife, it was held that such conduct on the part of the husband constituted legal cruelty so as to entitle the wife to relief.—JEAPES *v.* JEAPES, *P.D. & Ad.D.*; 89 L. T. 74.

4. *Desertion—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5—*Condonation—Revival.*—The Court held that the statutory offence of desertion created by the Matrimonial Causes Act, 1884, may be revived by subsequent adultery.—PAIN *v.* PAIN, *P.D. & Ad.D.*, 271; [1903] P. 263; 73 L. J. P. 1; 89 L. T. 588.

5. *Incest—Condonation—Revival—Desertion.*—The husband committed incestuous adultery, which the wife condoned, but he afterwards deserted her.

The Court held that such desertion revived the condoned incestuous adultery, and granted a decree *nisi*.—HOUGHTON *v.* HOUGHTON, *P.D. & Ad.D.*, 272; [1903] P. 150; 72 L. J. P. 31; 89 L. T. 76.

6. *Rehearing—Application—Practice.*—An application for the rehearing of a suit for dissolution of marriage cannot be made except to a Divisional Court.—WATSON *v.* WATSON, *P.D. & Ad.D.*; 89 L. T. 78.

7. *Scotland, law of—Divorce—Settled property—Divorced spouse surviving—Termination of interest in fund—Substitution of issue—Period of vesting.*—By a Scotch statute passed in 1573 desertion, under circumstances set out in the statute, is a sufficient cause for divorce, and the offending party is to lose all interest in the matrimonial property. By a marriage settlement made in 1866 certain property was settled upon trust for the husband and wife for life, and the survivor of them, and after the death of the survivor for the children, if any. There was one child of the marriage, who had attained twenty-one years. In 1885 the wife divorced the husband, under the above-mentioned statute, for desertion. In 1899 the wife died leaving the husband and the child surviving.

Held, that as long as the husband survived the settled property remained part of the wife's estate,

and the child could not come into possession of it till after the death of the husband.

Per Lord Davey.—By the law of Scotland a substitution of issue in case of the death of the institute before the period of distribution prevents vesting, so that the interest of the institute is not indefeasible.—DAWSON *v.* SMART, *H.L.*; [1903] A. C. 457; 89 L. T. 343.

8. *Settlements, variation of—Answer to petition before decree absolute*—Lis pendens.—A petitioner who has obtained a decree *nisi* for divorce cannot proceed with a petition to vary settlements until the decree has been made absolute; and nothing done between the time when the decree is made absolute and the hearing of the petition to vary can affect the power of the court to vary the settlements.—CONSTANTINIDI *v.* CONSTANTINIDI (No. 2), *C.A.*; [1904] P. 306.

9. *Settlements, variation of—Child—Question of legitimacy—Issue directed.*—On a petition for variation of settlements after a decree for dissolution of marriage, where a child was born between the date of the decree *nisi* and the decree absolute, the paternity of which the petitioner denied, the court directed an issue to be tried to ascertain the status of the child, and postponed the further consideration of the variation of settlements until after the trial of the issue.—EVANS *v.* EVANS, *P.D. & Ad.D.*; [1904] P. 274; 73 L. J. P. 87.

DOMICIL:—

Renunciation of domicil of origin—Evidence—Burden of proof.—The onus of proving that a domicil has been chosen in substitution for the domicil of origin lies upon the party asserting that the domicil of origin has been lost.

W., whose domicil of origin was in America, left America in 1850 and resided in Russia, for business purposes, for twenty years, visiting England in the winter to avoid the Russian climate. In 1870 he came to reside in England, but up to 1883 visited Russia yearly for business purposes. From 1883 up to his death in 1897 he resided in England. He retained a large interest in property in America, and always described himself as an American citizen, and spoke frequently of his intention of returning to America to develop his property in that country. While in England he lived in various houses taken on short leases. His will was proved in England, and the Crown claimed legacy duty on his estate, which was very large.

Held (reversing the judgment of the court below), Lord Lindley dissenting, that the Crown had failed to discharge the onus, which was upon them, of proving that W. had a fixed and settled purpose of renouncing his domicil of origin, and that the claim for legacy duty failed.—WINANS *v.* ATTORNEY-GENERAL, *H.L.*; [1904] A. C. 287; 73 L. J. K. B. 613; 90 L. T. 721.

EASEMENT:—

1. *Light—Prescription—Enjoyment for twenty years—Consent or agreement in writing—"Expressly given or made for that purpose"—Prescription Act,* 1832 (2 & 3 *Will.* 4, c. 71), *s.* 3.—R. M., the owner in fee of a house and the adjoining land, in 1816 conveyed the house in fee simple to J. A., the predecessor of the plaintiff. At the same time a stone was built into the wall of the house, upon which was inscribed: "1816. This stone is placed by J. A. to perpetuate R. M.'s right to build within nine inches of this or any other building."

The access of light to the windows of the house over the adjoining land was continuously enjoyed from 1816 to 1901, when the defendant erected a building on the adjoining land which obstructed that access of light.

Held (reversing the judgment of Lawrance, J.), that the inscription could not be construed as a consent or agreement "expressly made or given for the purpose" of the enjoyment of light within the meaning of section 3 of the Prescription Act, 1832; and that the plaintiff had an absolute right to the access of light.—RUSCOE *v.* GROUNSELL, *C.A.*; 89 L. T. 426.

2. *Light—Prescription—Substantial interference—Nuisance—Damage—Measure of right—Angle of* 45 *degrees—Mandatory injunction—Inquiry as to damage, refusal of—Ancient lights.*—To constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before.

The nature of the right to light and of an infringement was not altered by the Prescription Act (2 & 3 Will. 4, c. 71).

The decision of the Court of Appeal in *Home and Colonial Stores (Limited)* v. *Colls*, [1902] 1 Ch. 302, reversed, and the decision of Joyce, J., restored.

The decision of the Court of Appeal in *Warren* v. *Brown*, [1902] 1 K. B. 15, overruled.—COLLS *v.* HOME AND COLONIAL STORES (LIMITED), *H.L.*; [1904] A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687.

3. *Light and air—Necessity, easement of—Light—Grant of one of two adjoining tenements—Derogation from grant—Implied reservation.*—The defendant, being the owner of two adjoining tenements, granted one of them to the plaintiff's predecessor in title, while retaining the other, without expressly reserving to himself any rights over the tenement granted. The plaintiff built a wall on her premises so as to block out the light to two windows in the defendant's premises. One of these windows lighted a pantry which could not be lighted in any other way except by means of borrowed light, and the obstruction rendered the pantry useless as a pantry.

Held, that there was no implied reservation to the defendant of the right to the access of light to the pantry window, inasmuch as it was not an easement of necessity within the exception to the rule in *Wheeldon* v. *Burrows*, (1878) 12 Ch. D. 31.

The observations of Stirling, L.J., as to "easement of necessity" in *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557, 573, followed and approved.—RAY *v.* HAZELDINE, *C.A.*; *D. Kekewich, J.*; [1904] 2 Ch. 17; 73 L. J. Ch. 537; 90 L. T. 703.

4. *Way, right of—Annual payment—Uninterrupted enjoyment for forty years—Evidence of user—Lost grant—Prescription Act* (2 & 3 *Will.* 4, c. 71), *ss.* 2, 82.—Parol evidence is admissible in answer to an allegation of enjoyment of a way as of right, and a payment of an ambiguous character must be shown by a claimant not to be inconsistent with the claim.

Where, therefore, a right of way has been enjoyed openly for over forty years, but a payment annually made to the owners of the servient tenement, though whether for a licence or for what purpose was not determined by the evidence, the inference will be made that the annual payment was for a yearly licence, and the Prescription Act will consequently not apply.

Judgment of the Court of Appeal (49 W. R. 421, [1891] 2 Ch. 198) affirmed.—GARDNER *v.* HODGSON;

BREWERY CO., *H.L.*, 17; [1903] A. C. 229; 72 L. J. Ch. 558; 88 L. T. 698.

5. *Way, right of—Grant—Excessive user*—Bona fides—*Building extending beyond dominant tenement.*—A former owner of plot A bought an adjoining plot, B, together with a right of way thereto over plot C from a public street. The defendant M., the present owner of plot A and plot B, built a factory on both, with the entrance on plot B, the dominant tenement.

The plaintiff, the present owner of plot C, brought this action to restrain the defendant M. and his mortgagees, Flower & Sons (Limited), from using the right of way to the factory, contending that the effect of the building was to extend the user of the way unlawfully to plot A, and as it was practically impossible to separate the lawful from the excessive user the right of way was wholly extinguished. In any case the defendants were not entitled to use the way as a means of approach to the part of the factory built on plot A.

Held, that the right of way was not extinguished, and the defendants could not be restrained from using it as a means of access to the factory merely because having entered by the doorway on plot B, the dominant tenement, they might pass to the portion erected on plot A.—HARRIS *v.* FLOWER, *Ch.D. Swinfen Eady, J.*; 90 L. T. 669.

6. *Way, right of—Prescription—Right to use pump—Long user—Dominant and servient tenements held under same landlord—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2.—A right of way or other easement capable of being acquired under section 2 of the Prescription Act, 1832, by long user, cannot be so acquired by a lease of a tenement over an adjoining tenement where both tenements are held under the same landlord.—KILGOUR *v.* GADDES, *C.A.*, 438; [1904] 1 K. B. 457; 73 L. J. K. B. 233; 90 L. T. 604.

ECCLESIASTICAL LAW:—

1. *Clergy discipline—Immoral act—Construction—Clergy Discipline Act*, 1892 (55 & 56 *Vict.* c. 32), *s* 2.

Held, that the collection of alms on false and fraudulent pretences is an immoral act within the meaning of the Clergy Discipline Act, 1892.—FITZMAURICE *v.* HESKETH, *P.C.*; [1904] A. C. 266; 73 L. J. P. C. 53.

2. *Clergy Discipline Act*, 1892 (55 & 56 *Vict.* c. 32)—*Immoral habit of swearing and ribaldry.*—The occasional use of objectionable language by a clergyman, under circumstances of great provocation, upon rare occasions extending over a period of three years,

Held, not to amount to an immoral habit "of swearing and ribaldry" within the meaning of the Clergy Discipline Act, 1892.

Judgment of the court below reversed.—MOORE *v.* OXFORD (BISHOP), *P.C.*; [1904] A. C. 283; 73 L. J. P. C. 43; 90 L. T. 425.

3. *Faculty—Jurisdiction—Revocability of faculty.*—A faculty granted by the ordinary after citation and unappealed against cannot, in the absence of the consent of all the parties interested, be revoked for any cause other than fraud.—LONDON COUNTY COUNCIL *v.* DUNDAS, *Arches Ct.*; [1904] P. 1.

EDUCATION:—

United district school board—Transfer to educational authorities—Different "appointed days"—Adjustment of liabilities—Immediate or postponed arbitration—Education Act, 1902 (2 *Ed.* 7, *c.* 42), *s.* 27, *sub-section* 2; *Schedule II., clauses* 1, 8, 22—*Local Government Act*, 1894 (56 & 57 *Vict.* c. 73), *s.* 68—*Arbitration Act*, 1889 (52 & 53 *Vict.* c. 49), *s.* 2.—The H. Urban District Council is the local educational authority for the H. Urban District. The 1st of June, 1903, was the "appointed day" for the coming into operation of the Education Act, 1902, within the district. The corporation of J. and the county council of D. are respectively the local education authorities for the borough of J. and the rural district of M. At the passing of the Education Act, 1902, the H., M., and J. United District School Board was the school board for the urban district of H., the rural district of M., and the borough of J. The 1st of April, 1904, was the appointed day for the coming into operation of that Act within the county of D. and the borough of J. Matters having arisen requiring adjustment between the council and the united district school board, and clause 1 of the second schedule to the Act providing that the rights and liabilities "of any school board" existing at the appointed day should be transferred to the council exercising the powers of the school board,

Held, that an arbitrator should be at once appointed to adjust such matters, and that the appointment should not be delayed until the appointed day for the remainder of the united district school board.—HEBBURN URBAN COUNCIL, RE, *Ch.D. Kekewich, J.*; 90 L. T. 145.

See also Will, 7.

ELECTION LAW:—

1. *Corporation—Nomination of disqualified person—Right of defeated candidate to claim seat—Municipal Corporations Act*, 1882 (45 & 46 *Vict.* c. 50), *s.* 56, *sub-section* 2.—A candidate who has received a minority of the votes in an election under the Municipal Corporations Act, 1882, is not entitled to claim the seat when the successful candidate is disqualified for being elected, unless the disqualification was either apparent or such disqualification has been brought to the notice of the electors.—HOBBS *v.* MOREY, *K.B.D.*, 348; [1904] 1 K. B. 74; 73 L. J. K. B. 47; 89 L. T. 531.

2. *Illegal practice—Relief—Presentation of petition—Same grounds as on which relief is sought—Municipal Corporations (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict.* c. 70), *s.* 20.—The court will grant relief from an illegal practice in a proper case, even although an election petition has been presented, where the sole grounds for such petition are those in respect of which relief is sought, and none of the facts are in dispute.—FORSTER, EX PARTE, *K.B.D.*; 89 L. T. 18.

3. *Registration — Parliament — Lodger claim — Objection as to value of lodgings—Evidence—Disallowance of claim—Refusal to state case—Order* nisi *for* mandamus—*Statement of revising barrister in answer to order* nisi—*Statement to be made on affidavit—Registration Act*, 1843 (6 & 7 *Vict.* c. 18), *ss.* 42, 65—*Parliamentary Registration Act*, 1878 (41 & 42 *Vict.* c. 26), *ss.* 22, 23; *s.* 28, *sub-sections* 10, 11; *ss.* 36, 37.—J. claimed to vote as an old lodger; it appeared in the body of his claim that he occupied as lodgings two unfurnished rooms on the top floor of a house, for which rooms he paid 5s. 6d. weekly, and in the declaration annexed to the claim the claimant declared that his lodgings were of the clear yearly value, if let unfurnished, of £10 or upwards. The claim was duly objected to on the ground that the lodgings were not of sufficient value. It was proved that the whole house was only rated at £14, and there were also other circumstances in evidence before the revising barrister which raised a strong doubt in his mind as to

whether the lodgings were of sufficient value. The revising barrister adjourned the hearing to an evening sitting of the court, and meanwhile sent a written notice to the claimant that his claim would, or might be, disallowed unless he produced, or caused to be produced, at the evening sitting his rent-book or other sufficient evidence that his lodgings were of the requisite value. The claimant having altogether ignored this notice, the revising barrister disallowed the claim, on the ground that he was not satisfied that the claimant's lodgings were of the requisite value, and refused to state a case. An order *nisi* for a *mandamus* having been obtained *ex parte*,

Held, that the case raised a question as to the true construction of section 29, sub-sections 10, 11, of the Parliamentary Registration Act, 1878, and that the order *nisi* should be made absolute.

Held, also, that as a general rule a statement made by a revising barrister in answer to an order *nisi* should be on affidavit.

The observations of the court on this point in *In re Bane*, W. N. 1879, p. 200, discussed and distinguished.—REX *v.* NEPEAN, *K.B.D.*, 264.

4. *Registration — Parliament — Lodger claim — Objection as to value—Evidence* pro *and* con—*Revising barrister—Jurisdiction—Registration Act*, 1843 (6 *&* 7 *Vict.* c. 18), *ss.* 42, 65—*Representation of the People Act*, 1867 (30 *&* 31 *Vict.* c. 102), *s.* 4, *sub-section* 2—*Parliamentary Registration Act*, 1878 (41 *&* 42 *Vict.* c. 26), *ss.* 22, 23; *s.* 28, *sub-sections* 10, 11; *s.* 36.—A revising barrister has no jurisdiction to make the allowance of a lodger claimant's vote dependent upon the claimant's compliance with a requirement that he shall attend personally; the only way in which a lodger claimant's personal attendance can be required is by means of a summons under section 36 of the Registration Act, 1878.

Section 28 of the Registration Act, 1878, does not absolutely confine the right of a revising barrister to disallow a lodger claim to the case of such *primâ facie* proof of the ground of objection being given as is described in sub-section 10 of that section; that sub-section deals only with one special method of establishing a *primâ facie* case against the claim; and, therefore, even although the objector's case does not satisfy sub-section 10, it may still consist of evidence against the lodger's claim, which the revising barrister is entitled to weigh and ought to give effect to by allowing the objection, if he thinks that the weight of such evidence is sufficient to outweigh the evidence of the lodger's declaration (which by section 23 of the Act of 1878 is constituted *primâ facie* evidence of the qualification) and any other evidence confirmatory of the declaration which the claimant may think proper to adduce. As to the weight and effect of such evidence *pro* and *con*, the revising barrister is the constituted judge, and no appeal lies from his decision.—JENKINS *v.* GROCOTT, *K.B.D.*, 267; [1904] 1 K. B. 374; 73 L. J. K. B. 215; 90 L. T. 90.

5. *Registration—Parliament—Occupation franchise —Husband tenant of wife—Evidence of* bonâ fide *agreement to pay rent by husband to wife.*—The relationship of husband and wife does not in point of law preclude the existence of the relation of landlord and tenant between the wife and husband in respect of the house in which they both reside and which is owned by the wife; and where there is in fact a *bonâ fide* tenancy of such house by the husband from the wife, the husband is entitled to be registered under the Registration Acts in respect of his occupation as tenant of such house.

Hall v. *Michelmore*, 50 W. R. 172, explained and distinguished.—PEARCE *v.* MERRIMAN, *K.B.D.*, 141; [1904] 1 K. B. 80; 73 L. J. K. B. 183; 89 L. T. 745.

6. *Registration—Parliament—Ownership qualification—Freehold benefice—Pew-rents—Interest in land* —8 *Hen.* 6, *c.* 7.—Where the right to receive for his own benefit the pew-rents of a church is vested in the vicar by virtue of his office, even though such right arise merely by implication from the terms of the licence of the bishop when appointing the vicar, the pew-rents may, in such circumstances, constitute an equitable freehold interest in land within the meaning of the Registration Act, 8 Hen. 6, c. 7.

Quære, whether the mere actual receipt of pew-rents by the vicar for his own use would of itself be sufficient to constitute an interest in land.

Ex parte Arrowsmith, 26 W. R. 600, 8 Ch. D. 96, discussed.—VICKERS *v.* SELWYN, *K.B.D.*, 153; 89 L. T. 747.

7. *Registration—Parliamentary and county council franchise—Head master of school—Occupation of dwelling-house adjoining school premises—Character of occupation—Household or service franchise—Representation of the People Act*, 1867 (30 & 31 *Vict.* c. 102), *s.* 3—*Representation of the People Act*, 1884 (48 *&* 49 *Vict.* c 3), *ss.* 2, 3—*County Electors Act*, 1888 (51 & 52 *Vict.* c. 10). *s.* 3.—The appellant, a schoolmaster, had resided during the qualifying period in a dwelling-house attached to the school premises, which dwelling-house he held under an agreement from the school managers. No deduction from his annual salary as schoolmaster was made in respect of his occupation of the dwelling-house, nor did the agreement contain any stipulation requiring the appellant as schoolmaster to reside in the dwelling-house. The appellant claimed to have his name inserted in Division I. of the list of occupation electors in respect of his occupation as tenant of the said dwelling-house.

The revising barrister, although not finding as a fact, either that the appellant as schoolmaster was required to reside in the dwelling-house, or that he might, if he chose, reside elsewhere, dismissed the claim, on the ground that the appellant occupied the dwelling-house by virtue only of his office and services as schoolmaster, and, consequently, was not entitled to be placed in Division I.

Upon appeal, the court reversed the revising barrister, and held, upon the facts, that the case was governed by *Marsh* v. *Estcourt*, 38 W. R. 495, 24 Q. B. D. 147, and that the appellant was entitled to have his name inserted in Division I.—DOVER *v.* PROSSER, *K.B.D.*, 140; [1904] 1 K. B. 84; 73 L. J. K. B. 13; 89 L. T. 724.

ESTATE DUTY.—See Inland Revenue.

ESTOPPEL.—See Company, 24; Insurance, 3; Landlord and Tenant, 7; Ship, 27.

EVIDENCE:—

1. *Date of birth—Register—Entry—Births and Deaths Registration Act*, 1836 (6 & 7 *Will.* 4, *c.* 86).—A certified copy of an entry in a register of births and made pursuant to the statute 6 & 7 Will. 4, c. 86, is evidence, not merely of the fact of birth before the date of registration, but of the actual date of birth.

In re Wintle, (1870) L. R. 9 Eq. 373, disapproved. —GOODRICH, IN THE ESTATE OF, PAYNE *v.* BENNETT, *P.D. & Ad.D.*; [1904] P. 138; 73 L. J. P. 33; 90 L. T. 170.

2. *Expert's reports — Facts not within living memory — Admissibility.* — Where an engineer's reports are within the common knowledge of engineers and accepted by them as accurate, they constitute evidence which the court will accept as to facts not within living memory.—EAST LONDON RAILWAY CO. *v.* CONSERVATORS OF RIVER THAMES, *Ch.D. Farwell, J.*; 90 L. T. 347.

EXECUTION:—

Discovery in aid—Judgment against corporation—Examination of officer—Past officer—Ord. 42, *r.* 32. —An order may be made, under ord. 42, r. 32, where judgment has been recovered against a corporation, for the examination of a past as well as of a present officer of the corporation.—SOCIÉTÉ GÉNÉRALE DU COMMERCE ET DE L'INDUSTRIE EN FRANCE *v.* JOHANN MARIA FARINA & CO., *C.A.*, 404; [1904] 1 K. B. 794; 73 L. J. K. B. 355; 90 L. T. 472.

See also Bankruptcy, 7; County Court, 6.

EXECUTOR:—

1. *Indemnity—Privity of estate—Distribution—Administration — Leaseholds — Contingent future liabilities—Retention of assets.*—On making an order for the distribution of the estate of a testator amongst his residuary legatees the court will not set aside any part of his assets to indemnify his executors against possible liabilities which may arise in respect of leases formerly held by him, unless there is privity of estate between the executors and the lessors.—NIXON, RE, GRAY *v.* BELL, *Ch.D. Byrne, J.*; [1904] 1 Ch. 638; 73 L. J. Ch. 446.

2. *Power to compromise claim of co-executor—"Compromise"—Trustee Act,* 1893 (56 & 57 *Vict. c.* 53) *s.* 21—*Judicial Trustee Act,* 1896 (59 & 60 *Vict. c.* 35), *s.* 3.—The power of an executor to compromise claims against his testator's estate extends —in a proper case—to claims made by a co-executor, and where such a claim has been allowed by an executor acting honestly and reasonably the transaction is valid and binding on the residuary legatees.—HOUGHTON, RE, HAWLEY *v.* BLAKE, *Ch.D. Kekewich, J.*, 505; [1904] 1 Ch. 622; 73 L. J. Ch. 317; 90 L. T. 252.

See also Mortgage, 9; Practice, 26; Vendor and Purchaser, 4.

FACTORY:—

1. *Overtime—Part of factory in which overtime employment allowed—"Warehouse not used for any manufacturing process or handicraft"—Factory and Workshop Act,* 1901 (1 *Ed.* 7, *c.* 22), *s.* 49, *Schedule II., clause* 4.—By Schedule II., clause 4, of the Factory and Workshop Act, 1901, overtime is allowed in "any part of a factory (whether textile or non-textile) or workshop which is a warehouse not used for any manufacturing process or handicraft, and in which persons are solely employed in polishing, cleaning, wrapping, or packing up goods."

A part of a factory which is used at any time during ordinary hours for a manufacturing process or handicraft is not a "warehouse" in which overtime is allowed within the meaning of the above clause, and persons may not be employed in overtime therein, even though no manufacturing process or handicraft is being carried on therein during such overtime.—SMITH *v.* SIBRAY, HALL, & CO., *K.B.D.*, 218; [1903] 2 K. B. 707; 72 L. J. K. B. 822; 89 L. T. 358.

2. *"Tenement factory"—Fire-escape—Factory and Workshop Act,* 1901 (1 *Ed.* 7, *c.* 22), *ss.* 14, 149. —By section 149 of the Factory and Workshop Act, 1901, the expression "tenement factory" is defined to mean "a factory where mechanical power is supplied to different parts of the same building occupied by different persons for the purpose of any manufacturing process," &c.

Held, that by the words "is supplied" must be understood "is supplied from the same source," and that a building the parts of which, being occupied as factories by different persons have each their own independent supply of mechanical power, is not within the definition.

Toller v. *Spiers & Pond* (*Limited*), [1903] 1 Ch. 362, followed.—BRASS *v.* LONDON COUNTY COUNCIL, *K.B.D.*, [1904] 2 K. B. 336.

See also Master and Servant, 18-20.

FISHERY:—

1. *Mussel fishings—Right of Crown to grant.*—The House holding that mussel fishings may competently be granted by the Crown, affirmed the decision of the First Division of the Court of Session, Scotland, dated the 18th of March, 1902 (4 F. 698).—PARKER *v.* LORD ADVOCATE, *H.L.*; [1904] A. C. 364.

2. *Validity of bye-law—Salmon Fisheries Act,* 1873 (36 & 37 *Vict. c.* 71), *s.* 39, *sub-section* 3.—Where conservators of a river have power to determine (*inter alia*) "the length, size, and description of nets . . . for taking of salmon," they are entitled to prohibit the use of a particular kind of net altogether.—CLAYTON *v.* PEIRSE, *K.B.D.*, 495; [1904] 1 K. B. 424; 73 L. J. K. B. 268; 90 L. T. 119.

FIXTURES:—

1. *Tenant's fixtures—Removal—Determination of lease by forfeiture—Mortgage of lease—Right of mortgagee.*—A lease to a limited company contained a proviso for the determination of the term in the event of the company going into liquidation. The company having issued debentures which constituted a floating charge on all its property present and future, a receiver was appointed in a debenture-holders' action. The receiver took possession of the leasehold premises and obtained leave from the judge to sell the tenant's fixtures, the lessor being present and not objecting. After the fixtures had been advertised for sale the company went into voluntary liquidation, and the lessor thereupon demanded possession of the leasehold premises including the fixtures in question.

Held, that the voluntary act of the company in going into liquidation ought not in the circumstances to prejudice the right of the debenture-holders to remove the tenant's fixtures, and that they were entitled to a reasonable time after the determination of the lease for removal.

Pugh v. *Arton*, (1869) L. R. 8 Eq. 626, commented on.—GLASDIR COPPER WORKS (LIMITED), RE, ENGLISH ELECTRO-METALLURGICAL CO. *v.* GLASDIR COPPER WORKS (LIMITED), *Ch.D. Joyce, J.*; [1904] 1 Ch. 819; 73 L. J. Ch. 461; 90 L. T. 412.

FOOD AND DRUGS.—See Adulteration.

FORESHORE:—

1. *Land by the sea—Accretion—Parcels in conveyance—"Situate on seashore"—"Bounded by seashore"—Meaning of "seashore"—Measurements and plans inconsistent with description*—Falsa demonstratio—*Hearsay evidence—Declaration in discharge of professional duty.*—A conveyance of land described in the parcels as "situate on the seashore" and "bounded on the west by the seashore" passes all the land down to the foreshore—*i.e.*, to the high-water mark of medium ordinary tides, notwithstanding that the plan on the deed shows a more

restricted boundary which satisfies the measurements and contents given in the parcels.

The lord of a manor, of which the foreshore at B. was parcel, granted in 1864 two plots of land there to M. and H. respectively in fee. In each of the deeds the parcels described the plot as "situate on the seashore" and as "bounded on the west by the seashore," the northern, southern, and eastern boundaries being also named. The measurements from east to west and from north to south, and the contents correctly calculated from those measurements, were given, and agreed exactly with a rectangular figure representing the plot in a plan drawn on the deed, three sides of the figure corresponding with the north, south, and east boundaries named. The plan also showed a wavy line marked "sea coast," between which and the fourth or west side of the figure was a strip of land a few yards wide. It was proved that in 1864 the sea had sometimes covered this strip, and occasionally even washed over the plots as they were marked on the plans. Also, that the distance between the lines of high water of ordinary spring tides and ordinary medium tides was about 100 yards, but the position in 1864 of neither of these high-water marks could now be ascertained. Since then the sea had gradually receded, leaving considerable accretion to the land. In an action by successors in title of the grantees against successors in title of the grantor to ascertain the true western boundary of plaintiff's land,

Held, that the word "seashore" was used in the deeds as equivalent to "foreshore," and as meaning that space, *primâ facie*, vested in the Crown, of which the landward limit was the line of medium high tide between the springs and the neaps; that the deeds thus contained an adequate description of what was intended to pass by them, which was not vitiated by errors in dimensions or quantity nor by inaccuracies in the plans; that the western boundary at the date of the grant was, and still remained, the seashore; and that any accretion belonged to the plaintiffs.

Levels taken by a deceased surveyor under contract with a local board not admitted in evidence. —MELLOR *v.* WALMESLEY, *Ch.D. Swinfen Eady, J.*, 665.

2. *Public right of bathing—Dedication—Lawful access to the foreshore—Private ownership of foreshore.* —Although the public have the right of passage over the sea, including that part of it which is above the foreshore, and have *primâ facie* the right of fishery therein, yet when the foreshore is uncovered by the sea the public have not a general common law right to go upon it or to cross it for all purposes, and in particular have not the right to do so for the purpose of bathing therefrom in the sea. Nor does the fact of a person having lawful access to the foreshore give him the right of using it or crossing it for the purpose of bathing in the sea. The public cannot acquire by dedication from the owner of the foreshore the right to wander at will over it and down to the brink of the sea.—BRINCKMAN *v.* MATLEY, *Ch.D. Buckley, J.*, 363; 73 L. J. Ch. 160; 90 L. T. 199.

FRAUD.—See Company, 24; Mortgage, 8; Probate, 8; Settled Land, 5; Solicitor, 7.

FRAUDS, STATUTE of:—

Interest in land—Memorandum in writing—29 Car. 2, c. 3, s. 4.—A wife verbally agreed with her husband that if he bought a certain house she would make him a present of it. The husband accordingly bought the house, and sued his wife to recover the amount of the purchase-money.

Held, that this was merely an agreement by the wife to pay her husband the amount of the purchase if he bought the house, and was not a contract for or concerning an interest in land within section 4 of the Statute of Frauds, and that therefore the action was maintainable though there was no memorandum or note of the contract in writing.—BOSTON *v.* BOSTON, *C.A.*, 65; [1904] 1 K. B. 124; 73 L. J. K. B. 17; 89 L. T. 468.

FRIENDLY SOCIETY:—

Unregistered society—Continuance impracticable—Dissolution—Jurisdiction to wind up.—Where there is a fund which belongs to a number or society of persons who have individually certain interests therein regulated either by a trust deed or by a body of rules, and especially where the fund is vested in a trustee upon trust for those persons, if the rules cannot be carried into effect *modo et forma* and the society continued without giving certain members more than they are entitled to as between themselves and the other members, the court has jurisdiction to interpose and wind up the society for the purpose of administering its funds and distributing them equitably among its members.

A fund was formed for the purpose of providing the workmen and others employed by a company with allowances during sickness or infirmity and pensions during old age. Rules concerning the membership of the society of those entitled to the fund were made, and from time to time altered, under which entrance fees were paid, the sums for allowances and for subscriptions were fixed, and provision was made that when members attained sixty-five years they should cease to contribute to the funds or to have any allowance for sickness, but they should become entitled to have a weekly allowance or pension for the remainder of their lives. Under these rules the society existed for nearly a century. The society was governed by a committee chiefly composed of the officials of the company. The company having ceased to employ workmen, and having practically ceased business, and no new members having for some years joined the society, it became impracticable to carry out the rules, and it was found that if the society continued the funds would become exhausted for the benefit of some members only. At a meeting of the members a majority, both of pensioners and non-pensioners, voted for a dissolution.

Held, that, under such circumstances, although the society was not a partnership, yet the court had jurisdiction to wind it up, and, not being able to do more justice by continuing it, would wind it up for the purpose of distributing its funds equitably among its members according to their respective interests therein under the rules.—LEAD CO.'S WORKMEN'S FUNDS SOCIETY, RE, *Ch.D. Warrington, J.*, 571; [1904] 2 Ch. 196.

GAMING:—

1. *Betting-houses—Advertisement—Reasonable construction — Place used for betting — Must suggest unlawful betting—Betting Act*, 1853 (16 & 17 *Vict. c* 119), *ss.* 1, 7.—In order that the publication of an advertisement may be an offence within section 7 of the Betting Act, 1853, it is necessary that the advertisement on a reasonable construction of its words shall make it appear not merely that a place is used for betting, but that it is used for betting of one or other of the two kinds prohibited by section 1 of the Act—that is, betting with persons physically resorting to the place, or betting by receiving there money or some valuable thing as the consideration for a promise by the receiver to pay or transfer money or a valuable thing on the

event of a horse-race, &c.—ASHLEY v. HAWKE, K.B.D.; 89 L. T. 538.

2. *Shop—Automatic machine—Game of chance or skill—Gaming House Act*, 1854 (17 & 18 *Vict. c.* 38). —T., being the occupier of a tobacconist's shop, kept there an automatic machine by which a person, having put a penny in the slot, pulls a nob, and on releasing such nob the penny flies up into one of five compartments. If the penny goes into either of two compartments it is returned to the person using the machine; if it goes into either of the two others it is retained in the machine; but if it goes into the fifth he receives a ticket by which he can have a 3d. cigar or its value at his option.

It was established by evidence that dexterity could be acquired to some extent by the operator by practice, but the magistrate came to the conclusion that it was not proved that the chances were alike favourable to the appellant and the operator.

Held, that T. was properly convicted of permitting the shop to be used for the purpose of unlawful gaming, contrary to the Gaming House Act, 1854.—THOMPSON v. MASON, K.B.D.; 90 L. T. 649.

3. *Sweepstakes—Illegal lottery—Gaming Act*, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2.—A beerhouse keeper arranged a sweepstakes on his premises and offered certain prizes, but the amount of these prizes did not equal the amount subscribed as entrance money.

Held, that this was an illegal lottery within the meaning of section 2 of the Gaming Act, 1802.—HARDWICK v. LANE, K.B.D., 591; [1904] 1 K. B. 204; 73 L. J. K. B. 96; 89 L. T. 630.

See also Bankruptcy, 15; Licensing Law, 6.

GARNISHEE.—See Bankruptcy.

GAS:—

1. *Arrears of gas rent due by outgoing tenant—Purchase by incoming tenant of outgoing tenant's business and interest in premises—Right to recover from incoming tenant—Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *s.* 16—*Metropolis Gas Act*, 1860 (23 & 24 *Vict. c.* 125), *s.* 39—*Gas Light and Coke Co.'s Act*, 1872 (35 & 36 *Vict. c. xxiii.*), *s.* 18.—Under the 18th section of the Gas Light and Coke Co.'s Act, 1872, an incoming tenant who has purchased the goodwill of his predecessor and continues to carry on the business on the premises, but does not require a supply of gas, is not liable for arrears of gas rate due by the outgoing tenant. Should he require a supply for the premises himself, then the gas company may insist on payment of these arrears as a condition of such supply.

Decision of the Court of Appeal (51 W. R. 565, [1903] 1 K. B. 593) reversed.

Gas Light and Coke Co. v. *Mead*, 45 L. J. M. C. 71, 24 W. R. Dig. 111, approved. — CANNON BREWERY CO. v. GAS LIGHT AND COKE CO., *H.L.*, 657; [1904] A. C. 331.

2. *Statutory maximum dividend—Payment free of income tax—Ashton Gas Act*, 1877 (40 & 41 *Vict. c. clxxxvi.*), *ss.* 16, 17—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 54, 60, *Schedule A, Rule No. III.* (3). —A gas company, which is precluded by statute from paying dividend in excess of a statutory maximum rate, cannot pay a dividend at that rate free of income tax.—ATTORNEY-GENERAL v. ASHTON GAS CO., *Ch.D. Buckley, J.*, 347; 73 L. J. Ch. 283; 90 L. T. 204.

3. *Testing of gas—"Daily"—Inclusive of Sunday —Practice—Parties—Appeal—Jurisdiction—Gas Light and Coke Co.'s Act*, 1880 (43 & 44 *Vict. c.* 181), *s.* 7—*Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *s.* 34—*Metropolis Gas Act*, 1860 (23 & 24 *Vict. c.* 125), *s.* 55—*Sunday Observance Act*, 1677 (29 *Car.* 2, *c.* 7).—By the South Metropolitan Gas Co.'s special Acts of 1869 and 1876, provision was made for the public testing of the quality of the gas supplied by them to consumers. The mode of testing and the locus and number of testing-places which were to be provided by the company, and to be under the control of the Metropolitan Board of Works, were to be prescribed by gas referees appointed by the Board of Trade, and "daily" testings were to be made by gas examiners appointed by the Metropolitan Board. Similar provisions were contained in the special Acts of the other metropolitan gas companies. By the Gas Companies Act of 1880, which was applicable to all the metropolitan gas companies, the provisions as to daily testing were (in effect) re-enacted; and by section 7 of that Act it was enacted that a gas examiner should at each testing-place make "daily" such number of testings as the gas referees should prescribe.

There was also a provision in the special Act of 1869 which was to be read with the Act of 1880 defining "day" as twenty-four hours, beginning at 9 o'clock in the forenoon of one day and ending at 9 o'clock in the forenoon of the next. Under these Acts the practice had been to test on week-days only. In an action brought by the London County Council (the representatives of the Metropolitan Board of Works) against the gas company, claiming a declaration that the gas examiners appointed by the council were entitled to test the gas on Sundays, and an injunction to restrain the defendant gas company from preventing the gas examiners having access to the testing-places on Sundays.

Held, that the true meaning of "daily" in the Act of 1880 read with the Act of 1869, with reference to the South Metropolitan Gas Co., was "every day," including Sundays, taking the day as commencing at 9 o'clock in the forenoon; that the practice of not testing on Sundays prevailing under similar provisions in previous Acts of Parliament from 1869 to 1880 was not sufficient to justify the court to construe the word "daily" in section 7 of the Act of 1880 with reference to that practice; and that the plaintiff council were entitled to the relief claimed by their action.

Held, also, that the London County Council, as the "controlling authority" under the Acts, was entitled to bring the action in its own name as plaintiff.

Held, further, that although section 34 of the Gasworks Clauses Act, 1871, imposed a penalty recoverable in a court of summary jurisdiction for a refusal by the gas company to give proper access to the testing stations, yet the jurisdiction of the superior courts to deal with the matter was preserved by virtue of section 55 of the Metropolis Gas Act, 1860.

Decision of Joyce, J. (*ante*, p. 45, [1903] 2 Ch. 532), affirmed. — LONDON COUNTY COUNCIL v. SOUTH METROPOLITAN GAS CO., *C.A.*, 161; [1904] 1 Ch. 76; 73 L. J. Ch. 136; 89 L. T. 618.

GOODWILL:—

Sale of business with goodwill—Vendor interested in new business—Solicitation of old customers who have also become customers of the new business.—The vendor of an interest in a business which with the goodwill thereof had been sold by him to a company solicited on behalf of a competing business in which he was interested customers of the old

business, who were also customers of the competing business.

Held, that, on the rule laid down in *Trego* v. *Hunt*, 73 L. T. Rep. 514, [1896] A. C. 7, the vendor must be restrained by injunction from soliciting the customers of the business which he had sold, whether or not such customers were also customers of the competing business.—CURL *v.* WEBSTER, *Ch.D. Farwell, J.*, 413; [1904] 1 Ch. 685; 73 L. J. Ch. 540; 90 L. T. 479.

See also Partnership, 1.

HABEAS CORPUS:—

Jurisdiction—Person to whom directed out of jurisdiction—Power to issue writ.—The court has no jurisdiction to issue a writ of *habeas corpus* directed to a person who is at the time out of the jurisdiction.

Ex parte Wyatt, 5 Dowl. 389, explained and distinguished.—REX *v.* PINCKNEY, *C.A.*, 338; [1904] 2 K. B. 84; 73 L. J. K. B. 475; 90 L. T. 468.

HIGHWAY:—

1. *Diversion, proceedings for—Resolution of district council to request justices to view—Period for which notice must be fixed at ends of highway—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 84, 85.—In proceedings for the diversion of a highway under section 85 of the Highway Act, 1835, it is essential to the validity of a certificate of justices under that section that the notice of proposed diversion, which is thereby required to be affixed at each end of the highway proposed to be diverted, should be first so affixed at such a date as to leave a period of twenty-eight days between the date of the affixing and the date of the issue of the certificate.

A resolution of a district council under section 84 of the Highway Act, 1835, directing their surveyor to apply to two justices to view a highway which it is proposed to divert, it is not exhausted by the fact that the first two justices applied to, having viewed, refuse to certify that the proposed new highway is nearer or more commodious; and a second set of justices to whom the surveyor applies have jurisdiction to issue a certificate without any fresh resolution of the council in that behalf.—REX *v.* KENT JUSTICES, *K.B.D.*; [1904] 2 K. B. 349.

2. *Local authority—Road not safe for traffic—Misfeasance—Liability.*—The appellants, who were both the sanitary and the highway authority, dug a trench along a road under their control for the purpose of laying a sewer. When the work was completed they filled in the trench and opened the road for traffic. About a week afterwards the respondent was driving along the road in a cab at night. The driver found that the part of the road where the trench had been opened was soft, and crossed on to the other side, and ran into a heap of rubbish, with the result that the cab was overturned and the respondent was injured. The rubbish had been wrongfully deposited in the road without the permission of the appellants, but they knew that it was there, and had not lighted or fenced it. The jury found that the part of the road where the trench had been opened had been properly filled in, but had been rendered soft by subsequent rain, and was dangerous to traffic at the time of the accident.

Held, that the appellants were liable for the injury. Judgment of the Court of Appeal affirmed.—SHOREDITCH CORPORATION *v.* BULL, *H.L.*; 90 L. T. 210.

3. *Locomotive—Traction engine—Nuisance—Interim injunction—Locomotive Act*, 1861 (24 & 25 *Vict. c.* 70), *s.* 13—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 6.—In an action by the Attorney-General, on the relation of a county council, for an injunction to restrain the defendant from using a traction engine upon a road in such a way as to cause a public nuisance,

Held, that nothing in the Locomotives Act, 1898, had effected the prohibition in section 13 of the Locomotive Act, 1861, against causing a nuisance by the user upon a highway of a locomotive engine; and that it was no answer to an application for an interim injunction that the damage to the road would not have happened but for the neglect of the county council to keep it in a proper state of repair.—ATTORNEY-GENERAL AND MONMOUTHSHIRE COUNTY COUNCIL *v.* SCOTT, *C.A.*; [1904] 1 K. B. 404; 73 L. J. K. B. 196; 89 L. T. 726.

4. *Repair—Extraordinary traffic—Extraordinary expenses for repairs—Haulage of timber over roads—Timber the natural produce of land—Period of limitation for recovery of expenses—"Particular work extending over long period"—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-section* 1 (b).—The defendants for a period extending over two years bought from the owner of an estate a large quantity of timber which was felled on the estate, and the timber was hauled by the defendants to the railway station over two roads for a distance of between two and three miles on each road, the haulage being done partly by horses and partly by a traction engine. The quantity of timber so hauled was about 1,500 tons, and the felling and hauling were done under several separate contracts extending over the two years. During this period the traffic of the defendants over the roads was unusual traffic, did unusual damage to the roads, and caused unusual expenses in repairing the roads, which were constructed to bear ordinary country traffic, usually agricultural traffic.

In an action brought by the highway authority to recover the expenses of repairing the roads, as being "extraordinary expenses" incurred by them in consequence of the "extraordinary traffic" within section 23 of the Highways and Locomotives Act, 1878, the defendants alleged that the timber was the natural produce of the land and that the carting of such produce to the railway station was ordinary traffic and an ordinary user of the road.

Held, that, having regard to the total weight carried, the frequency of the loads and the means by which it was carried, the traffic was "extraordinary traffic" within the meaning of section 23, and the fact that the timber was the natural produce of the land did not, under the circumstances, prevent the traffic from being "extraordinary," or the expenses from being "extraordinary expenses," which the highway authority were entitled to recover.

Held, further, that the work was not a "particular work extending over a long period" within the meaning of section 12, sub-section 1 (*b*), of the Locomotives Act, 1898, and that therefore the sub-section did not give the highway authority the right to bring their action for the recovery of the whole of the expenses within six months after the completion of the work, and consequently that by the sub-section their claim was barred for any expenses incurred more than twelve months before the commencement of the action.—NORFOLK COUNTY COUNCIL *v.* GREEN, *K.B.D.*; 90 L. T. 451.

5. *Repair—General district rate—Alleged exemption by reason of liability to repair* ratione tenuræ—*Evidence not forthcoming that in* 1835 *predecessor in title was "legally exempt"—Highway Act*, 1835 (5 &

6 *Will.* 4, *c.* 50), *s.* 33—*Public Health Act*, 1875, *ss.* 210, 211, 269.—Where a general district rate is levied and the owner of property assessed thereto claims exemption from so much of the rate as relates to the cost of the repair of a highway, under section 33 of the Highway Act, 1835, he must not only prove that he or his predecessors in title had, previous to 1835, been under liability to repair *ratione tenuræ*, but must also prove the fact of non-payment of rates or other circumstances giving rise to the presumption of the existence of the exemption claimed.—FERRAND *v.* BINGLEY URBAN COUNCIL, *K.B.D.*, 77; [1903] 2 K. B. 445; 72 L. J. K. B. 734; 89 L. T. 333.

6. *Road of varying width—Roadside strip—Public right—Disuse no deprivation of right.*—Although a highway varies in width as measured between the fences, nevertheless the public right of passage or way, *primâ facie*, unless there be evidence to the contrary, extends to the whole space between the fences, and is not limited to that portion which may be metalled or kept in order for the more convenient use of carriages and foot passengers.—HARVEY *v.* TRURO DISTRICT COUNCIL, *Ch.D. Joyce, J.*, 262; [1903] 2 Ch. 638; 72 L. J. Ch. 705; 89 L. T. 90.

7. *Wilful obstruction—No obstruction in fact—Truck in street for purpose of cleaning house—Purpose, time, and space reasonable—Metropolitan Police Act*, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 54.—A truck, 6ft. long by 2ft. 8in. wide, containing an apparatus for removing dust from houses, was placed by D. in a highway 30ft. wide for some hours while the dust was being removed from a certain house. There was no evidence that anyone was incommoded or that anyone was prevented from passing along the highway. It was found as a fact that the business, purpose, and time selected were reasonable, and that neither the time nor the space occupied were excessive, but that the system of cleaning was not necessary to the ordinary comfort or exigency of life and was still in the experimental stage, and that the noise of the apparatus and the collection of sightseers might cause discomfort or inconvenience to the occupiers of houses and people using the street.

Held, that there was no evidence of wilful obstruction within section 54 (6) of the Metropolitan Police Act, 1839.—DUNN *v.* HOLT, *K.B.D.*; 90 L. T. 577.

See also Crown, 2.

HOUSE OF LORDS:—

1. *Practice—Discharge of judgment by consent.*—Where upon an appeal to the House of Lords the respondent petitions that the judgment of the court below should be discharged and the case sent back for trial the consent of both parties to that course must be brought before the House itself.—HANNAH v. HUNTER, *H.L.*; [1904] A. C. 379.

2. *Practice—Reversal—Point not argued.*—The defendants in an action relating to a piece of ground, and which involved questions of encroachment, right to the land, title to sue, and possession, appealed to the House of Lords against all the interlocutors of the Courts below. At the hearing in the House ([1904] A. C. 73), one only of these questions was argued by the defendants, and the appeal was allowed.

Held, by the Appeal Committee, that the defendants were not entitled to an order for the reversal generally of the interlocutors appealed from, but only for the reversal of the interlocutors so far as they related to the question raised in the House.—MONTGOMERIE & CO. v. WALLACE-JAMES (No. 2), *H.L.*; [1904] A. C. 214.

HUSBAND AND WIFE:—

1. *Desertion—Condonation—Second separation—Summary jurisdiction (Married Women) Act*, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 4, 7.—Where an offence has been committed which *primâ facie* entitles a married woman to an order under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, and the offence has been condoned by the wife, the effect of such condonation depends upon the common law and not upon any section of that Act.

A married woman issued a summons against her husband complaining of his desertion. The hearing of the summons was adjourned by the justices before whom it came, and before the resumed hearing the wife resumed cohabitation with her husband. She subsequently left him—this also before the resumed hearing—and the justices at the hearing granted her an order for separation and an allowance for maintenance.

Held, the order must be discharged since the wife had put an end to the original cause of complaint by the resumption of cohabitation, and that the justices had nothing to adjudicate upon at the date of the adjourned hearing when the order was made.—WILLIAMS v. WILLIAMS, *P.D. & Ad.D.*; [1904] P. 145; 73 L. J. P. 31; 90 L. T. 174.

2. "*Desertion*"—*Summary Jurisdiction (Married Women) Act*, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 4, 5 (*a*)—*Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 27, 31—*Misconduct, on part of complainant, short of a matrimonial offence—Ground for cessation of cohabitation—Husband and wife.*—"Desertion" under the Summary Jurisdiction (Married Women) Act, 1897, means, and is to be interpreted and dealt with as meaning, the same as desertion under the Matrimonial Causes Act, 1857, save that no period is specified as requisite to constitute the offence.—FROWD *v.* FROWD, *K.B.D.*; [1904] P. 177; 73 L. J. P. 60; 90 L. T. 175.

3. *Separation deed—Construction—Settlement—Trust for wife and children on separation—Resumption of cohabitation—Continuing validity.*—A deed made in contemplation of the separation of a husband and wife which assigns property of the husband to a trustee upon trusts for the benefit of the wife and children is a good voluntary settlement, and though caused by the contemplated separation, is not put an end to by the reconciliation and subsequent resumption of cohabitation of the husband and wife.—SPARK'S TRUST, RE, MASSEY *v.* SPARK, *Ch.D. Kekewich, J.*, 426; [1904] 1 Ch. 451; 73 L. J. Ch. 259; 90 L. T. 54.

4. *Separation deed—Construction—Son to remain under "tutelage or care" of wife—Allowance to wife for the son's maintenance—Education of son at Christ's Hospital—Liability of husband to continue the allowance.*—By a covenant in a separation deed the husband agreed to pay the wife a weekly sum for her sole and separate use, and also a further weekly sum so long as their son should remain under the age of twenty-one and should reside with or under the tutelage or care of the wife, for and towards the support, maintenance, board, lodging, clothing, and education of the son; and the wife covenanted that out of this further sum, and without any further assistance from the husband, she would support, maintain, board, lodge, clothe, and educate the son in a suitable manner, and would indemnify the husband from all liability on account thereof.

Afterwards the son obtained admission to Christ's

Hospital, where he was maintained and educated at very small expense to his mother.

Under an originating summons an order was made by consent that the son should spend half his holidays with his father and half with his mother.

Held, reversing the decision of Wright, J., that the husband was not relieved under those circumstances from continuing to pay to the wife the weekly sum covenanted by him to be paid so long as their son should remain under the age of twenty-one, and should reside with or under the tutelage and care of the wife.—ROWELL *v.* ROWELL, *C.A.*; 89 L. T. 288.

See also Legitimacy, 1; Poor Law, 2.

INCOME TAX.—See Inland Revenue.

INJUNCTION:—

Slander of title to goods—Damage direct result and imminent—Damage not accrued—Letters patent—An injunction will lie at the instance of legal or equitable owners of letters patent to restrain the publication of a libel or slander of title, if the defamation is in fact a libel or slander of title, where no damage has actually accrued, provided that damage is imminent and is the natural and direct result likely to follow.—DUNLOP PNEUMATIC TYRE CO. *v.* MAISON TALBOT, *K.B.D.*, 254.

See also Easement, 2; Nuisance, 1-3; Partnership, 3, 4; Receiver, 3; Street, 1.

INLAND REVENUE:—

1. *Estate duty—Exemption—Settlement of personal property—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-section* 1.—By the Finance Act, 1894, s. 21, sub-section 1, "Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of the Act, in respect of which property" probate duty (among other specified duties) "has been paid."

Under the will of a testator who died in 1849, his residuary personal estate became vested in trustees upon trust to invest it in land and to hold the same in trust for two persons in succession for life, with remainder to the defendant in tail male. Probate duty was paid on the testator's personalty. On the death of the second tenant for life in 1900, estate duty was claimed in respect of the land, then subject to the trusts of the will, which represented the residuary personal estate of the testator.

Held, that estate duty was payable; that section 21, sub-section 1, did not apply, because at the date of the death in respect of which estate duty was claimed the settled property was not personal property.—ATTORNEY-GENERAL *v.* EARL OF LONDESBOROUGH, *K.B.D.*; [1904] 1 K. B. 749; 73 L. J. K. B. 503.

2. *Estate duty—Gift* inter vivos—*Death of donor within twelve months—Release of donor from prior covenant for payment of gift after death—Liability of gift to estate duty—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (c)—*Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s* 38, *sub-section* 2 (a)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11, *sub-section* 1.—In 1892 a person covenanted with trustees that within three months after her death her executors should pay the sum of £5,000, free of all duties and deductions, to the trustees upon trust for a certain charity. Some eight years afterwards the donor, with the object of giving the sum in her lifetime, executed another deed by which she covenanted to pay the £5,000 at once, and by this deed she, her executors, and estate, were relieved from payment of the £5,000 under the former deed. The £5,000 was paid over, and the donor died within twelve months from the execution of the deed and the payment. Upon her death the Crown claimed estate duty upon this sum of £5,000.

Held, that the payment of the £5,000 was "an immediate gift *inter vivos*," within the meaning of section 38, sub-section 2 (*a*), of the Customs and Inland Revenue Act, 1881; that it was none the less a gift because there was a release of the donor and her estate from the obligation under the prior deed, and that, as the donor died within twelve months from the making of the gift, estate duty was payable under section 2, sub-section 1 (*c*), of the Finance Act, 1894. — ATTORNEY-GENERAL *v.* VISCOUNT COBHAM, *K.B.D.*; 90 L. T. 816.

3. *Estate duty—Mortgage by tenant for life and remainderman—Indemnity to tenant for life—Property passing on death of tenant for life—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 7.—The tenant for life of settled lands joined with the remainderman in creating a mortgage on the lands.

The loan secured by the mortgage was entirely for the benefit of the remainderman, and the tenant for life did not covenant to pay either the mortgage debt or the interest on it.

By an indenture of even date with the mortgage, and made between the remainderman and the tenant for life, the former covenanted to indemnify the latter against any loss of profits on the settled lands, and against any expenses or charges in respect of the mortgage, and assigned certain securities and charges on other lands as security for the performance of such covenants. The tenant for life was in fact kept wholly indemnified during her life.

Held, reversing the judgment of the court below, that on the death of the tenant for life the estate duty should be assessed upon the whole value of the settled lands, and not upon the value after deducting the amount of the mortgage debt.—ATTORNEY-GENERAL *v.* LORD MONTAGU, *H.L.*; [1904] A. C. 316; 73 L. J. K. B. 707; 90 L. T. 726.

4. *Estate duty—Property deemed to pass on death—Interest provided by deceased—Policy of life insurance—Marriage settlement—Policy on life of deceased settled by father of deceased—Insurable interest—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (d).—On the marriage of C. P. a settlement was made of his fortune. By the deed of settlement it was witnessed (*inter alia*) that the father of C. P., who had some years previously effected a policy of insurance in his own name on the life of C. P., assigned the policy to the trustees of the settlement with the approbation of C. P. On the death of C. P. the insurance company paid the policy-money to the trustees. The Crown claimed estate duty on the policy-money under section 2, sub-section 1 (*d*), of the Finance Act, 1894, as on an "interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person."

Held, that estate duty was not payable, for the policy was not provided by the deceased within the meaning of sub-section 1 (*d*).

Held, also, that the want of insurable interest on the part of the father would not have prevented estate duty being payable.

Polices of insurance are within sub-section 1 (*d*) of section 2 of the Finance Act, 1894, as well as within sub-section 1 (*c*).

Judgment of Ridley, J. (51 W. R. 572, [1903] 2 2 K. B. 64), reversed.—ATTORNEY-GENERAL *v.*

MURRAY, *C.A.*, 258; [1904] 1 K. B. 165; 89 L. T. 710.

5. *Estate duty—Settlement estate duty—Precatory trust—Letter with wishes of testator—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*c*), 5 (1).—N. C., by his will, dated the 13th of December, 1901, devised and bequeathed all his estate and effects of every description to his brother, C. T. C., absolutely, and he appointed his said brother, H. J. M., and C. G. executors and trustees of his will.

On the 11th of January, 1902, N. C. signed a document or letter (which has not been admitted to probate) which was headed: "Instructions to my executors Crawford, Morgan, and Gasquet."

A copy of this document was sent to C. T. C., who, on the 14th of January, 1902, wrote to C. G. a letter in which he said: "All I wish to say now is that every wish expressed by my brother shall be carried out to the very fullest extent so far as I am concerned, and as far as all we three executors are concerned, for his wishes are sacred, every word."

The effect of this letter was communicated to N. C.

N. C. died on the 18th of February, 1902, and his will was proved by all the executors, and estate duty and legacy duty was paid on his estate, including sums given or settled by the testator within twelve months of his death.

C. T. C. took possession as beneficial owner of the residuary personal estate and of the freehold and leasehold estate of N. C., and he made on the 13th of May, 1902 (within twelve months next before his death), a settlement of £5,000 on each of his four nephews and neice. C. T. C. also gave and paid other sums to various persons in accordance with the instructions in the letter of the 11th of January, 1902.

C. T. C. died on the 13th of December, 1902.

Held, that no trust was created, and that the settlement of £5,000 so made was a gift made by C. T. C. within twelve months of his death, and so estate duty and settlement estate duty were payable in respect thereof.—ATTORNEY-GENERAL *v.* CHAMBERLAIN, *K.B.D.*; 90 L. T. 581.

6. *Estate duty—Succession duty—Will charging residue with duties payable on testator's death on property of which he was tenant for life—Succession duty on proceeds of sale of timber cut by succeeding tenant for life—Heirlooms of national interest—Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 20—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 23.—By his will, dated in 1900, a testator, who died in 1901, directed the trustees to pay out of the residuary proceeds of his estate (1) so much of the estate duty and other death duties which under the Finance Act, 1894, or any amending statute, should become payable upon or by reason of his death in respect of all the estates and property of which he should immediately before his death be tenant for life under a certain will or resettlement as the capital moneys and investments subject thereto should be insufficient to pay; and (2) all such succession duty as should become payable upon his death in respect of the same estates and property.

Held, that, as to the duty in respect of the sale of certain timber, the provision of the will was applicable to duty payable in respect of a succession on the death of the testator, which duty was payable out of his residuary estate.

Held, also, that, as to certain heirlooms of national interest, the duty did not become payable upon the death of the testator, and would not until the happening of the event mentioned in section 20 of the Finance Act, 1896.—LECONFIELD, RE, WYNDHAM *v.* LECONFIELD, *C.A.*; 90 L. T. 399.

7. *Excise—Carriage—Motor bicycle—Necessity of excise licence for—"Carriage drawn or propelled upon road by any mechanical power"—Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 4.—A motor bicycle is, within the meaning of section 4 of the Customs and Inland Revenue Act, 1888, a "carriage" for which a licence is required, as being a carriage drawn or propelled upon a road by mechanical power.—O'DONOGHUE *v.* MOON, *K.B D.*; 90 L. T. 843.

7A. *Excise—Grogging spirit casks—Extracting spirit from wood of casks—Spirit exuding from the wood—Liability—Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 4, *sub-section* 1 (b).—By the Finance Act, 1898, s. 4, sub-section 1, it is provided that "a person shall not (*a*) subject any cask to any process for the purpose of extracting any spirits absorbed in the wood thereof; or (*b*) have on his premises any cask which is being subjected to any such process, or any spirits extracted from the wood of any cask."

Held, the words "process for the purpose of extracting" do not include a natural exudation, and that, therefore, the section does not include, as an offence, the innocent possession of spirits which have exuded without any active or permissive process to lead to such exudation.—ROBINSON *v.* DIXON, *K.B.D.*, 8; [1903] 2 K. B. 701; 72 L. J. K. B. 717; 78 L. T. 132.

8. *Income tax—Business of bank—Purchase by another bank—Succeeding to business—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D, cases* 1 *and* 2, *r.* 4.—The National Provincial Bank of England, whose head office was in London, acquired by purchase the premises and business of the County of Stafford Bank, which was carried on at Wolverhampton. After the purchase the business of the Stafford Bank was carried on as usual, but for the benefit and the expense of the purchasing bank until a certain date, when the premises were opened as the Wolverhampton branch of the purchasing bank, who had never previously carried on any business at Wolverhampton. The manager and the staff of the Stafford bank were taken over by the purchasing bank, but none of the books of the Stafford bank were taken over except that the ledgers were continued in use until the end of the current year. All new cheque-books and new pass-books were issued in the name of the purchasing bank. From the date of the purchase the profits, if any, of the Wolverhampton branch of the purchasing bank were merged in, and formed part of the general profits of the bank, without any distinction as to source or origin of profit, and there were no means of ascertaining whether there were any profits or the proportion of increase or decrease in the profits, if any, of the bank which had arisen from the business purchased. Assessments to income tax were made on the purchasing bank's returns for the three years following the date of the purchase, based on the average of the profits of the whole business for the three preceding years respectively, and an additional assessment was made upon them, based upon the assumed profits of the the Stafford bank during those three years, under section 100, Schedule D, cases 1 and 2, r. 4, of the Income Tax Act, 1842.

Held, that the purchasing bank had succeeded to the business of the Stafford bank, and that the additional assessment was rightly made.

Judgment of Ridley, J. ([1903] 2 K. B. 249, 51 W. R. Dig. 67), reversed.—BELL *v.* NATIONAL

PROVINCIAL BANK, *C.A.*, 406; [1904] 1 K. B. 149; 73 L. J. K. B. 142; 90 L. T. 2.

9. *Income tax — Company — Residence—"Person residing in the United Kingdom"—Company registered abroad—Head office and directing power in United Kingdom—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—A company registered abroad, but having its head office in London, where the meetings of the directors are held and where the directing and controlling power is exercised, is assessable to income tax on the whole of its profits as "a person residing in the United Kingdom" within the meaning of section 2, Schedule D, of the Income Tax Act, 1853.—GOERZ & Co. *v.* BELL, *K.B.D.*; [1904] 2 K. B. 136; 73 L. J. K. B. 448; 90 L. T. 675.

10. *Income tax—Deductions—Premium on policy of life insurance—Advance by insurance company of half premium—Premium partly paid with money borrowed from insurer at interest and charged on policy—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 54, *Schedules D and E.*—By the terms of a policy of life assurance it was provided that, if the assured should so desire, a part of the premium—viz., £33, should in each year be advanced by the insurance company, and that the money so advanced should, with interest thereon, be a first charge on the policy. The premium was expressed to be for £66 17*s.* 6d. The assured paid in respect of premium each year £33 17*s.* 6d., and obtained a receipt for £66 17*s.* 6d., the balance of £33 being advanced as provided for by the policy.

Held, that, under section 54 of the Income Tax Act, 1853, the assured was not entitled to deduct from his assessment to income tax the sum of £66 17*s.* 6d., as the amount of the annual premium paid by him for life insurance, but only £33 17*s.* 6d.

Decision of the Court of Appeal (Lord James of Hereford dissenting) (51 W. R. 490, [1903] 1 K. B. 514) affirmed.—HUNTER *v.* ATTORNEY-GENERAL, *H.L.*, 593; [1904] A. C. 161; 73 L. J. K. B. 381; 90 L. T. 325.

11. *Income tax—Master at school—Provident fund scheme—Additional allowance—Allowance to go to fund—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Schedule E.*—Under a provident fund scheme at D. College the following increases of salaries came into operation: (*a*) Assistant masters having not less than five, but less than fifteen years' service, an increase of 5 per cent.; (*b*) those having fifteen years and over, 7½ per cent.; (*c*) a further addition equal to those sums subject to certain conditions.

The whole of these increases were not to be paid to the masters, but were to be accumulated at compound interest to form the fund.

The conditions above referred to were that masters of less than ten years' service who resigned or ceased to belong to the college from any other cause than ill-health were to be entitled to increase (*a*) and the accumulations thereof, but not to increase (*c*); if the master retired from ill-health, the governors in addition to (*a*) might grant him (*c*); and in the event of death both (*a*) and (*c*) were to be paid to his legal representative. Masters of over ten years' service were to receive on retirement before the age of sixty the total sum due under (*a*) or (*b*) and (*c*) with accumulations, and in the case of death the same was to be paid to his legal representative. Masters removed for misconduct or, having been guilty of misconduct, allowed to resign were not entitled to (*c*).

Held, that these increases of salary were sums really added to the salary, and were assessable to income tax under section 146, Schedule E, of the Income Tax Act, 1842.—SMYTH *v.* STRETTON, *K.B.D.*; 90 L. T. 756.

12. *Inhabited house duty—Unoccupied furnished house—House Tax Act*, 1803 (43 *Geo.* 3, *c.* 161)—*House Tax Act*, 1808 (48 *Geo.* 3, *c.* 55)—*House Tax Act*, 1825 (6 *Geo.* 4, *c.* 7)—*House Tax Act*, 1851 (14 & 15 *Vict. c.* 36).—The tenant of a dwelling-house which is kept furnished, although during the year of assessment it has not been used for the purposes of residence and no one has slept or dwelt therein, is liable to inhabited house duty under the House Tax Act, 1851.—SMITH *v.* DAUNEY, *K.B.D.*; [1904] 2 K. B. 186; 73 L. J. K. B. 646; 90 L. T. 760.

13. *Land tax—Public underground lavatories provided and maintained by sanitary authority—Land Tax Act*, 1797 (38 *Geo.* 3, *c.* 5), *s.* 4—*Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 44, 45.—Public underground lavatories provided and maintained by a sanitary authority under the powers conferred upon them by the Public Health (London) Act, 1891, are not rateable in respect of land tax, as the sanitary authority does not acquire such rights of ownership in the lavatories as to render them liable to be charged, but only such an interest as is necessary to enable them to fulfil their public duties in respect of the lavatories.—WESTMINSTER CORPORATION *v.* JOHNSON, *K.B.D.*, 350; [1904] 1 K. B. 19; 73 L. J. K. B. 8; 89 L. T. 562.

14. *Legacy duty—Incidence.*—The assignment of a specified portion of a mortgage debt belonging to the residuary personal estate of a testator, and upon which estate legacy duty is payable, does not free such portion of its proportionate liability for legacy duty. In such a case the legacy duty is not an incumbrance covered by the assignor's covenant for further assurance.—REPINGTON, RE, WODEHOUSE *v.* SCOBELL, *Ch.D. Farwell, J.*, 522; [1904] 1 Ch. 811; 73 L. J. Ch. 533; 90 L. T. 663.

15. *Stamp*—Ad valorem *duty—Acknowledgment indorsed on instrument that all the debenture stock secured thereby had been redeemed, paid off, and satisfied—Whether such receipt is stampable as a discharge—Things which in themselves operate to end security—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 12, *Schedule I.*, voce *Mortgage, sub-head* 5.—The following acknowledgment was indorsed on an instrument presented to the Commissioners of Inland Revenue on behalf of the appellants for their opinion as to the stamp duty (if any) with which the instrument was chargeable: "We, the within-named Edward Firth, John Bradley Firth, and Samuel Roberts do hereby acknowledge all the debenture stock secured by the within-written indenture and all interest thereon has been redeemed, paid off, and satisfied." By Schedule I. of the Stamp Act, 1891, *voce* "Mortgage," sub-head 5, a reconveyance, release, discharge, or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money secured, is liable to *ad valorem* stamp duty. The commissioners held that the instrument was chargeable under the above schedule.

Held, allowing the appeal, that the word "discharge," as well as the other words, pointed to an instrument that put an end to a security, and did not include a receipt indorsed on a deed acknowledging that the capital sum and interest secured by the deed had been redeemed, paid off, and satisfied.—FIRTH *v.* INLAND REVENUE COMMISSIONERS, *K.B.D.*, 622; [1904] 2 K. B. 205; 73 L. J. K. B. 632.

16. *Stamp duty — Company — Consolidation of debenture stock—Issue of loan capital—Finance Act,* 1899 (62 & 63 *Vict. c.* 9), *s.* 8.—By a local and private Act passed in 1900, the debenture stocks which had been issued by the defendant company, bearing interest at 3 per cent., 4 per cent., and 4½ per cent., were extinguished, and there was created in lieu thereof a new debenture stock bearing interest at 3 per cent. Each stockholder received such an amount of the new stock as would yield him the same amount of interest as had been payable in respect of the stock previously held by him. The total amount of the debenture stocks existing before the Act was £411,852. The amount of the new debenture stock was £529,136.

Held, that the defendant company were liable to pay the stamp duty imposed by section 8 of the Finance Act, 1899, on any company who "propose to issue any loan capital."—ATTORNEY-GENERAL *v.* REGENT'S CANAL AND DOCK CO., *C.A.*, 211; [1904] 1 K. B. 263; 73 L. J. K. B. 50.

17. *Stamp duty—Company—English debenture—Colonial debenture—Substituted security—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *Schedule, "Marketable security"* (3) (4); *s.* 82.—A colonial company was formed for the purpose of taking over the assets and liabilities of an English company, and by agreement the holders of debentures in the English company delivered them up, and accepted in lieu thereof debentures of an equivalent amount in the colonial company.

Held, that these debentures in the colonial company were not "given in substitution for a like security" within the Stamp Act, 1891, Schedule, "Marketable security" (4). — MOUNT LYELL MINING CO. *v.* INLAND REVENUE COMMISSIONERS, *K.B.D.*; [1904] 1 K. B. 757; 73 L. J. K. B. 371; 90 L. T. 579.

18. *Stamp duty — Conveyance on sale — Person authorized by statute to purchase property—Purchase of realty and chattels—Finance Act,* 1895 (58 & 59 *Vict. c.* 16), *s.* 12.—By section 12 of the Finance Act, 1895, where "any property" is purchased under statutory authority, a duly stamped instrument of conveyance of the property must be produced to the Commissioners of Inland Revenue.

Held, that the *ad valorem* duty was payable on personal as well as real property purchased under the special statutory powers.

Decision of the Court of Appeal (50 W. R. 161, [1902] 1 K. B. 403) affirmed.—EASTBOURNE CORPORATION *v.* ATTORNEY-GENERAL, *H.L.*, 577; [1904] A. C. 155; 73 L. J. K. B. 259; 90 L. T. 99.

19. *Stamp duty—Conveyance on sale—Sale to company—Consideration—Annual payments out of profits —Amount varying with paid-up capital—Conveyance "subject contingently to the payment of money"— "Money payable periodically"—Double contingency.* —By a conveyance on sale a company sold its undertaking to another company. Part of the consideration for the sale consisted of annual sums payable by the purchasing company out of its annual profits. These annual sums were to be equal to 3 per cent. on the amount for the time being paid up on so much of the ordinary share capital of the purchasing company as should be for the time being issued, and were only payable after a dividend of 5 per cent. upon the same amount had been paid to the shareholders of the purchasing company.

Held, that the conveyance was not "subject contingently to the payment of money" within the meaning of section 57 of the Stamp Act, 1891; and that the amount of the consideration—being dependent upon a double contingency in that it varied, first, with the amount paid up on the capital issued, and, secondly, with the amount of profits earned—was too uncertain to make the conveyance chargeable with *ad valorem* duty. — UNDERGROUND ELECTRIC RAILWAYS CO. *v.* INLAND REVENUE COMMISSIONERS, *K.B D.*; [1904] 2 K. B. 198; 73 L. J. K. B. 549.

20. *Succession duty—Alienation of succession—Disentailing deed—Devise by alienee—Liability of devisee to duty on original succession—Succession Duty Act,* 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.—A tenant for life of settled real estate and the tenant in tail in remainder, having executed a disentailing deed, joined in conveying a parcel of land, part of the estate, in fee to a purchaser. The purchaser devised the parcel of land to his wife, who devised it to their daughter, who paid succession duty in respect thereof on her mother's death. Subsequently the tenant for life died.

Held, that succession duty was payable by the daughter on the death of the tenant for life also.

Judgment of Ridley, J. ([1903] 2 K. B. 71, 51 W. R. Dig. 71), affirmed.

In re Cooper and Allen to Harlech, 25 W. R. 301, 4 Ch. D. 802, overruled.—ATTORNEY-GENERAL *v.* NORTHUMBERLAND (DUKE), *C.A.* 518; [1904] 1 K. B. 762; 73 L. J. K. B. 418; 90 L. T. 630.

21. *Tax on "male servant"—Apprentice—Lad apprenticed to be trained as riding groom—Customs and Inland Revenue Act,* 1869 (32 & 33 *Vict. c.* 14), *s.* 19 (3).—By an indenture of apprenticeship the respondent agreed to teach B. to be a riding groom. The term of the contract was seven years. The respondent undertook to find B. in clothing, food and lodging, and to pay him certain wages, and B. undertook to obey all lawful orders given him by the respondent. B. was engaged for the greater portion of each day in the performance of duties which would, if he were merely engaged otherwise than under the said contract, render a licence necessary for him as a male servant. An information under section 19, sub-section 3, of the Customs and Inland Revenue Act, 1869, was preferred by the appellant against the respondent for employing B. as a male servant without taking out a licence. The magistrates dismissed the information, being of opinion that the contract was one of apprenticeship, and that B. was an apprentice and not a male servant within the Act.

Held, that the decision of the magistrates was right, and that the words of the Act were not sufficient to bring the case within it.—HORAN *v.* HAYHOE, *K.B.D.*, 231; [1904] 1 K. B. 288; 73 L. J. K. B. 133; 90 L. T. 12.

INSURANCE:—

1. *Fire—Lloyd's policy—"Subject to average"— No average clause attached—Other policies on zones— Applying policies rateably—9 Geo.* 4, *c.* 13, *s.* 3.—A timber yard, as a whole, was insured by a Lloyd's policy for £11,450 and in three zones by various fire insurance companies for £25,500. On zone B there was only one company's policy for £3,000. The value in the three zones was £36,500—viz., £1,940 in zone A, £13,260 in B, and £21,300 in C; and £12,850—viz., £1,900 in zone A, £9,400 in B, and £1,550 in C—was the value of the timber burnt.

The Lloyd's policy was expressed to be "subject to average," but had no average clause attached.

Held, that the system of marshalling the policies, so as to apply the Lloyd's policy and the company's policy for £3,000 rateably to the loss in zone B, and the then unexhausted portion of the Lloyd's

rateably with the other policies on zones C and A respectively, could not be introduced by the words "subject to average" in a Lloyd's policy. On this policy the plaintiffs, being insured on only a portion of the goods at risk, must be considered as being their own insurers for the difference, and must bear a rateable share of the loss accordingly.

The underwriters were liable for $\frac{11150}{21150}$ of £12,850.

Whether the average clause is attached to a Lloyd's policy or not, if the policy is expressed to be "subject to average," it is according to the usage of Lloyd's the same as if the clause were attached.—ACME WOOD FLOORING CO. *v.* MARTEN, *K.B.D.*; 90 L. T. 313.

2. *Life—Illegal contract—Want of insurable interest—Action to recover premiums paid—Life Assurance Act*, 1774 (14 *Geo.* 3, *c.* 48), *ss.* 1, 2.—The agent of an insurance company, acting in good faith and believing what he said to be true, induced the plaintiff to effect an insurance on his mother's life, and assured him that the insurance would be valid. The plaintiff in consequence of the agent's representation, effected such an insurance, and for some considerable time paid the premiums in respect of the policy. Subsequently, on hearing that the insurance was invalid, the plaintiff bought an action against the insurance company to recover back the premiums.

Held, assuming the illegality of the policy, that the parties were *in pari delicto*, and that the plaintiff could not recover back the premiums he had paid.

Decision of Divisional Court ([1903] 2 K. B. 92, 51 W. R. Dig. 73) reversed.—HARSE *v.* PEARL LIFE ASSURANCE CO., *C.A.*, 457; [1904] 1 K. B. 558; 73 L. J. K. B. 273; 90 L. T. 245.

3. *Life—Lapse of policy on failure of payment of premium—Subsequent payment—Conditional receipt by insurance company—Neglect of assured to read conditions of receipt—Duty of insurance company—Estoppel.*—A policy of life insurance effected with an insurance company was expressed to be conditional upon the payment of the premiums each year within thirty days of their becoming due. The holder of the policy failed to pay a certain premium within thirty days of its becoming due. On his afterwards sending the money to the company they sent back to him a receipt upon a printed form which stated that the policy had lapsed and that the payment was accepted subject to certain conditions printed on the back of the receipt. He received this receipt but did not read it.

One of these conditions was that the person whose life was insured had been during the past twelve months in continuous good health and free from all disease; and he was in fact, and to his knowledge, suffering at that time from a disease of which he afterwards died. Until he died the subsequent premiums were punctually paid. On his death the company refused to pay the sum for which his life had been insured on the ground that the policy had lapsed, and the conditions of the receipt above-mentioned had not been complied with. In an action to recover the amount of the insurance money,

Held, that, as the policy had lapsed on account of the breach of its conditions, and the plaintiff had given no evidence of any conduct on the part of the company which would justify him in thinking that the policy had not lapsed, and would estop them from relying on the lapsing of the policy, he was not entitled to succeed in the action.—HANDLER *v.* MUTUAL RESERVE FUND LIFE ASSOCIATION, *C.A.*; 90 L. T. 192.

4. *Life—Undertaking not to commit suicide—Insurance for benefit of creditor—Executor suing as trustee for creditor.*—An application for a policy was expressed to be "the basis and a part of a proposed" insurance contract, and the policy commenced by stating that "in consideration of the application . . . which is hereby made part of this contract," the company would insure the life subject to certain conditions. The application contained the following clause: "I also warrant and agree that I will not commit suicide whether sane or insane, during the period of one year from the date of the said contract," which was signed by the person proposing to have his life insured. During the period of one year the assured committed suicide during a fit of temporary insanity.

Held, that the breach of the undertaking not to commit suicide rendered the policy void. The undertaking was a limitation of the defendant's liability, and not a personal undertaking the breach of which might give the defendant a claim against the estate of the deceased person.—ELLINGER *v.* MUTUAL LIFE INSURANCE CO. OF NEW YORK, *K.B.D.*, 366; [1904] 1 K. B. 832; 73 L. J. K B. 546; 90 L. T. 484.

5. *Marine—Constructive total loss only—Sue and labour clause—Claim by underwriters for work and labour done, or as salvors—Common law—Maritime law.*—A vessel was insured against total and/or constructive total loss only, and the policy contained the sue and labour clause. During the continuance of the policy the vessel was stranded and the crew left her. Before the insurers' representatives arrived to take charge of the vessel considerable damage was done by looting. The insurers, through a contractor on the no cure no pay system, raised the vessel and brought her into port. The insurers claimed for an award as salvors or for an amount for work and labour done.

Held, that there was no constructive total loss, and that the underwriters were not entitled to an award as salvors, and that there was no common law right to recover.

The Pickwick, 16 Jurist 669, distinguished.—CRONIN *v.* STANIER, *K.B.D.*, 75; [1904] 1 K. B. 87; 73 L. J. K. B. 102.

6. *Marine—Deck cargo—River and canal—Rhine steamers—Dutch code—Liability of underwriters.*—The rule which exempts underwriters from liability for loss of deck cargo does not apply to an inland voyage by canal or river plainly contemplated by a policy, on which voyage it is and has been the practice and usage to carry cargoes on deck.—APOLLINARIS CO. *v.* NORDDEUTSCHE INSURANCE CO., *K.B D.*, 174; [1904] 1 K. B. 252; 73 L. J. K. B. 62; 89 L. T. 670.

7. *Marine—Discovery—Discovery of ship's papers—Action by underwriters to recover money paid on fraudulent claim.*—In an action brought by underwriters claiming repayment of sums obtained from them by the defendants by false and fraudulent claims under policies of marine insurance, and alleging a conspiracy to defraud,

Held, that the underwriters were entitled to the same full discovery as if they had been defendants being sued on the policies.—BOULTON *v.* HOULDER BROTHERS, *C.A.*, 388; [1904] 1 K. B. 784; 73 L. J. K. B. 493; 90 L. T. 621.

8. *Marine—Policy on machinery of torpedo-boat destroyer—"Trials."*—A policy of marine insurance upon the machinery of a torpedo-boat destroyer, which was being built for the Admiralty, was expressed to cover the following perils: "Fire in

shops and on board on stocks trials and all marine risks to completion and acceptance by the Admiralty," and also "of the seas men-of-war fire . . . and of all other perils losses and misfortunes." Attached to the policy was a clause which contained the following words: "With leave to go on trial trips." During a trial the connecting-rod of the starboard engine broke, causing great damage.

Held, that "trials" did not denote a period during which the assured were to be insured against fire, but specified a particular peril insured against —viz., perils of trials; and that the damage which had occurred was covered by the policy.

Judgment of Kennedy, J. (51 W. R. 91), affirmed. —JACKSON *v.* MUMFORD, *C.A.*, 342.

9. *Marine—Property of alien enemy—Loss before commencement of war—Warranty free of seizure.*—Gold, the property of a company registered under the laws of the South African Republic, was insured against "arrests, restraints, and detainments of all kings, princes, and people" during transit from the mines to the United Kingdom subject to a warranty "free of capture, seizure, and detention, whether before or after declaration of war." During transit the gold was taken by the Republic on its own territory in anticipation of war with England and in accordance with the laws of the Republic.

Held, that there was a "seizure" of the gold within the meaning of the warranty, and that the insurers were not liable on the policy.—ROBINSON GOLD MINING CO. *v.* ALLIANCE INSURANCE CO., *H.L.*; [1904] A. C. 359.

10. *Marine—Risk, duration of—"Thirty days in port after arrival"—Days, computation of.*—A policy of insurance on ship was expressed to be "from Portland, O., by any route to Algoa Bay and for thirty days in port after arrival." The policy further described the risk as continuing until the ship "hath there moored at anchor in good safety." The ship arrived at Algoa Bay on the 2nd of August, and was moored in good safety at 11.30 a.m. on that day. She remained at Algoa Bay until she was lost by a peril insured against at 4.30 p.m. on the 1st of September.

Held, that the thirty days meant thirty consecutive periods of twenty-four hours each beginning at 11.30 a.m. on the 2nd of August, and that therefore the ship was lost after the insurance had ceased.

Judgment of Bigham, J. (51 W. R. 527, [1903] 2 K. B. 363), affirmed.—CORNFOOT *v.* ROYAL EXCHANGE ASSURANCE CORPORATION, *C.A.*, 49; [1904] 1 K. B. 40; 73 L. J. K. B. 22; 89 L. T. 490.

11. *Marine—Subject-matter of insurance—Shipowner's liability to cargo-owner—Suing and labouring clause—Applicability.*—A shipowner agreed to convey to South Africa a number of mules, valued at £40,000. There was no clause in the contract exempting him from liability for loss occasioned by the negligence of his servants. He accordingly effected an insurance with an underwriter at Lloyd's to protect himself against "liability of any kind" to the owners of the mules up to £20,000. The policy was in the printed form of an ordinary Lloyd's policy, and contained the usual suing and labouring clause. During the voyage the vessel stranded through the negligence of the shipowner's servants, and expenses were incurred by the shipowner in salving the mules. The shipowner therefore sought to recover the expenses thus incurred under the suing and labouring clause.

Held, that the suing and labouring clause was inapplicable, and was never intended to apply.

Judgment of Walton, J. (reported [1902] 2 K. B. 624), affirmed.—CUNARD STEAMSHIP CO. *v.* MARTEN, *C.A.*, 39; [1903] 2 K. B. 511; 72 L. J. K. B. 754; 89 L. T. 152.

12. *Marine—Time policy—General average—Contract of affreightment—Foreign statement—Belgian law.*—A shipowner effected with underwriters a time policy of insurance on his ship containing the following clause: "General average payable according to foreign statement if so made up or York-Antwerp rules if in accordance with contract of affreightment." The shipowner sub-chartered the ship to third parties, and by the terms of that charter-party it was provided that the ship might carry a deck-load of timber, and that "in case of average the same to be settled according to York-Antwerp Rules, 1890, except that jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as general average." The ship sailed for Antwerp, and in the course of the voyage it became necessary for the steamer's safety to jettison part of the deck cargo. The average statement was made up at Antwerp, and included jettisoned deck cargo and freight thereon. The shipowner paid the ship's contribution to general average. In an action by the shipowner to recover from the underwriters the amount of his contribution,

Held, applying the principle laid down in *Harris* v. *Scaramanga*, 20 W. R. 777, that the parties having agreed that general average should be payable according to the foreign statement if so made up, and the terms of the contract of affreightment not being of a special and unusual character, which could not have been contemplated by the parties to the policy of insurance, the underwriters were liable to pay the shipowner the amount of his contribution, notwithstanding that, apart from the express agreement in the contract of affreightment, the Belgian law would not recognize jettisoned deck cargo and freight thereon as being the subject of a claim for general average.

Decision of Kennedy, J. (51 W. R. 318, [1901] 1 K. B. 109), affirmed.—DE HART *v.* COMPANIA ANONIMA DE SEGUROS AURORA, *C.A.*, 36; [1903] 2 K. B. 503; 72 L. J. K. B. 818; 89 L. T. 154.

13. *Marine—Voyage policy—Round voyage—Implied warranty of seaworthiness—Insufficiency of coal—Sacrifice of cargo and spars—Negligence clause—Breach of warranty covered by insurance.*—There are only two kinds of insurance policies, "time policies" and "voyage policies," and a voyage policy does not lose its character because the voyage is of an intermediate nature instead of being between specified ports.

A steamship was insured for a round voyage from the United Kingdom to port or ports on the West Coast of South America and back again, with leave to call at any ports or places on the East Coast of South America. The perils insured against were of the sea, and the clauses annexed provided (*inter alia*) that the insurance should cover loss through the negligence of master, mariners, engineers, or pilots. The vessel started on one of the stages of the voyage with an insufficient supply of coal to carry her to the next coaling place, in consequence of which it became necessary to sacrifice part of the cargo, spars, and fittings.

Held, that the starting of the vessel on a stage of the voyage with an insufficient quantity of coal was a breach of the implied warranty of seaworthiness on the part of the shipowner.

The principle of *The Vortigern*, 47 W. R. 437, [1899] P. 140, applied.

Decision of Bigham, J. (51 W. R. 447, [1903] 1 K. B. 367), affirmed.—GREENOCK STEAMSHIP CO. *v.* MARITIME INSURANCE CO., *C.A.*, 186; [1903] 2 K. B. 657; 72 L. J. K. B. 868; 89 L. T. 200.

See also Company, 15.

INTERPLEADER:—

Practice—Appeal—Summary decision at chambers—Ord. 57, *rr.* 9, 11—*Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 1 (b); *s.* 5; *Schedule.*—Where upon an interpleader summons the judge decides the question under ord. 57, r. 9, without directing an issue or ordering a special case to be stated, there is no appeal from his decision, even with leave, the Judicature Act, 1894, not having modified or in any way altered section 17 of the Common Law Procedure Act, 1860.—VAN LAUN *v.* BARING, *C.A.*, 59; [1903] 2 K. B. 277; 72 L. J. K. B. 756; 89 L. T. 120.

JUSTICES:—

1. *Habitual drunkard—Proof of previous conviction—Register of convictions in court of summary jurisdiction—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 22—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 14—*Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112), *s.* 18—*Jurisdiction—Consent of accused to being dealt with summarily—Inebriates Act*, 1898 (61 & 62 *Vict. c.* 60), *s.* 2, *sub-section* 1—*Licensing Act*, 1902 (2 *Ed.* 7, *c.* 28), *s.* 6 (1).—The respondent was convicted at Bow-street police-court of one of the offences mentioned in the first schedule to the Inebriates Act, 1898, and the appellant requested the magistrate to make an order under section 6 (1) of the Licensing Act, 1902. The appellant tendered in evidence the register which was kept at the police-court, and called the gaoler for the purpose of proving that the respondent had been convicted of offences mentioned in the first schedule to the Inebriates Act, 1902, on three occasions within the preceding twelve months at that court.

Held, that the register of the minutes or memorandum of convictions of a court of summary jurisdiction, kept under section 22 of Summary Jurisdiction Act, 1879, by the clerk of the court, was sufficient evidence to enable the magistrate to to be satisfied of the three previous convictions mentioned in the register.

Held, further, that the consent of the respondent to be tried summarily under section 2 of the Inebriates Act, 1898, was necessary before the magistrate could make an order under section 6 (1) of the Licensing Act, 1902.—POLICE COMMISSIONER *v.* DONOVAN, *K.B.D.*, 14; [1903] 1 K. B. 895; 72 L. J. K. B. 545; 88 L. T. 555.

2. *Jurisdiction—Power of adjournment—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 16.—Where, on the hearing of a criminal information, the justices are equally divided in opinion they have power to adjourn the case for rehearing, and are not bound to dismiss the information.—BAGG *v.* COLQUHOUN, *K.B.D.*, 494; [1904] 1 K. B. 554; 73 L. J. K. B. 272; 90 L. T. 386.

3. *Married woman—Order for maintenance—Act of adultery—Discharge of order—Committal for non-payment of arrears—Appeal to Divisional Court—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 7, 9, 11.—An order for a weekly payment by a husband towards his wife's maintenance, under the Summary Jurisdiction (Married Women) Act, 1895, is *ipso facto* discharged upon proof before a court of summary jurisdiction that the wife has subsequently committed adultery even if the husband has been guilty of conduct conducing to the adultery, and even if no formal order of discharge be made by the court.

The order of the court of summary jurisdiction committing a husband to prison for non-payment of arrears alleged to be due to the wife is not an order in respect of which an appeal lies to the Probate Court, but an appeal lies by way of case stated to the King's Bench Division.—RUTHER *v.* RUTHER, *K.B.D.*, 154; [1903] 2 K. B. 270; 72 L. J. K. B. 826.

4. *Nuisance on premises—Complaint heard before three justices at petty sessions—Order signed by one justice only—Objection against order—Validity—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 14—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 96, 251.—An order was made by three justices at petty sessions under section 96 of the Public Health Act, 1875, requiring the appellant to abate a nuisance on his premises. The order as drawn up and served on the appellant was signed by one justice only.

Held (allowing the appeal), that the order as drawn up and served on the appellant ought to have been signed by two justices, as that was the form of the order indicated by section 96 of the Act of 1875, and having been signed by one justice only was bad.—WING *v.* EPSOM URBAN COUNCIL, *K.B.D.*, 461; [1904] 1 K. B. 798; 73 L. J. K. B. 389; 90 L. T. 543.

5. *Petty sessions—County business—Borough business—County justices—Jurisdiction—Precedence of mayor.*—The county justices for the petty sessional division of Highgate sat at Hornsey in petty sessions. The business of the court included an information against H. for an offence committed within the borough on a summons against H. signed by a county justice. The mayor of Hornsey claimed the right to take the chair.

Held, when a case has once been earmarked as county business or borough business by the issue of a proper summons to appear before the county or the borough tribunal, the county justices or the borough justices, as the case may be, have seisin of it, and the other body of justices, although having concurrent jurisdiction, cannot intercept the case. The business in this case was not borough business for the purpose of founding a claim for the mayor to take the chair. It was, in fact, *ab initio* and remained throughout, county business.—LAWSON *v.* REYNOLDS, *Ch.D. Farwell, J.*, 375; [1904] 1 Ch. 718; 73 L. J. Ch. 451; 90 L. T. 278.

6. *Special petty sessions—Revision of jury list—Power to state a case—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 47), *s.* 33—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 13, *sub-section* 11.—Justices sitting in special petty sessions for the purpose of revising jury lists are not a court of summary jurisdiction, and have, therefore, no power to state a special case for the opinion of the court under section 33 of the Summary Jurisdiction Act, 1879.—HOGMAIER *v.* WILLESDEN OVERSEERS, *K.B.D.*, 654; [1904] 2 K. B. 316; 73 L. J. K. B. 638; 90 L. T. 683.

See also Licensing Law, 2-4; Public Authority, 2.

LAND TRANSFER ACTS.—See Administration, 6; Probate, 9; Vendor and Purchaser, 8.

LANDLORD AND TENANT:—

1. *Affirmative and negative covenants—Covenant not to assign or sublet without lessor's consent—Proviso for re-entry on breach of any covenant on the lessee's*

part to be performed.—A lease of a house contained covenants by the lessee to pay rates, taxes, and repairs, and not to assign or underlet the premises without first obtaining the lessor's consent in writing, and it contained a proviso for re-entry that "if the lessee shall commit any breach of the covenants hereinbefore contained, and on his part to be performed, then the said lessor may re-enter upon the premises." The lessee underlet the premises without obtaining the lessor's consent.

Held, that the proviso for re-entry applied to breaches of negative as well as affirmative covenants, and that as there had been a breach of the covenant not to assign or underlet without the landlord's consent, a forfeiture had occurred, and the landlord was entitled to recover the possession of the house.

Decision of Wright, J. ([1903] 2 K. B. 241), reversed.—HARMAN *v.* AINSLIE, *C.A.*, 615; [1904] 1 K. B. 698; 73 L. J. K. B. 539; 90 L. T. 624.

2. *Covenant—Assignment of reversion—Liability of assignor on express covenants in lease*—32 *Hen.* 8, *c.* 34, *ss.* 1, 2.—A lessor who has assigned his reversion remains liable upon his express covenants, running with the reversion, in a lease for years under seal.—STUART *v.* JOY, *C.A.*; [1904] 1 K. B. 362; 73 L. J. K. B. 97; 90 L. T. 78.

3. *Covenant — Restrictive covenant — Trade — Covenant not to let adjoining property for purposes of a particular trade—Meaning of term "artistic and heraldic stationer"—"Picture post-cards."*—In 1901 the defendant T. demised to the plaintiff for twenty-one years premises in an arcade by an agreement containing a stipulation on the part of the plaintiff "not to carry on upon the premises any other trade or business than that of a dealer in pictures, prints, engravings, photographs, and articles of vertu, artistic and heraldic stationer, frame-maker, and dealer in photographic frames, artists' colours, and the accessories to said trade or business," and a stipulation on the part of the lessor (the defendant T.) "not to let any other portion of the said arcade for the trade or business hereinbefore mentioned to be carried on by" the plaintiff. In 1902 the defendant T. demised to the defendant G. for one year other premises in the arcade, adjoining the premises demised to the plaintiff, and this agreement contained a stipulation on the part of G. not to carry on, upon the premises demised to him, any other business than that of a "librarian, newsagent, bookseller, or stationer." The defendant G., in the course of the business carried on by him in the arcade, sold and dealt in (*inter alia*) picture post-cards, Christmas and New Year cards.

The plaintiff claimed an injunction and damages both against T. for letting and permitting the use of, and against G. for using, premises in the arcade for the purpose of carrying on a business similar to that carried on by the plaintiff.

Held, that, having regard to the terms of the plaintiff's agreement, the business contemplated to be carried on by him was of an aggregate description, and included as a substantial portion thereof that of "artistic and heraldic stationer"; that the subsequent letting of other premises in the arcade to the defendant G. for the purpose of carrying on (*inter alia*) the business of a "stationer" generally, without any limitation, was a breach on the part of the lessor T. of his stipulation in the agreement with the plaintiff "not to let" any other part of the arcade for the purpose of the trade or business carried on by the plaintiff, and that the defendant T. was liable in damages to the plaintiff in respect of such breach.

Held, further, that the plaintiff's claim against G. failed altogether, inasmuch as the express terms of the restrictive covenant only extended to "not letting," and did not restrict "the using of" the premises for the purpose above mentioned.

Kemp v. *Bird*, 25 W. R. 838, 5 Ch. D. 549, discussed.—BRIGG *v.* THORNTON, *C.A.*, 276; [1904] 1 Ch. 386; 73 L. J. Ch. 301; 90 L. T. 327.

4. *Covenant by lessee—Not to do or suffer to be done any act whereby licence may be lost—Offence against Licensing Acts by sub-lessee of assignee—Action against assignee.*—A lease of a licensed public-house contained a covenant by the lessee on behalf of himself, his heirs, executors, administrators, and assigns, that he or they would not do or suffer to be done on the premises any act whereby the licence might be forfeited or the renewal withheld. The lessee assigned the lease, and the assignee sublet the premises. The sub-lessee was convicted of an offence against the Licensing Acts, and in consequence thereof the licence was not renewed. In an action by the lessor against the assignee for breach of the covenant,

Held, that the assignee could not be said to have "suffered" an act done by his sub-lessee.—WILSON *v.* TWAMLEY, *C.A.*, 529; [1904] 2 K. B. 99; 73 L. J. K. B. 703; 90 L. T. 751.

5. *Covenant to pay all assessments "which now are or during the term shall be imposed or assessed"—Paving expenses under Public Health Act,* 1875—*—Works completed before lease—Apportionment after lease—Liability of lessee.*—A covenant by a lessee that he will pay "all rates, taxes, and assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof by authority of Parliament or otherwise" does not apply to paving expenses which have become a charge upon the premises under the Public Health Act, 1875, upon the completion of the works before the date of the lease, although such expenses do not become payable until after that date.

Surtees v. *Woodhouse*, [1903], 1 K. B. 396, followed.—LUMBY v. FAUPEL, *C.A.*; 90 L. T. 140.

6. *Covenant to pay "all taxes, rates, assessments, and outgoings"—Tenancy for three years—Requirement by local authority to relay drainage.*—By an agreement in writing the plaintiff let to the defendant a house at a yearly rent of £55, and the defendant agreed to "pay all taxes, rates, assessments, and outgoings of every description," landlord's property tax only excepted, and to "keep and leave the premises (including the fixtures) in as good condition as they are now in (reasonable wear and tear excepted) . . . and keep in repair all sash-lines and internal pipes and taps." During the term the local authority served notice on the plaintiff, under the Public Health Act, 1875, requiring him to abate a nuisance that existed on the premises, and for that purpose to relay the existing drain. The plaintiff executed the work at a cost of £83 10s., and sued to recover this amount from the defendant under his contract.

Held, that the defendant was liable to repay this sum to the plaintiff.

Judgment of Wright, J. (*ante*, p. 13, [1903] 1 K. B. 873), affirmed.—STOCKDALE *v.* ASCHERBERG, *C.A.*, 289; [1904] 1 K. B. 447; 73 L. J. K. B. 206; 90 L. T. 111.

7. *Estoppel* in pais—*Mortgage by sub-demise before Conveyancing Act*, 1881 (44 & 45 *Vict.* c. 41)—*Lease by mortgagor—Foreclosure—Underlease—License—Representation.*—A lessee granted a mortgage by

way of sub-demise for the residue of the term comprised in his lease except the last three days thereof before the Conveyancing Act, 1881. He subsequently granted a sub-lease of the mortgaged premises to G., without the consent of the mortgagee; and this sub-lease contained a provision for re-entry in case the sub-lessee became bankrupt. The mortgagee foreclosed, and after the foreclosure received the rent from G. G. granted another underlease with the license of the mortgagee. In the license it was stated that the reversion expectant on the determination of G.'s term was vested in the mortgagee. The mortgagee subsequently assigned his interest to the plaintiff. G. having become bankrupt, the plaintiff claimed a right to determine the sub-lease granted to G.

Held, that G. and his underlessee having altered their positions on the faith of representations made by the mortgagee that G.'s lease was subsisting, the plaintiff, who stood in the shoes of the mortgagee, was estopped from disputing its validity.

Decision of Joyce, J., affirmed. — KEITH *v.* GANCIA, *C.A.*, 532; [1904] 1 Ch. 774; 73 L. J. Ch. 411; 90 L. T. 395.

8. *Forfeiture—Relief—Underlessee—Non-payment of rent—Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 14—*Conveyancing and Law of Property Act,* 1892 (55 & 56 *Vict. c.* 13), *s.* 4. —The court has power, under section 4 of the Conveyancing and Law of Property Act, 1892, to grant to an underlessee relief against forfeiture of the superior lease incurred by reason of non-payment of rent.—GRAY *v.* BONSAL, *C.A.*, 387; [1904] 1 K. B. 601; 73 L. J. K. B. 515; 90 L. T. 404.

9. *Notice to quit—Tenancy at yearly rent—Three months' notice—Expiration of notice.*—By an agreement of tenancy premises were let "at an inclusive rental of £25 per annum from the 1st of October; the tenant to pay rates and taxes in addition; three months' notice on either side to terminate this agreement,"

Held, that this agreement created a yearly tenancy determinable by three months' notice expiring with a year of the tenancy and not at any other time.—DIXON *v.* BRADFORD AND DISTRICT RAILWAY SERVANTS' COAL SUPPLY SOCIETY, *K.B.D.*; [1904] 1 K. B. 444; 73 L. J. K. B. 136; 90 L. T. 122.

10. *Outgoings—Lease for three years—Covenant to repair and pay outgoings—Holding over by tenant—Defective drainage—Cost of reconstruction of—"Intimation" notice—Liability of tenant for expenses—Public Health (London) Act,* 1891 (54 & 57 *Vict. c.* 76), *ss.* 3, 4.—A tenant having a three years' lease of a house at £70 a year covenanted to pay all outgoings whatsoever in respect of the premises and keep the inside in repair.

At the termination of the lease the tenant held over.

An expense of £70 1s. 6d. having been incurred by the landlord in abating a nuisance that had arisen during such holding over,

Held, that the tenant was not liable for such sum, as such liability could not have been within the contemplation of the parties, as a covenant to pay such outgoings could not be applicable to a yearly tenancy.

A notice served upon the owner of premises under section 3 of the Public Health (London) Act, 1891, does not create a legal liability to abate a nuisance, and should a person upon whom it is served incur expense thereby, he does so voluntarily and not under compulsion of law.—HARRIS *v.* HICKMAN, *K.B.D.*; [1904] 1 K. B. 13; 73 L. J. K. B. 31; 89 L. T. 722.

11. *Paving expenses—Covenant by tenant to pay all charges—Notice to tenant to pay—Payment by tenant—Deduction of amount paid from rent—Landlord's right to distrain for amount deducted—Metropolis Management (Amendment) Act,* 1862 (25 & 26 *Vict. c.* 102), *s.* 96.—The lease of a house contained a covenant on the part of the tenant to pay the rent free of all deductions except landlord's property tax, and to pay all rates, taxes, and assessments whatsoever, and all charges imposed by any local authority upon the frontagers in respect of the taking over and the making and repair of the roads abutting on the premises. The local authority, having incurred expenses in paving the road and having apportioned the expenses among the frontagers, gave the tenant notice, under section 96 of the Metropolis Management (Amendment) Act, 1862, not to pay his rent without first deducting the amount of the paving expenses due to the local authority from the landlord as owner of the house. The amount of the expenses so claimed from the tenant exceeded the whole sum which he owed to his landlord as rent, and the tenant paid to the local authority the whole rent then due, in accordance with the notice. The landlord then demanded the rent from the tenant, which the tenant refused to pay, and thereupon the landlord distrained upon the tenant for the rent, the whole amount of which the tenant had paid to the local authority.

Held, that the tenant was not entitled to make the deduction, and that the rent remained due, and the landlord could distrain for it.—SKINNER *v.* HUNT, *C.A.*; [1904] 2 K. B. 452; 73 L. J. K. B. 680.

12. *Renewal of lease—"At the costs of the lessee"—Costs of arbitration to assess fine payable on renewal.* —A lease contained a covenant by the lessor that he would at any time during the term "upon the request and at the costs of the lessee," and on payment of a fine calculated upon the number of years of the term which had expired and the full improved annual value of the premises at the time of the renewal (such value to be determined by the lessor's surveyor or at the option of the lessee by the award of two referees or their umpire), renew the term. The lessee required the lessor to renew the term, and gave notice of his desire to have the full improved annual value of the premises determined by the award of two referees or their umpire.

Held, that the costs of the reference and award must be paid by the lessee.

Decision of the Court of Appeal (51 W. R. 257; [1903] 1 K. B. 349) affirmed. — FITZSIMON *v.* MOSTYN, *H.L.*, 337; [1904] A. C. 46; 73 L. J. K. B. 72; 89 L. T. 616

13. *Tenancy—Grant of lease during tenancy—Notice to quit by original landlord—Validity.*—A landlord who, during the currency of a yearly tenancy, grants a lease of the premises to a third person, cannot, during the term granted by such lease, give the yearly tenant notice to quit.—WORDSLEY BREWERY CO. *v.* HALFORD, *K.B.D.*, 90 L. T. 89.

14 *Underlease—Forfeiture of lease—Relief to underlessee—Terms—Conveyancing and Law of Property Act,* 1892 (55 & 56 *Vict. c.* 13), *s.* 4.—By a lease dated the 22nd of June, 1896, the plaintiff company demised unto S. T. and C. T. the ground floor and basements of No. 21, R.-approach, for a term of twenty-one years at a rent of £300 for the first three years, and thereafter at a rent of £350.

By an underlease dated the 31st of December, 1896, S. T. and C. T. demised unto T. J. C. a part of the ground floor of No. 21, R.-approach, for the

same term of twenty-one years, except the three last days thereof, at a rent of £125.

Forfeiture of the lease of the 22nd of June, 1896, having occurred by reason of the non-payment of rent, on the 9th of September, 1902, the plaintiff company instituted an action to recover possession of the premises demised by them to S. T. and C. T., and for £226, being arrears of rent up to the 24th of June, 1902, and for further proportionate rent from the 24th of June, 1902, until payment.

The action was brought against all persons then interested in the premises, and on the 7th of January and the 15th of January, 1903, judgment was recovered against all the defendants, except T. S. C.

T. S. C., by his defence and counterclaim, delivered the 13th of January, 1903, denied that under the lease of the 22nd of June, 1896, any cause of forfeiture had arisen, and claimed an order under section 4 of the Conveyancing and Law of Property Act, 1892, vesting in him the premises comprised in the underlease of the 31st of December, 1896, for the whole of the term thereby created.

It was admitted by T. S. C. at the trial that cause of forfeiture had in fact arisen under the lease of the 22nd of June, 1896.

The court granted the order as claimed by T. S. C., but upon the terms that he should pay all arrears of rent due from S. T. and C. T. to the plaintiff company down to the 15th of January, 1903, and the costs of the present proceedings, and that as from the 15th of January, 1903, he should pay a fair rent to be ascertained.—LONDON BRIDGE BUILDINGS CO. *v.* THOMSON, *Ch.D. Joyce, J.*; 89 L. T. 50.

15. *Tithe—Agreement to pay additional sum by way of tithe—Legality of agreement—Tithe Act,* 1891 (54 *&* 55 *Vict. c.* 8), *s.* 1 (1).—An agreement whereby a tenant agrees to pay by way of further rent "so much as the landlord shall pay for tithe rent-charge" comes within the prohibition enacted by section 1 (1) of the Tithe Rent-charge Act, 1891, and is therefore void.—LUDLOW *v.* PIKE, *K.B.D.*, 475; [1904] 1 K. B. 531; 73 L. J. K. B. 274; 90 L. T. 458.

LANDS CLAUSES ACTS:—

1. *Compensation—Assignment of—Right of assignee to sue in own name—Damages for tort—Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25.—The defendants constructed under statutory powers a tunnel for the purposes of their railway. The construction of the tunnel caused a subsidence of the soil, whereby certain houses, not taken by the defendants, suffered structural damage; and the owners of the houses thereupon became entitled to compensation for injurious affection under section 68 of the Lands Clauses Act, 1845. After the damage had occurred the owners of the houses assigned their interests in them, together with their rights to compensation, to the plaintiff. At an inquiry held for the purpose a jury assessed the amount of compensation payable in respect of the damage done to the houses. The action was brought by the plaintiff as assignee in her own name upon the verdict and judgment obtained at the said inquiry.

Held, that compensation for injurious affection under section 68 is in the nature of damages for a tort; that a right to sue for damages in tort is not a legal *chose in action* within the meaning of section 25 of the Judicature Act, 1873; and that consequently the plaintiff was not entitled to sue as assignee in her own name.—DAWSON *v.* GREAT NORTHERN AND CITY RAILWAY CO., *K.B.D.*; [1904] 1 K. B. 277; 73 L. J. K. B. 174; 90 L. T. 20.

2. *Compensation—Interest in land—Right to sell refreshments at theatre—Right to affix advertisements—Lands Clauses Act,* 1845 (8 *&* 9 *Vict. c.* 18), *s.* 68.—The lessee of a theatre, by an agreement in writing, granted to the plaintiffs for a term the free and exclusive right to sell refreshments at the theatre, with the necessary use of the refreshment-rooms and bars and cloak-rooms and wine cellars, together with the free right of access to all parts of the house as might be necessary, and also the free and exclusive right during the term of supplying to the visitors and other people attending the theatre wines, spirits, cigars, and refreshments of all kinds, programmes and all other articles, and of providing cloak-rooms and other accommodation, and also the sole and exclusive privilege of advertising and letting spaces for advertisements in the refreshment and cloak-rooms and on programmes. The defendant county council having taken the theatre under their statutory powers,

Held, that the plaintiffs had not acquired an interest in land within the meaning of section 68 of the Lands Clauses Act, 1845, and were therefore not entitled to compensation under that section.—WARR & CO. *v.* LONDON COUNTY COUNCIL, *C.A.*, 405; [1904] 1 K. B. 713; 73 L. J. K. B. 362; 90 L. T. 368.

3. *Compensation—Notice to treat—Colliery owner to leave coal unworked—Subsequent rise in price of coal—Basis of assessment—Waterworks Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 17), *ss.* 6, 22, *and* 25.—Where a notice to treat has been given under the Lands Clauses Act, 1845, for the assessment of compensation payable in respect of certain seams of coal which a waterworks company requires the coal owner to leave unworked, the arbitrator is entitled to take into consideration, in assessing compensation, a rise in the value of coal which has taken place subsequently to the notice to treat.

Decision of the Court of Appeal (50 W. R. 627, [1902] 2 K. B. 135), reversed.—BWLLFA AND MERTHYR DARE STEAM COLLIERIES *v.* PONTYPRIDD WATERWORKS CO., *H.L.*, 193; [1903] A. C. 426; 72 L. J. K. B. 805; 89 L. T. 280.

4. *Compensation—Sealed offer—Allegation that premises to be acquired were unsanitary—Jury discharged after giving verdict as to unsanitary condition of premises, but before they found as to value of the premises—Right of claimant after verdict to accept "sum previously offered"—Lands Clauses Act,* 1845 (8 & 9 *Vict. c.* 18), *ss.* 38, 51—*London County Council (Improvement) Act,* 1899 (62 & 63 *Vict. c. cclxvi.*), *s.* 20.—A "sealed offer" for the purchase price of land to be acquired, made under section 38 of the Lands Clauses Act, 1845, is a continuing offer, which may be accepted at any time before the verdict of the jury assessing the amount of compensation has been given.—REX *v.* WESTMINSTER HIGH BAILIFF, *K.B.D.*, 10; [1903] 2 K. B. 189; 72 L. J. K. B. 600; 88 L. T. 834.

5. *Payment out of court—Railway company—Entry on land before determination of purchase-money—Deposit of estimated value—Bond—Payment out of deposit to company—Evidence—Delivery up of bond—Lands Clauses Consolidation Act,* 1845 (8 *&* 9 *Vict. c.* 18), *ss.* 85, 86, 87, 124.—When under section 85 of the Lands Clauses Consolidation Act, 1845, a railway company have entered into possession of land which they are authorized to take, giving a bond to the person who claims to be entitled to the land and depositing money in court as provided by that section, the company, having satisfied the conditions of the bond and showing that it has been delivered up to them, are entitled,

upon a petition by themselves and the obligee of the bond, to have the money deposited repaid to them, without proving that the purchase-money of the land has been paid to the persons really entitled to it.

The rights of any person, other than the obligee of the bond, having an interest in the land are protected by section 124 of the Lands Clauses Consolidation Act.

Decision of Kekewich, J., reversed.—MIDLAND RAILWAY CO., EX PARTE, *C.A.*; [1904] 1 Ch. 61; 73 L. J. Ch. 64; 89 L. T. 545.

LEGITIMACY:—

Perpetuating testimony—Paternity of child born in wedlock—Husband and wife, Statements by as to paternity—Access or non-access before marriage—Evidence—Admissibility.—Less than six months after the late Earl Poulett's first marriage a son was born, a full-grown child. In a suit to perpetuate testimony, Earl Poulett deposed that he had never had sexual intercourse with his wife before the marriage; that soon after the marriage she confessed to him that she was at the time of the marriage enceinte by another man, the father of the child; that he then separated from his wife for ever and never acknowledged the child as his. Upon a question of the legitimacy of the child in a claim to the peerage,

Held, that the deposition of Earl Poulett was admissible as evidence that the child was a bastard.

Anon. v. *Anon.*, (1856) 22 Beav. 481, 23 Beav. 273, overruled.—POULETT PEERAGE, THE, *H.L.*; [1903] A. C. 395.

LIBEL:—

1. *Fair comment—Matter of public interest—Personal imputations—New trial.*—If in criticizing the conduct of a man in relation to a matter of public interest the writer goes on to impute to him base and sordid motives, there being no facts to warrant the imputation, the defence of "fair comment" cannot be maintained in an action for libel.

Campbell v. *Spottiswoode*, [1863] 3 B. & S. 769, 32 L. J. 185, followed.

McQuire v. *Western Morning News Co.*, [1903] 2 K. B. 100, commented on and distinguished.—JOYNT *v.* CYCLE TRADE PUBLISHING CO., *C.A.*; [1904] 2 K. B. 292.

2. *Libel by officer of corporation—Liability of corporation—Scope of duty of agent—Malice.*—A limited company is liable for a libel published by one of its officers acting within the scope and in the course of his employment, on the ordinary principles of agency; and, if there is evidence that it was within the scope of the agent's authority and employment to write the letter which contained the libel complained of, the fact that he went further than the facts warranted, and made charges which he knew to be false, will not relieve the company from liability.

Judgment of the court below affirmed.—CITIZENS' LIFE ASSURANCE CO. *v.* BROWN, *P.C.*; [1904] A C. 423; 90 L. T. 739.

See also Defamation, 1; Slander.

LICENSING LAW:—

1. *Beerhouse—Privileged beerhouse—Sale of spirits without a licence—Conviction—House closed—Application by owners of beerhouse for grant of licence—Application refused on a ground other than one of those specified in section 8 of the Wine and Beerhouse Act, 1869—Licensing Act,* 1874 (37 & 38 *Vict. c.* 49), *s.* 15.—The holder of a licence to sell by retail beer to be consumed on or off the premises was convicted for the first time of selling spirits without a licence. The house had been licensed for the sale of beer and wine prior to the 1st of May, 1869, and the licence had been regularly renewed from time to time, the last renewal having been made to the then tenant at the general annual meeting on the 13th of February, 1903. The tenant having been convicted on the 30th of July following, the owners of the house applied at the next special sessions, under section 15 of the Licensing Act, 1874, for a grant of a provisional licence in respect of the premises. The application was refused on a ground other than one of the four grounds specified in section 8 of the Wine and Beerhouse Act, 1869.

Held, that the case was governed by *Ex parte Flinn*, 48 W. R. 29. [1899] 2 Q. B. 607, and that the justices could only refuse the application upon one of the four grounds specified in the Act of 1869.

Reg. v. *West Riding Justices*, 36 W. R. 855, 21 Q. B. D. 258. discussed.—TOWER JUSTICES *v.* CHAMBERS, *K.B.D.*, 541; 90 L. T. 228.

2. *Control of justices over licensed premises—Power to order alterations on renewing licence—"Part of the premises where intoxicating liquor is sold or consumed"—Premises with front and back entrances—Jurisdiction to order back entrance to be closed—Licensing Act,* 1902 (2 *Ed.* 7, *c.* 28), *s.* 11, *sub-section* 4.—Under section 11, sub-section 4, of the Licensing Act, 1902, where an application is made for the renewal of a licence in respect of premises which have both a front and a back entrance, the justices have power, on renewing the licence, to order the back entrance to be closed, although there is no evidence that intoxicating liquor has ever been sold or consumed at the back entrance or in the passage immediately inside the back entrance.

Judgment of Lord Alverstone, L.C.J., and Wills and Channell, JJ. (51 W. R. 695), affirmed.—BUSHELL *v.* HAMMOND, *C.A.*, 453.

3. *General annual licensing meeting—Statutory adjournment within one month—Further adjourned meeting for undisposed-of business—Jurisdiction of justices at further adjourned meeting to entertain new business—Licensing Act,* 1902 (2 *Ed.* 7. *c.* 28), *s.* 14, *sub-sections* 1, 6.—Section 14, sub-section 1, of the Licensing Act, 1902, provides that every adjournment of the general annual licensing meeting "shall be held within one month of the date of the general annual licensing meeting."

Held, that if licensing justices, who are unable to dispose of the licensing business at the general annual licensing meeting or the statutory adjournment thereof within one month afterwards, hold a further adjourned meeting for the purpose of disposing of the business then before them but remaining undisposed of, they have no jurisdiction at such further adjourned meeting to hear or dispose of new business or new applications which were not made and were not before them at the general annual licensing meeting or the adjournment thereof one month afterwards; and therefore they are not bound to hear an application for the renewal of a licence to a new tenant of a licensed house, whose tenancy began after the date of the statutory adjournment, and whose application consequently was not before them at the general annual licensing meeting or at the statutory adjournment thereof.—REX *v.* BRISTOL JUSTICES, *K.B D.*; 89 L. T. 474.

4. *Justices—Appeal—Employment of county solicitor—Alehouse Act,* 1828 (9 *Geo.* 4, *c.* 61), *s.* 29—*Licensing Act,* 1902 (2 *Ed.* 7, *c.* 28), *s.* 20.—The quarter sessions of West Riding, on the hearing of two appeals against the refusal of the licensing justices to renew a licence, dismissed one appeal and

allowed the other appeal, but in both cases made a special order disallowing the profit costs of the solicitor employed by the justices, on the ground that they should have employed the county solicitor.

Held, that the quarter sessions had no jurisdiction to do so, and that the justices were not bound to employ the county solicitor.—REX *v.* WEST RIDING JUSTICES, *K.B D.*, 540; [1904] 1 K. B. 545; 73 L. J. K. B. 224; 90 L. T. 381.

5. *Keeping open during prohibited hours—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.—In order to constitute the offence of keeping open licensed premises under section 9 of the Licensing Act, 1874, it is necessary that the premises should be capable of being entered from the outside, or that liquor could be supplied to persons outside.—COMMISSIONERS OF POLICE *v.* ROBERTS, *K.B.D.*, 560; [1904] 1 K. B. 369; 73 L. J. K. B. 231.

6. *Offences—"Gaming"—Game of skill played with cards for prizes given by persons not competitors—"Whist drive"—Suffering gaming on licensed premises—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17, *sub-section* 1.—The appellant, a licensed victualler, suffered a game of skill, called a "whist drive," to be played by members of a club in a room on his licensed premises, for prizes only given by their friends.

Held, that he could not properly be convicted of suffering gaming under the Licensing Act, 1872, section 17, sub-section 1.—LOCKWOOD *v.* COOPER, *K.B.D.*, 48; [1903] 2 K. B. 428; 72 L. J. K. B. 690; 89 L. T. 306.

7. *Order taken by traveller—Appropriation—Sale off licensed premises—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.—An order for beer having been given to the traveller of a person licensed to retail beer at his premises by a customer at such customer's house, the traveller handed the order to the licensee at the licensed premises, who appropriated the beer by placing it in a box at those premises with a piece of paper on which was the customer's name. The beer was delivered and paid for at the customer's house.

Held, that this was not a sale off the licensed premises.—WALKER *v.* WALKER, *K.B.D.*; 90 L. T. 88.

8. *Renewal—Refusal to renew—Appeal to quarter sessions—Evidence at quarter sessions.*—On appeal to quarter sessions against the refusal to renew a licence the only evidence produced in support of the refusal was a map showing that there were a large number of other licensed houses within a short distance of the licensed premises in question.

Held (Kennedy, J., dissenting), that this was not evidence on which the quarter sessions could refuse to renew the licence of the house.—RAVEN *v.* SOUTHAMPTON JUSTICES, *K.B.D.*, 574; [1904] 1 K. B. 430; 73 L. J. K. B. 282; 90 L. T. 94.

9. *Renewal of licence—Value of house—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 45.—Section 45 of the Licensing Act, 1872, which requires premises to be of a certain annual value as a qualification for being licensed for consumption of intoxicating liquor thereon, does not apply to a house which was licensed at the time of the passing of the Act, and also at the time when the renewal was applied for, even in the case of there having been a break in the continuity of the licence.

Decision of the Court of Appeal (51 W. R. 38; [1902] 2 K. B. 740) reversed.

Freer v. Murray, [1894] A. C. 576, distinguished.—IGOE *v.* SHANN, *H.L.*, 111; [1903] A. C. 320; 72 L. J. K. B. 693; 89 L. T. 105.

10. *Sale of liquors—Sale on unlicensed premises—Order taken by traveller—Duty of traveller to forward order to principal—Goods appropriated at and sent from licensed premises—Offence—Executory contract of sale—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.—An order was taken by a brewer's traveller at a customer's house for beer to be supplied from the appellant's brewery, to be paid for by the customer on or after delivery. It was a rule in the brewery that no order taken at a customer's house would be executed until the traveller had sent into the office the name and address of the customer and the order had been entered and passed through the books and directions given to the carman in the ordinary way.

Held, that an order taken by the appellant's traveller, and so executed, did not constitute evidence of a sale at the premises of the customer, and therefore the appellant was wrongly convicted of an offence under section 3 of the Act of 1872. Whether, on other facts, an executory contract of sale would come within section 3 was discussed, but not decided.

Walker v. Walker, 67 J. P. 452, and *Stephenson v. Rogers (Limited)*, 63 J. P. 230 47 W. R. Dig. 101, considered.—STRICKLAND *v.* WHITTAKER, *K.B.D.*, 538; 90 L. T. 445.

11. *Sale of liquor to children—Information for "knowingly" selling—Sale by barman—No knowledge on part either of barman or licence-holder—Liability of licence-holder.*—A licence-holder cannot be convicted under section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, for "knowingly selling" intoxicating liquor to a person under the age of fourteen years, when he himself has no knowledge of the sale and when the barman who sells the liquor has no knowledge that the person to whom he sells is under the age of fourteen years, but honestly believes that he has attained that age. The section does not create an absolute prohibition against the sale of intoxicating liquor to any person under the age of fourteen years, except in corked and sealed vessels, and where there is no knowledge on the part of the licence-holder or the barman who sells, the licence-holder cannot be convicted.—GROOM *v.* GRIMES, *K.B.D.*; 89 L. T. 129.

LIGHT.—See Easement.

LIMITATIONS, STATUTE of:—

1. *Acknowledgment of debt—Conditional promise to pay—Implied promise to pay*—21 *Jac.* 1, *c.* 16—*Lord Tenterden's Act*, 1828 (9 *Geo.* 4, *c.* 14).—In an action by a creditor to recover money lent the debtor pleaded, in his defence, that the claim was barred by the Statute of Limitations. The debtor, however, before the expiration of six years after the debt was incurred, wrote the following letter: "I am willing to sell the 5,230 shares that I hold . . . for the sum of £816 4s. 6d., and in the event of my doing so I will with the money pay the ten-shilling call on 629 of the above shares, amounting to £314 10s., and the balance in settlement of my account with R. Barrett & Son (Limited)," the creditor, "amounting at the 31st of December last to £501 14s. 6d."

Held, that this was a sufficient acknowledgment of the debt to take the case out of the statute, as the letter was a general acknowledgment of the debt with a conditional promise to pay, but without any distinct statement that except upon the performance of the condition the debtor would not or could not pay, and that therefore there was an implied promise to pay the debt.—BARRETT *v.* DAVIES, *K.B.D.*, 607; 90 L. T. 460.

2. *Principal and agent—Fiduciary relation.*—A company remitted money to its agent in America to be used in the purchase of lands. The agent bought land and sold it to the company at a profit without disclosing his interest in the transaction.

Held, that an express trust was created, and that the Statute of Limitations was no bar to an action for an account in order to recover the balance of the moneys remitted to him and not applied for the particular purpose.

Burdick v. *Garrick*, 18 W. R. 387, L. R. 2 Ch. App. 233; *Soar* v. *Ashwell*, 42 W. R. 165, [1893] 2 Q. B. 390, followed.—NORTH AMERICAN LAND AND TIMBER CO. *v.* WATKINS, *Ch.D Kekewich, J.*, 360; [1904] 1 Ch. 242; 73 L. J. Ch. 117; 89 L. T. 602.

See also Company, 40; Solicitor, 2.

LOCAL GOVERNMENT:—

1. *Bye-law—Building—Deposit of plans—Change of bye-laws after approval of plans—Row of houses—Part of work carried out—Right to complete according to approved plans—Harrogate Corporation Act*, 1893 (56 & 57 *Vict. c. ccix.*), *s.* 27.—Section 27 of the Harrogate Corporation Act, 1893, provided that the deposit with the corporation of any plan of any street or building should be null and void "if the execution of the work specified in such plan should not be commenced within three years from the date of such deposit."

In 1894 a builder deposited a plan showing thereon a number of houses which he proposed to erect, and which were in accordance with the building bye-laws then in force in the borough. The plan was approved by the corporation.

Some of the houses were built and completed, and certificates were given on their completion by the corporation.

In November, 1901, the building bye-laws in force in the borough were repealed, "except as regards any work commenced before that date," and on the same day new bye-laws came into force with which the plan that had been deposited by the builder in 1894 did not comply.

Held (affirming the decision of Wright, J.), that the plan approved in 1894 was not merely the plan of one building, but was really a number of separate plans for the buildings shown thereon; that therefore the completion of some of the houses shown on the plan was not a commencement of the other buildings there shown, which were not in fact begun till after the new bye-laws came into force, and the defendant was not entitled to go on with the work under the old bye-laws.—HARROGATE CORPORATION *v.* DICKINSON, *C.A.*; [1904] 1 K. B. 468; 73 L. J. K. B. 262; 90 L. T. 41.

2. *Bye-law—Building—"Place of habitual employment for any person in any business"—Stables of building contractor.*—By bye-law No. 2 certain buildings which should not be constructed or adapted to be used "as a place of habitual employment for any person in any manufacture, trade, or business" were to be exempt from the bye-laws relating to new buildings.

Held, that a building divided into three parts, consisting of a rain goods store, a timber store, and stables, used by a building contractor, was not a building used "as a place of habitual employment for any person in any manufacture, trade, or business" even although part consisted of the stables. — LINZELL *v.* FELIXSTOWE URBAN COUNCIL *K.B.D.*; 90 L. T. 388.

3. *Bye-law—Erecting shed—Neglecting to comply with notice—Sufficiency of notice.*—By certain bye-laws Nos. 53 and 96 it was provided that if any person should erect new domestic buildings certain open space was to be provided, and anyone who was intending to erect a building was to give notice to the council and deliver plans thereof, a description of the materials to be used, and other details.

By bye-law No. 98, where a person who has erected a building or done any other work to which the bye-laws apply receives a notice in writing specifying any matters in respect of which the erection or the work is in contravention of any bye-law, such person must cause anything done in contravention to be amended.

A notice was served stating: "I am directed . . . to call your attention to the fact that a wooden erection has been made . . . contrary to Nos. 53 and 96 of the bye-laws. . . ."

Held, that such notice was sufficient.—DICKINSON *v.* FORSYTH, *K.B.D.*; 90 L. T. 30.

4. *Bye-law — Infringement — Erection of houses abutting on public highway—Laying out new street—Urban authority — Statutory remedy — Attorney-General, absence of—Jurisdiction.*—The defendants were the owners of a triangular piece of land within the plaintiffs' borough. Two sides of the triangle abutted upon public highways within the borough. The defendants, in pursuance of a building scheme, erected houses on their land fronting the highways. The plaintiffs alleged that the defendants were laying out the highways as new streets which did not comply with the requirements of the borough bye-laws as to width, and they claimed, first, an injunction, and, secondly, a declaration that the plaintiffs were entitled to remove or pull down any work begun or done by the defendants in contravention of the bye-laws. The bye-laws, which were framed under the Public Health Act, 1875, prescribed a penalty for infringement, to be recovered by summary proceedings, and provided that the plaintiffs might, subject to any statutory provision in that behalf, remove, alter, or pull down any work begun or done in contravention of the bye-laws.

Held, (1) that the plaintiffs could not maintain an action in the absence of the Attorney-General; (2) that the facts did not justify the inference that the defendants were laying out a "new street" within the meaning of the bye-laws.

Decision of Joyce, J. ([1902] 2 Ch. 182, 50 W. R. Dig. 97) affirmed.

Attorney-General v. *Ashborne Recreation Ground Co.*, 51 W. R. 125, [1903] 1 Ch. 101, approved.—DEVONPORT CORPORATION *v.* TOZER, *C.A.*, 6; [1903] 1 Ch. 759; 72 L. J. Ch. 411; 88 L. T. 113.

5. *Bye-law—New buildings—No exempting power reserved therein—Bye-law not unreasonable—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 16.—By a bye-law with respect to new buildings made by a rural sanitary authority it was provided that "Every person who shall erect a new building shall cause such building to be enclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together (*a*) with good mortar compounded of good lime and clean sharp sand or other suitable material, or (*b*) with good cement, or (*c*) good cement mixed with sharp sand."

Held, that the bye-law was not unreasonable and *ultrà vires*, because it did not reserve to the rural authority any discretion to permit the erection of any new building in exceptional circumstances other than in accordance with the requirements of the bye-law. On proceedings being taken under the Summary Jurisdiction Act, 1879, in respect of an offence against the above bye-law, the justices have discretion under section 16, though the

charge is proved, to dismiss the summons if they think the offence is of a trifling nature and that punishment would be inexpedient.—SALT *v.* SCOTT-HALL, *K.B.D.*, 95; [1903] 2 K. B. 245; 72 L. J. K. B. 627; 88 L. T. 868.

6. *Bye-law—Privy—Bye-law containing no provision as to notice to person complained against—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 37, 39.—A bye-law made by the London County Council under section 39 of the Public Health (London) Act, 1891, and which provides that a person offending against it shall be liable to a penalty, is unreasonable and void if it does not contain a provision that notice shall be given to the person complained against before proceedings to recover the penalty are commenced against him.—NOKES *v.* ISLINGTON CORPORATION, *K.B D.*, 399; [1904] 1 K. B. 610; 73 L. J. K. B. 100; 90 L. T. 22.

7. *Bye-law — Public health — Lodging-house — Validity of bye-law—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 94, *sub-section* 1 (d) (e). —Two borough councils, acting under the power conferred upon them by section 94 of the Public Health (London) Act, 1891, made a bye-law with respect to lodging-houses in their respective boroughs, requiring the landlord of any such house in the first week in April in every year to cause every part of the premises to be thoroughly lime-washed. "Lodging-house" was defined as a house which is let in lodgings or occupied by members of more than one family. "Landlord" was defined in the first case as the person who receives or is entitled to receive the rack-rent of a lodging-house, and in the second case as the person entitled to receive the profits arising from the letting of the lodging-house.

Held, that the bye-law in both cases was bad, as it contained no provision that the landlord, before he became liable to a penalty for a breach of the bye-law, should receive notice that the bye-law had not been complied with.

Held, further (by Lord Alverstone, L.C.J., and Kennedy, J., Wills, J., dissenting), that the bye-laws were not unreasonable, in so far as they required the lime-washing to be done in the first week of April.—STILES *v.* GALINSKI, *K.B.D.*, 462; [1904] 1 K. B. 615; 73 L. J. K. B. 485; 90 L. T. 437.

8. *Hoarding—"Abutting" on street.*—A hoarding for advertisements sixty feet long and twelve feet above a hedge, no part of such hoarding being nearer to the street than two feet and having the hedge between it and the street, does not "abut" on the street.—BARNETT *v.* COVELL, *K.B.D.*; 90 L. T. 29.

9. *Metropolitan borough—Compensation to existing officer on abolition of office—Amount of salary and emoluments—Resolution assessing compensation—Rescission by subsequent resolution—Validity—London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 30 (2) —*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 81 (7)—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 120.—A metropolitan borough council, successors to a vestry, resolved to abolish the office of an "existing officer," and passed a resolution assessing his compensation under section 120 of the Local Government Act, 1888. The amount assessed was a proportion of a sum claimed by him as representing his emoluments. Afterwards the council being advised that this amount was excessive, and therefore illegally assessed, by reason of the fact that certain items were improperly included in his claim, passed another resolution rescinding the first, and assessing his compensation at the same proportion of a lesser sum.

Held, that the amount of his emoluments was a question of fact to be ascertained by the council, subject to an appeal to the Treasury, and that the council, having ascertained that fact, and, by the first resolution, assessed the compensation, in the absence of an appeal to the Treasury, became bound to the officer to pay to him the compensation so assessed, and could not, by a subsequent resolution, relieve itself of that obligation.—LIVINGSTONE *v.* WESTMINSTER CORPORATION, *K.B.D.*, 395; [1904] 2 K. B. 109; 73 L. J. K. B. 434.

10. *Severance of part of rural district into urban district—Adjustment of property and liabilities—Highway expenses—Loss of income—Local Government Acts*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 57, 62; *and* 1894 (56 & 57 *Vict. c.* 73), *s.* 54.—By an order of a county council, made under section 57 of the Local Government Act, 1888, part of a rural district was converted into an urban district, which was no longer liable for the maintenance of the highways in the rural district, but took over its own liabilities and property in its own separate area. The rural district council claimed an adjustment of the income, liabilities, and expenses, under section 62 of the Act, in respect of the maintenance of the highways, as the contributions formerly received from the urban district area exceeded the rates derived therefrom.

Held, that the loss of profit from the contributions formerly received by the rural district council from the area comprised in the new urban district was not a matter for adjustment, for the section does not give compensation for such loss, and loss of income under this section referred to present income and not to that to be derived from rates which may hereafter be imposed.

Decision of the Court of Appeal (51 W. R. 353, [1903] 1 K. B. 554) reversed.

In re Rochdale Union and Haslingden Union, 47 W. R. 322, [1899] 1 Q. B. 540, and *In re Buckinghamshire County Council and Hertfordshire County Council*, [1899] 1 Q B. 515. 47 W. R. Dig. 114, overruled —CATERHAM AND GODSTONE DISTRICT COUNCILS, RE, *H L*, 625; [1904] A. C. 171; 73 L. J. K. B. 589; 90 L. T. 653.

11. *Sewer—Drain—Nuisance by sewage—Drainage of houses—Liability of local authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 2, 4, 14, 19, 21, 42, 43.—A channel or gutter, which was vested in the defendants as the local authority, and which ran between a road and the footpath in front of the house of the plaintiff adjoining the road, was used for carrying off the surface water from the road, and also the water from the roofs of some of the other houses bordering on the road, by means of pipes communicating therewith, and from the curtilages of these houses. In the channel itself at various intervals were gratings for conducting the water into the deep underground drains. There was also a cesspool situate in a garden adjoining the plaintiff's house. Sewage-matter had overflowed from the cesspool into the channel through no fault of the plaintiff, as it came from another house, and being permitted to remain in the channel had caused the illness of the plaintiff's infant son by means of foul and noxious smells escaping therefrom, through the defendants neglecting to keep the channel properly cleaned out.

Held (1) that the channel was a "sewer" within the meaning of the definition of sewers in section 4 of the Public Health Act, 1875; (2) that being a sewer the local authority were bound under section

19 of the same Act to keep it free from pollution; and (3) that the plaintiff not having himself caused the pollution, was entitled to damages and an injunction against the defendants.

Decision of Phillimore, J., affirmed.—WILKINSON *v.* LLANDAFF AND DINAS POWIS RURAL COUNCIL, *C.A.*, 50; [1903] 2 Ch. 695; 73 L. J. Ch. 8; 89 L. T. 462.

12. *Street—Objection to proposed works—Grounds—Not a street within the Act—Local government—Highway repairable by inhabitants at large—Evidence—Admissibility—Private Streets Works Act,* 1892 (55 & 56 *Vict. c.* 57), *ss.* 5, 7.—By section 7 of the Private Streets Works Act, 1892, the owner of premises liable to be charged with any part of the cost of executing works under the Act may by written notice to the urban authority object to the proposed works on the following, amongst other, grounds: (*a*) that an alleged street is not a street within the meaning of the Act; (*b*) that a street is a highway repairable by the inhabitants at large. By section 5 the expression "street" in the Act means a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large.

Held, that where the ground of objection was that the alleged street was not a street within the meaning of the Act, evidence was admissible to prove that the street was a highway repairable by the inhabitants at large.—CARRY *v.* BEXHILL CORPORATION, *K.B.D.*; [1904] 1 K. B. 142; 73 L. J. K. B. 74; 90 L. T. 58.

13. *Street—Paving expenses—Decision of justice that street is a highway repairable by the inhabitants at large*—Res judicata—*Wakefield Corporation Act,* 1887 (50 & 51 *Vict. c. lxxi.*), *ss.* 29, 30, 31—*Private Streets Acts,* 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 7, 8.—Upon an objection by the owners of premises in a street to a scheme for certain private street works which the local authority proposed to execute under a local Act (which contained provisions identical with sections 6, 7, and 8 of the Private Streets Acts, 1892), the justices decided that the street was a highway repairable by the inhabitants at large, and upheld the objection. Subsequently the local authority proposed to execute private streets works in the street under a different scheme.

Held, upon objection taken by the owners of premises in the street, that the mattter was *res judicata*, by reason of the former determination of the justices.

Reg. v. *Hutchins*, 29 W. R. 724, 6 Q. B. D. 300, distinguished.

Decision of the Court of Appeal (51 W. R. 305, [1903] 1 K. B. 417) affirmed.—WAKEFIELD CORPORATION *v.* COOKE, *H.L.*, 321; [1904] A. C. 31; 73 L. J. K. B. 88; 89 L. T. 707.

14. *Street—Power of local authority to erect pillar for overhead tramway wire—Pillar sunk in soil of pavement — Trespass to private property — Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 4. 19—*Newport Corporation Act,* 1900, *s.* 51.—Where a local authority requires to open up the soil of a street, the surface only of which has been dedicated to the public, they do not commit a trespass on private property so long as the act to be done is within the area of their statutory powers.

Held, therefore, that no trespass was committed by the digging of a hole in the footway in which to place a pole to carry the electric wire for a tramway scheme authorized by a private Act which incorporated the provisions of the Land Clauses Act, the act complained of not amounting to a taking of land but only to the exercise of a right in the nature of an easement.—ESCOTT *v.* NEWPORT CORPORATION, *K B.D.*, 543; [1904] 2 K. B. 369; 73 L. J. K. B. 693; 90 L. T. 348.

15. *Street—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Expenses incurred by local authority—Charge upon premises—Date of charge—Completion of works—Vendor and purchaser.*—Expenses incurred by a local authority for works executed in a street after notice to the owners of adjoining premises only became a charge on the premises within section 257 of the Public Health Act, 1875, on the completion of the works, and not on the date on which the local authority enter into a binding contract for their execution.

Nor do such expenses, by reason of the notice, constitute an incumbrance on the premises so as to prevent a vendor, who conveys the property after the notice but before the completion of the works, making a good title free from incumbrances.

Decision of Byrne, J. (*ante*, p. 392), affirmed.—ALLEN AND DRISCOLL'S CONTRACT, RE, *C.A.*, 680.

16. *Transfer of powers of other authorities—County borough—Urban sanitary district—"Urban district"—Local Government Act,* 1894 (56 & 57 *Vict. c.* 73), *ss.* 21, 35, 62—A county borough, if it be an urban sanitary district under the Public Health Act, 1875, is an "urban district" within section 62 (1) of the Local Government Act, 1894, and its council can exercise the powers of that section. Section 21 of the Local Government Act, 1894, which by the operation of section 35 is inapplicable to a county borough, is not to be read as if it were a definition of "urban district" excluding county boroughs.—KIRKDALE BURIAL BOARD *v.* LIVERPOOL CORPORATION, *Ch.D. Swinfen Eady, J.*, 427; [1904] 1 Ch. 829; 73 L. J. Ch. 529.

LOCKE-KING'S ACT.—See Will, 26.

LUNATIC:—

1. *Practice—Vesting orders—Direction to transfer stock—Title of proceedings—Lunacy Act,* 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-section* 1 (*d*); *ss.* 133, 333—*Rules in Lunacy,* 1892, *rr.* 9, 57, 58; *Schedule, Form* 1.—An order in Lunacy directing a transfer of stock under section 133 of the Lunacy Act, 1890, should be entitled in the matter of the Lunacy Acts, 1890 and 1891, as well as in the matter of the particular lunacy; but this is not to apply to a case under section 116, sub-section 1 (*d*) (of a person who through mental infirmity arising from disease or age is incapable of managing his affairs), where the title contains a reference to the statutes "53 Vict. c. 5, and 54 & 55 Vict. c. 65."—PURVIS, RE, *C.A.*; [1904] 1 Ch. 373; 73 L. J. Ch. 381; 90 L. T. 394.

2. *Real estate—Permanent improvements—Application that sums so expended may be a charge on such real estate for the benefit of persons entitled to personalty—Nature of improvements—Administration in lunacy—Jurisdiction—Lunacy Act,* 1890 (53 & 54 *Vict. c.* 5), *s.* 118.—Under section 118 of the Lunacy Act, 1890, the court has discretion to consider not only the benefit of the lunatic personally, but also the question of what is fair as between his real and personal property; and the court has jurisdiction under that section to order that money already expended under a previous order in permanent improvements should be charged upon the real estate improved. Repairs incidental to the ordinary course of management would not come within the category of permanent improvements, and therefore ought not to be made a charge upon the real estate.

Attorney-General v. *Marquis of Ailesbury,* 36

W.R. 737, 12 A. C., 672, discussed.—GIST, RE, *C.A.*, 422; [1904] 1 Ch. 398; 73 L. J. Ch. 251; 90 L. T. 35.

3. *Trust fund—beneficiary of unsound mind not so found by inquisition—Maintenance of lunatic—Undertaking—Jurisdiction—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 116.—A lunatic not so found was absolutely entitled to a trust fund under a will and settlement. An originating summons was taken out in the Chancery Division for the purpose of having it declared that a certain part of the investments representing the fund might be expended for the personal benefit and maintenance of the lunatic, and also so much of the capital as the court should think fit. The fund was represented by some India Stock and mortgages.

Held, that if the trustees transferred the stock and deposited the mortgage deeds in court, and if the sister of the lunatic, who was also one of the trustees of the settlement, gave an undertaking to apply the income for the lunatic's benefit, the trustees might pay to the sister the income of the fund during the lunatic's life or until further order.

Decision of Joyce, J., who held the administration was more properly one in lunacy jurisdiction, reversed.—CARR'S TRUSTS, RE, CARR *v.* CARR *C.A.*, 595; [1904] 1 Ch. 792; 73 L. J. Ch. 459; 90 L. T. 592.

MARKET:—

Disturbance—Intention—Setting up rival market on market day—Declaration—Liberty to apply for injunction.—Although according to the decision in *Mayor of Brecon* v. *Edwards*, 1 H. & C. 51, it is necessary to consider what has been the intention of the defendant against whom an action is brought for the alleged disturbance of a market, in committing the acts complained of, yet in a case where the defendant had set up a rival market on a market day, taking advantage of the concourse of people coming to the lawful market, it was held to be quite immaterial that he had no intention of rivalling the lawful market; but that it was not necessary to give effect to this conclusion by granting an injunction, for, in the circumstances, the justice of the case would be met by a declaration to the effect that the conduct of the defendant was unlawful and constituted an invasion of the plaintiff's market, with liberty to the plaintiff to apply for an injunction if the defendant should repeat the wrongful acts complained of.

Decision of Kekewich, J., reversed.—WILCOX *v.* STEEL, *C.A.*; [1904] 1 Ch. 212; 73 L. J. Ch. 217; 89 L. T. 640.

MARRIAGE:—

Presumption in favour of a valid marriage—Long-continued open cohabitation—Ceremony—Foreign marriage—Recognition—Strict proof.—Where there is clear proof that English persons intended to be married to one another, some evidence of a ceremony by way of a French marriage *de facto*, and of recognition of them afterwards as man and wife by their families and by them of their children as legitimate, during a long course of years, the court will not require strict proof of marriage, even upon the assumption that to contract marriage in France in the manner alleged was not in accordance with the habits of law-abiding people there.

The offspring of such a union held therefore entitled to share in a gift under a will to "children."—SHEPHARD, RE, GEORGE *v.* THYER, *Ch.D. Kekewich, J.*; [1904] 1 Ch. 456; 73 L. J. Ch. 401; 90 L. T. 249.

MARRIED WOMAN:—

1. *Advances—No separate property—Acknowledgment in* 1894 *of debt—Contract to pay—Executor—Retainer—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1—*Will—Construction—Money on deposit—"Ready money."*—A married woman will not render herself liable, under the Married Women's Property Act, 1893, by acknowledging, in 1894, advances previously made to her by a testator in respect of which she could not have been sued, although the acknowledgment would take the debt out of the Statute of Limitations. In such a case the executor cannot retain the advances to the married woman out of such portion of the testator's estate as is bequeathed to her. A bequest of "ready money" does not include money on deposit at a bank withdrawable on fourteen days' notice.—WHEELER, RE, HANKINSON *v.* HAYTER, *Ch.D. Warrington, J.*, 586; [1904] 2 Ch. 66; 73 L. J. Ch. 576.

2. *Authority of wife to pledge husband's credit—Necessaries—Husband and wife sued jointly—Presumption of agency—Alternative liability of husband—Election—Rules of Supreme Court, ord.* 14, *r.* 5.—The relationship of husband and wife gives rise to no presumption of joint liability for goods supplied to the domestic establishment on the order of the wife. Should husband and wife be sued jointly for goods supplied to the wife, and judgment obtained against her, then, in the absence of joint liability, there is no alternative remedy against the husband, nor does ord. 14, r. 5, alter this.

When it is established that a sufficient allowance has been paid by the husband to his wife, and she has been directed not to go beyond it, the presumption of the agency of the wife for the usual domestic purposes of the joint establishment and other necessaries will be rebutted.

Decision of the Court of Appeal (51 W. R. 290 [1903] 1 K. B. 64) affirmed.—MOREL *v.* WESTMORLAND *H.L.*, 353; [1904] A. C. 11; 73 L. J. K. B 93; 89 L. T. 702.

3. *Separate estate—Restraint on anticipation—Ante-nuptial debt—Property available to satisfy debt—Form of judgment—Validity of restraint—Exception—Settlement of woman's own property by herself—Money payable by husband under separation deed—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 19.—In an action against a married woman, who married after the passing of the Married Women's Property Act, 1882, on an ante-nuptial debt, judgment was signed against her for a sum to be paid out of her separate property, whether subject to any restraint against anticipation or not. Subsequently she separated from her husband under a deed of separation, which contained a covenant by the husband to pay her a yearly sum by monthly instalments for her separate use without the power of anticipation.

Held, that, on the true construction of section 19 of the Married Women's Property Act, 1882, the money payable under the covenant could not be made available to answer the judgment debt, and that the judgment ought to be rectified by limiting its operation to separate property of the married woman not subject to any restraint against anticipation.

Axford v. *Reid*, 37 W. R. 291, 22 Q. B. D. 548 distinguished.—BIRMINGHAM EXCELSIOR MONEY SOCIETY *v.* HAYWOOD, *C.A.*, 84; [1904] 1 K. B. 35; 73 L. J. K. 28; 89 L. T. 656.

4. *Separate estate—Restraint on anticipation—Wife's contracts during coverture—Judgment after cessation of coverture—Married Women's Property Act*, 1893

(56 & 57 *Vict. c.* 63), *s.* 1.—A married woman, who was possessed of separate property with a restraint against anticipation, made a promissory note jointly with her husband. After the death of the husband an action was brought against the widow on the promissory note, and judgment was obtained against her. On an application by the plaintiff for the appointment by way of equitable execution of a receiver of the income due to the widow from the aforesaid property,

Held, that, although in consequence of her having become discovert the restraint against anticipation had ceased, still the property was protected by section 1 of the Married Women's Property Act, 1893, and an order for a receiver could not be made.

Decision of A. L. Smith and Vaughan Williams, L.JJ., in *Barnett* v. *Howard*, [1900] 2 Q. B. 784, 49 W. R. Dig. 107, approved and followed.—BROWN *v.* DIMBLEBY, *C.A.*, 53; [1904] 1 K. B. 28; 72 L. J. K. B. 35; 89 L. T. 424.

5. *Tort committed by wife—Action against husband and wife—Separate and inconsistent defences—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.—Section 1, sub-section 2, of the Married Women's Property Act, 1882, has not abolished the common law right to sue both husband and wife for a tort committed by the wife during coverture, and in such an action the husband and wife cannot put in separate and inconsistent defences.

A husband and wife were sued in the old common law form of action for a libel written and published by the wife during coverture. One statement of defence was delivered. In paragraph 1 the husband said that so far as he was liable, as the husband of the other defendant, he paid money into court in satisfaction of the claim. In paragraphs 2 to 5 the wife pleaded a denial of liability.

Held, that there could be only one defence to the action—namely, the one which the husband put on the record, and that the inconsistent defence of the wife must be struck out.—BEAUMONT *v.* KAYE, *C.A.*, 241; [1904] 1 K. B. 292; 73 L. J. K. B. 213; 90 L. T. 51.

6. *Trustee-mortgagee—Transfer of mortgage—Deed not acknowledged—Bare trustee—Married Women's Property Act*, 1882 (45 & 46 *Vict. c* 75), *s.* 2—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 16.—Two trustees for sale, of whom one was a lady, sold land, and next day took a mortgage from the purchaser for a sum expressed to belong to them on a joint account. The lady having afterwards married, she and her co-mortgagee transferred the mortgage, and, on a sale by a person deriving title under the transferees, the purchaser objected that the deed of transfer had not been executed by the husband of the married woman or acknowledged by her. The vendor replied that, being a mortgagee, she could convey as a *feme sole* according to the decision in *In re Brooke and Fremlin's Contract*, 46 W. R. 442, [1898] 1 Ch. 647.

Held, following that case, that the purchaser's requisition had been satisfactorily answered.—WEST AND HARDY, RE, *Ch.D. Farwell, J.*, 188; [1904] 1 Ch. 145; 73 L. J. Ch. 91; 89 L. T. 579.

See also Justices, 3.

MASTER AND SERVANT:—

1. *Clerk in bank—Qualified to receive retiring allowance—"Retiring with the consent of the directors"—Act by clerk contrary to the policy of the bank—Intimation to clerk to resign—Right to pension.*—When a clerk breaks an unwritten but well recognized rule of his employer, and receives in consequence a letter requiring him to resign, that notice, although polite instead of peremptory language was used, is a dismissal.

Held, therefore, that the plaintiff, who had received such a notice, was not entitled to a retiring allowance; one of the conditions on which such an allowance was granted being that the applicant "retired with the consent of the directors."—STEPHENSON *v.* LONDON JOINT STOCK BANK, *C.A.*, 183.

2. *Contract to supply carriage and driver to commercial traveller—Goods left in carriage—Obligation to take care of carriage during temporary absence of traveller—Larceny by coachman—Liability of jobmaster for loss.*—The plaintiff, a wholesale jeweller, entered into a contract with the defendant, a jobmaster, for the hire of a brougham and driver for the use of the plaintiff's traveller, and the brougham was fitted for the purpose of such use. The traveller left the brougham in the street for the purpose of getting his lunch, and while he was away the contents of the carriage were stolen, with the connivance of the coachman.

Held, that the defendant was liable, because there was an obligation on him, by virtue of the contract, to provide a careful and trustworthy driver who would safeguard the contents of the brougham during intervals when the traveller would be necessarily absent, and that the defendant was not the less liable because the breach of contract was occasioned by a criminal act on the part of the defendant's servant.

Abrahams v. *Bullock*, 50 W. R. 626, followed.—CHESHIRE *v.* BAILEY, *K.B.D.*, 631.

3. *Employers' liability—Accident—Compensation—Accident arising out of and in the course of employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the deceased workman was an engine-driver in the employment of a railway company; that it was his duty to sign on for work at 7.45 every morning at an engine-shed near to which he lived and to which he could get, without crossing the line, by a path running by the side of the line from the road in which he lived; that on the day of the accident he left home at 6 o'clock and went along the line in the contrary direction to a signal-box, which was in the middle of the permanent way about a quarter of a mile distant from the engine-shed, in order to ask the signalman a question about the time of the passing of a train which he was charged with having run late a few days before; and that while he was making his way back along the line from the signal-box to the engine-shed he was accidentally run over by an engine and killed.

Held, that the accident did not arise out of and in the course of the deceased's employment.—BENSON *v.* LANCASHIRE AND YORKSHIRE RAILWAY CO., *C.A.*, 243; [1904] 1 K. B. 242; 73 L. J. K. B. 122; 89 L. T. 715.

4. *Employers' liability—Accident—Compensation—Accident arising out of and in the course of the employment—Death from lightning—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—A bricklayer was killed by lightning while working at a height of 23 feet above the level of the ground on a scaffolding which was being used for the purpose of constructing a building more than 30 feet in height. In proceedings taken by his widow under the Workmen's Compensation Act, 1897, expert evidence was given to the effect that the deceased man's risk of being struck by lightning was appreciably increased by reason of

the exposed position in which he was working at the time.

Held, that the county court judge was justified in coming to the conclusion that the deceased was killed by an accident arising out of, as well as in the course of, his employment.—ANDREW *v.* FAILSWORTH INDUSTRIAL SOCIETY, *C.A.*, 451; [1904] 2 K. B. 32; 73 L. J. K. B. 510; 90 L. T. 611.

5. *Employers' liability—Accident—Compensation—Agreement—Registration of memorandum—Genuineness—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule II., s.* 8.—Schedule II., section 8, of the Workmen's Compensation Act, 1897, provides that where the amount of compensation under the Act shall have been ascertained by agreement, a memorandum thereof shall be sent by any party interested to the registrar of the county court, who, "on being satisfied as to its genuineness," shall record it in a special register.

Held, that the registrar could not refuse to record the memorandum merely because owing to altered circumstances the workman was no longer entitled to the amount of compensation fixed by the agreement, but that his only duty was to ascertain whether the memorandum accurately represented the agreement which had been entered into.—BLAKE *v.* MIDLAND RAILWAY CO., *K.B.D.*; [1904] 1 K. B. 503; 73 L. J. K. B. 179; 90 L. T. 433.

6. *Employers' liability—Accident—Compensation—Appeal—Costs—Refusal of judge to direct review of taxation—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clause* 12; *Schedule II., clause* 4.—An appeal will not lie to the Court of Appeal from the refusal of a county court judge to direct a review of taxation of the costs of an application to vary a weekly payment under Schedule I., clause 12, of the Workmen's Compensation Act, 1897.—RIGBY & CO. *v.* COX, *C.A.*, 195; [1904] 1 K. B. 358; 73 L. J. K. B. 80; 89 L. T. 717.

7. *Employers' liability — Accident—Compensation —Apprentice—Infant—Election by infant to claim under Workmen's Compensation Act*, 1897—*Agreement not for the benefit of infant—Subsequent action to recover damages at common law—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 2 (b); *s.* 7, *sub-section* 2.—An apprentice, who was an infant, met with an accident in the course of his employment, and he agreed with his employers to accept a weekly payment amounting to half his wages in compensation, and signed a receipt, which stated that he elected to accept this sum under the Workmen's Compensation Act, 1897, in full satisfaction and discharge of all claims for compensation. Subsequently he brought an action against his employers at common law for damages in respect of the same injuries, based on their negligence in not having fenced the machine plane.

Held, that the Act by including an apprentice in the general word "workman" did not alter the law applicable to contracts made by infants, and that, it not being for the infant's benefit to accept compensation under the Workmen's Compensation Act, 1897, his election to accept the same did not bind him, and his claim under the Act was therefore no bar to his common law right to sue.

Decision of Bruce, J. (19 Times L. R. 665), affirmed. — STEPHENS *v.* DUDBRIDGE IRONWORKS CO., *C.A.*, 644; [1904] 2 K. B. 225; 90 L. T. 838.

8. *Employers' liability—Accident—Compensation—Arising out of and in the course of employment—Unexplained accident—Burden of proof—Inference of fact—Presumption — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the deceased workman, who was a fireman in the service of a railway company, was travelling by train, as he had a right to do, after he had finished work for the day, from the place where he had left his engine to the station where it was his duty to report himself, and that he fell from the train and was killed. It was admitted that the fall was the result of an accident, and that the accident happened in the course of his employment. The evidence as to how the accident happened was that he had a basket with him when he got into the train, and that he stood up to put it into the rack, that the train began to move on while he was standing by the door and that almost immediately afterwards he fell out.

Held, that there was evidence to justify the county court judge in drawing the inference of fact, apart from any question of presumption, that the accident not only happened in the course of the employment, but also arose out of the employment. —POMFRET *v.* LANCASHIRE AND YORKSHIRE RAILWAY CO., *C.A.*, 66; [1903] 2 K. B. 718; 72 L. J. K. B. 729; 89 L. T. 176.

9. *Employers' liability—Accident—Compensation—Average weekly earnings—Review of weekly payment—Fall in wages—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clauses* 1 (b), 2, 12. —A haulier in a colliery was injured by an accident which for a time totally incapacitated him for work, and, by arrangement, his employers paid him one-half his weekly wages as compensation under the Workmen's Compensation Act, 1897. Subsequently he was able to do light work, and his employers took him back into their employment as a lamp man, and paid him the same amount of wages as hauliers were then receiving, hauliers' wages having fallen since the accident. The employers thereupon discontinued the weekly payment. The workman filed a request for arbitration under the Act of 1897 to assess the weekly payment. The county court judge refused to award any weekly payment upon the ground that the maximum which had been originally fixed on the average weekly earnings before the accident was subject to variation according to the variation in the wages, and that, as the wages which the workman was receiving were the same as he would have received if there had been no accident and he had continued in the same employment, he was not entitled to any weekly sum as compensation.

Held, that the county court judge was wrong in holding that the original maximum was subject to variation, and that he was bound as a matter of law to award the workman no weekly sum as compensation, but that he should consider, in the exercise of his discretion, whether he would award any, and if so what, proportion of the difference between the wages earned by the workman previous to the accident and the wages which he was earning in the new employment since the accident.—JAMES *v.* OCEAN COAL CO., *C.A.*, 497; [1904] 2 K. B. 213; 90 L. T. 834.

10. *Employers' liability—Accident—Compensation —Award by arbitrator appointed by a county court judge—Appeal to Court of Appeal—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37) *Schedule II., clause* 4. — Under the Workmen's Compensation Act, 1897, no appeal lies direct to the Court of Appeal from the award of an arbitrator appointed by a county court judge to assess a claim for compensation under that Act.—GIBSON *v.* WORMALD, *C.A.*, 661; [1904] 2 K. B. 40; 73 L. J. K. B. 491.

11. *Employers' liability—Accident—Compensation—Building—Scaffolding—Ladder—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the injured workman and another man were engaged at the time of the accident in whitewashing the interior of a shed more than thirty feet in height, and that they made use of a ladder by either standing or sitting on the rungs for the purpose of applying the whitewash to the higher parts of the shed. The county court judge found as a fact that the ladder was not a scaffolding within the meaning of the Act.

Held, that this finding was not wrong in point of law.—CROWTHER *v.* WEST RIDING WINDOW CLEANING CO., *C.A.*, 374; [1904] 1 K. B. 232; 73 L. J. K. B. 71.

12. *Employers' liability—Accident—Compensation—Costs—Review of amount fixed by award or agreement—Interlocutory or original proceeding—Discretion of county court judge—Practice—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clause* 12.—A county court judge has no jurisdiction to give a general direction to the registrar that the costs of all applications under clause 12 of Schedule I. of the Workmen's Compensation Act, 1897, to vary the amount of compensation fixed by award or agreement shall be treated as a mere application in the matter of the arbitration, and not as an original arbitration or proceeding.—RIGBY & CO. *v.* COX (No. 2), *K.B.D.*; [1904] 2 K. B. 208; 73 L. J. K. B. 690.

13. *Employers' liability—Accident—Compensation—Damages—Payments by employer—Receipts "without prejudice"—"Proceeding"—Action against third person—Exercise of "option"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 6.—The mere fact that a workman has received money from his employer and given receipts therefor, which receipts are expressed to be without prejudice, does not amount to an exercise of his option, under section 6 of the Workmen's Compensation Act, 1897, to proceed against the employer, so as to preclude him from subsequently pursuing any legal remedy which he may have against some person other than the employer. And in dealing with any particular case it should be regarded as a matter of substance, so that the omission of the words "without prejudice" from the first receipt will not irrevocably bind the workman so as to make it impossible for him to pursue his legal remedy, notwithstanding that the subsequent payments show that the parties must, as between themselves, have treated him as not irrevocably bound by the first payment.—OLIVER *v.* NAUTILUS STEAM SHIPPING CO., *C.A.*, 200; [1903] 2 K. B. 639; 73 L. J. K. B. 857; 89 L. T. 318.

14. *Employers' liability—Accident—Compensation—Dependants—Payment to or for benefit of dependants—Power to exclude any dependant—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (4) (5) (6).—An arbitrator under the Workmen's Compensation Act, 1897, has no power, when awarding compensation to the dependants of a deceased workman, to direct payment of the compensation money in such a way as may result in the exclusion of any dependant who is not *sui juris*.—MANCHESTER *v.* CARLTON IRON CO., *C.A.*, 291; 89 L. T. 730.

15. *Employers' liability—Accident—Compensation—Disease—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.—A workman who was employed in a wool-combing factory had to cart some wool to the washing machine in the factory, and in doing so he had to pass close to some Persian wool, and thereby caught anthrax, which was a disease commonly imported in Persian wool.

A workman, who was employed as a wool sorter in a factory, in the course of his duty had to handle Persian wool, from which he caught anthrax.

Held, that, in both cases, the injury was caused by "accident" arising out of and in the course of the employment within the meaning of section 1 of the Workmen's Compensation Act, 1897.—HIGGINS *v.* CAMPBELL, *C.A.*, 195; [1904] 1 K. B. 328; 73 L. J. K. B. 158; 89 L. T. 660.

16. *Employers' liability—Accident—Compensation—Dock—Ship in dock—Sailor—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1901 (1 *Ed.* 7), *s.* 104.—A sailor who meets with an accidental injury while engaged in clearing out the hold of a ship lying in dock is entitled to the benefit of the Workmen's Compensation Act, 1897.

Per Collins, M.R., and Cozens-Hardy, L.J., Mathew, L.J., dissenting.—GRIFFIN *v.* HOULDER LINE (LIMITED), *C.A.*, 323; [1904] 1 K. B. 510; 73 L. J. K. B. 202; 90 L. T. 142.

17. *Employer's liability—Accident—Compensation—Employment—Bricklayer paid so much an hour—Accident during dinner hour—Workman permitted to remain on premises—Workmen's Compensation Act*, 1897, *s.* 1, *sub section* 1.—A workman employed on a building which exceeded thirty feet in height was paid by the hour for the number of hours per week that he was actually engaged on his work, not including the midday dinner hour. The workman, without being under any obligation to do so, remained on the premises during the dinner hour, and was eating his dinner under a wall which he had been building when the wall was blown down and he was injured.

Held, that the action arose out of and in the course of his employment within section 1 of the Workmen's Compensation Act, 1897, the dinner hour not causing a break in the workman's employment with his master.—BLOVETT *v.* SAWYER, *C.A.*, 503; [1904] 1 K. B. 271; 73 L. J. K. B. 155; 89 L. T. 658.

18. *Employers' liability—Accident—Compensation—Factory—Building exceeding thirty feet in height in which more than twenty persons are employed—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1901 (1 *Ed.* 7, *c.* 22), *s.* 105, *sub-section* 2.—A building which exceeds thirty feet in height and in which more than twenty persons, not being domestic servants, are employed for wages, is not constituted a factory for the purposes of the Workmen's Compensation Act, 1897, by virtue of section 105, sub-section 2, of the Factory and Workshop Act, 1901.—DYER *v.* SWIFT CYCLE CO., *C.A.*, 483; [1904] 2 K. B. 36; 73 L. J. K. B. 566; 90 L. T. 613.

19. *Employers' liability—Accident—Compensation—Factory—Warehouse—Wholesale business—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—A place which is used for storing goods for sale in a wholesale business, and as ancillary thereto, is a "warehouse" within the meaning of section 7 of the Workmen's Compensation Act, 1897.

Burr v Whiteley, 19 Times L. R. 117, discussed.—GREEN *v.* BRITTEN, *C.A.*, 198; [1904] 1 K. B. 259; 73 L. J. K. B. 126; 89 L. T. 713.

20. *Employers' liability—Accident—Compensation—"Factory"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—Every wharf is a

factory within the meaning of section 7 of the Workmen's Compensation Act, 1897.

Hall v. *Snowden, Hubbard, & Co.*, 47 W. R. 486, [1899] 2 Q. B. 136, is overruled by *Raine* v. *Jobson & Co.*, 49 W. R. 705, [1901] A. C. 404.—BARRETT *v.* KEMP, *C.A.*, 257; [1904] 1 K. B. 517; 73 L. J. K. B. 138; 90 L. T. 305.

21. *Employers' liability—"Accident"—Compensation—Injury—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—A workman of average health and strength unintentionally injured himself by overstrain while turning a machine in the course of his ordinary work for his employer.

Held, that this was an "accident" within the Workmen's Compensation Act, 1897, where the word is used in the popular and ordinary sense, and the workman was therefore entitled to compensation thereunder.

Decision of the Court of Appeal reversed.

Hensey v. *White*, 48 W. R. 257, [1900] 1 Q. B. 481, overruled.—FENTON *v.* THORLEY, *H.L.*, 81; [1903] A. C. 443; 72 L. J. K. B. 787; 89 L. T. 314.

22. *Employers' liability—Accident—Compensation—Medical examination of workman—Refusal to submit to examination by medical referee—Stay of proceedings—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (11).—Where a workman receiving weekly payments under the Workmen's Compensation Act, 1897, has, on being required by his employer, submitted himself to examination by a medical man provided and paid by the employer, in accordance with clause 11 of the first schedule to the Act, it is optional with the workman whether he should submit himself to further examination by one of the medical referees appointed under the Act. His refusal to submit himself to such further examination is no ground for staying proceedings in an arbitration commenced by him under the Act.—NEAGLE *v.* NIXON'S NAVIGATION CO., *C.A.*, 356; [1904] 1 K. B. 339; 73 L. J. K. B. 165; 90 L. T. 49.

23. *Employers' liability—Accident—Compensation Partial incapacity—Weekly payment—Earnings before accident—Earnings after accident—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clause* 2.—Where a workman claiming compensation under the Workmen's Compensation Act, 1897, is at the time of the arbitration only partially incapacitated, and has resumed work and is earning wages, but those wages are less than half the wages he was earning before the accident, there is no general rule by which the arbitrator ought, in assessing compensation, to award the maximum weekly payment allowed by the Act—viz., a payment of half the amount of the average weekly earnings before the accident; but he must exercise his discretion in each particular case.—WEBSTER *v.* SHARP, *C.A.*, 275; [1904] 1 K. B. 218; 73 L. J. K. B. 141; 89 L. T. 627.

24. *Employers' liability—Accident—Compensation—Railway guard—Earnings—Lodging allowances—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (1), (a), (i).—The House affirmed the decision of the Court of Appeal, *Sharpe* v. *Midland Railway Co.*, [1903] 2 K. B. 26, without hearing the respondent's counsel, holding that the lodging allowances were part of the earnings of the railway guard.—MIDLAND RAILWAY CO. *v.* SHARPE, *H.L.*; [1904] A. C. 349; 73 L. J. K. B. 666.

25. *Employers' liability—Accident—Compensation—Reviewing award—Earnings—Business set up since accident—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clauses* 2, 12.—Upon an application by employers under clause 12 of Schedule I. to the Workmen's Compensation Act, 1897, to review a weekly payment awarded to the injured workman under the Act, the arbitrator must take into consideration the fact that the workman is earning profits from a business which he set up after the accident, and which he carries on for himself.—NORMAN *v.* WALDER, *C.A.*, 402; [1904] 2 K. B. 27; 73 L. J. K. B. 461; 90 L. T. 531.

26. *Employers' liability—Accident—Compensation—Scheme of compensation—Right to take proceedings independently of Act—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 2 (b); *s.* 3, *sub-section* 1.—A workman contracted with his employers to accept a scheme of compensation in substitution for the benefits which he might claim under the Workmen's Compensation Act, 1897. The scheme, which was duly certified by the Registrar of Friendly Societies under section 3, sub-section 1, of the Act, made provision for payments in cases of fatal and non-fatal accidents, and provided that the contributions made by the employers to the fund were to be in lieu of and to exempt them from any further claims which otherwise the workmen might be entitled to prosecute as the result of accidents occurring during their employment. The workman having been killed by an accident arising out of and in the course of his employment, his widow received certain weekly payments under the scheme, and then brought an action against the employers under the Employers' Liability Act, 1880, to recover damages for the death of her husband.

Held, that she was precluded from suing by section 1, sub-section 2 (*b*), and section 3, sub-section 1, of the Workmen's Compensation Act, 1897.—TAYLOR *v.* HAMSTEAD COLLIERY CO., *C.A.*, 417; [1904] 1 K. B. 838; 73 L. J. K. B. 469; 90 L. T. 363.

27. *Employers' liability—Accident—Compensation—Seaman—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42.—A man employed on a sailing barge whose main duty is to load and unload her, but who in fact assists in her navigation, such barge being suitable for coasting purposes, and is in fact being used on the sea reaches of the Thames, is a seaman, and so is not entitled to sue for personal damages for personal injuries under the Employers' Liability Act, 1880.—CORBETT *v.* PEARCE, *K.B.D.*; [1904] 2 K. B. 422; 90 L. T. 781.

28. *Employers' liability—Accident—Compensation—"Undertakers"—"Actual use or occupation"—Warehouse—Making additions to—Factory and Workshop Act*, 1901 (1 *Ed.* 7, *c.* 22), *s.* 104—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—The respondents had contracted with the Government to erect certain pigeon-holes or cupboards in a warehouse in Woolwich Dockyard for storing military accoutrements. The warehouse had just been built for the Government by another contractor, and it consisted of two floors, each about 25 feet high, the pigeon-holes which were being erected by the respondents being on the upper floor. A workman in the employment of the respondents was killed by an accident while engaged in the work of erecting the pigeon-holes. At that time the lower floor was already occupied for the storage of military accoutrements, and a foreman and two men in the employment of the building contractor were engaged, in the same room where the respondents were erecting the pigeon-holes, finishing doors, putting on locks and painting, and the Government by their own

workmen were fixing hydraulic cranes at each end of the room. The clerk of the works for the Government was in charge of the work to see that it was properly carried out. In proceedings to assess compensation under the Workmen's Compensation Act, 1897,

Held, that the respondents had the actual use or occupation of a definite portion of the warehouse for the purpose of carrying on the work within the meaning of section 104 of the Factory and Workshop Act, 1901, and were therefore liable as the undertakers within section 7 of the Workmen's Compensation Act, 1897.

Bartell v. *Gray & Co.*, 50 W. R. 310, [1902] 1 K. B. 225, followed.—WEAVING *v.* KIRK, *C.A.*, 209; [1904] 1 K. B. 213; 73 L. J. K. B. 77; 89 L. T. 577.

29. *Employers' liability—Accident—Compensation—Undertakers—Sub-contractor—Repair of buildings—Sub-contract for supply of scaffolding—Indemnity—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 4.—J., having contracted to paint the outside of a building more than thirty feet in height, entered into a sub-contract with P., whereby P. undertook the supply, fixing, and subsequent removal of certain cradles to be used as scaffolding in the work of painting. A workman in the employment of P. was accidently killed while engaged in the work of removing the cradles. The dependants of the deceased workman took proceedings under the Workmen's Compensation Act, 1897, against both J. and P.

Held, that the applicants were entitled to an award of compensation against J., and that J. was entitled to be indemnified by P.—MCCABE *v.* JOPLING, *C.A.*, 358; [1904] 1 K. B. 222; 73 L. J. K. B. 129; 89 L. T. 624.

30. *Employers' liability—Accident—Compensation—Weekly payment—Application to review—Change of circumstances*—Res judicata—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clause* 12.—The employer of a workman receiving weekly payments under the Workmen's Compensation Act, 1897, applied for a review of the weekly payment, under clause 12 of the 1st schedule to the Act, upon the ground that the workman was no longer incapacitated for work.

The county court judge, acting upon the evidence of medical experts that the workman was not incapacitated for work, reduced the weekly payment to the nominal sum of 1d.

Subsequently the workman applied for a review of the weekly payment upon the ground that since the previous hearing he had repeatedly been refused, and had been unable to obtain, work owing to incapacity arising from his physical condition caused by the accident.

The county court judge refused to entertain the application, upon the ground that the matter was *res judicata*, and that no change of circumstances since the previous hearing was alleged which would give him jurisdiction to review the weekly payment.

Held (allowing the appeal), that the matter was not *res judicata*, and that sufficient change of circumstances was alleged to give the judge jurisdiction to entertain the application.

Crossfield & Sons v. *Tanian*, 82 L. T. Rep. 813, [1900] 2 Q. B. 629, distinguished.—SHARMAN *v.* HOLLIDAY & GREENWOOD, *C.A.*; [1904] 1 K. B. 235; 73 L. J. K. B. 176; 90 L. T. 46.

31. *Employers' liability—Accident—Compensation—Wharf—Steamship lying alongside wharf—Fireman—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—The applicant, who was a seaman on the ship's articles, was employed as a fireman on board a passenger steamer, which made daily trips from Cardiff to places in the Bristol Channel. On the evening of the 20th of August the steamer arrived at Cardiff, and was made fast to a landing-stage outside the docks, where she remained until the following morning. She was timed to leave Cardiff at 8 15 a.m. on the 21st August. At 8.17 a.m. on that day, while she was still made fast to the landing stage, with the gangways still out, the applicant, while attending to the boilers, was injured by the bursting of one of the boiler tubes. In proceedings to assess compensation under the Workmen's Compensation Act, 1897,

Held (by Collins, M.R., and Romer, L.J., Mathew, L.J., dissenting), that the applicant was not at the time of the accident employed "about" the landing-stage, and therefore not about a factory within section 7 of the Act, his employment having no connection with the purposes for which his employers had the use of the landing stage.—OWENS *v.* CAMPBELL, *C.A.*, 481; [1904] 2 K. B. 60; 73 L. J. K. B. 634; 90 L. T. 811.

32. *Employers' liability—Accident—Compensation—"Workman"—Sempstress—Whether sempstress is a "workman."*—A sempstress, who works at a sewing machine, and heats irons on a stove and irons materials, is a person "engaged in manual labour" within the definition of "workman" in section 10 of the Employers and Workmen Act, 1875, and therefore entitled to the benefit of the Employers' Liability Act, 1880.—MAYNARD *v.* PETER ROBINSON (LIMITED), *K.B.D.*; 89 L. T. 136.

33. *Truck Acts—Wages—Deductions—Set-off—Sum payable under magistrate's order.*—A workman having absented himself from work in breach of his contract of employment, his employers took proceedings against him under the Employers and Workmen Act, 1875, and obtained an order against him for payment of a sum of money by instalments payable on days on which his wages became due. On the day on which the first instalment became payable, the employers when paying him his wages deducted therefrom the amount of the instalment.

Held, that such deduction was not an offence against section 3 of the Truck Act, 1831.—WILLIAMS *v.* NORTH'S NAVIGATION COLLIERIES, *C.A.*, 564; [1904] 2 K. B. 44; 73 L. J. K. B. 575.

34. *Truck Acts—Wages—Payment otherwise than in coin—Payment in full with part to be handed back—Illegal payment.*—The respondent, a manufacturer employing several workmen, had since the Workmen's Compensation Act, 1897, adopted the practice of paying his workpeople their wages fortnightly in full, but at the time of such payment a slip of paper was handed to each workman on which was written a sum equal to 2d. in the pound on the amount of the wages handed to the workmen, and the sum so indicated on the paper was then handed back by the workman to the respondent's cashier. This system was explained and was understood by the workmen as being intended to provide for the insurance premiums which the employer himself paid to cover his own liability in respect of accidents under the Workmen's Compensation Act. In accordance with this system the respondent paid a workman his wages (£2 5s.) in full, and at the same time handed him a slip of paper on which was written 4½d., which the workman then paid to the respondent.

Held, that there was not a payment of a part of the wages otherwise than in current coin, and that the respondent had committed no offence against

section 3 of the Truck Act, 1831.—OWNER *v.* HOOPER, *K.B.D.*; 89 L. T. 130.

See also Trade Union, 1, 2.

MERGER:—

Charge—Intestacy of portioner—Owner of land next-of-kin—No administration—Merger of beneficial interest.—A father was the settlor of a portion term which became vested in his son. The father became beneficially entitled to the portion on the decease of his son intestate in the father's lifetime. The father did not take out letters of administration to the son.

Held, that it was for the benefit of the father that the portion should sink into the estate. That the father's own beneficial interest in the charge, as the sole next-of-kin of the son, had merged in the estate.—FRENCH BREWSTER, RE, WALTERS *v.* FRENCH BREWSTER, *Ch.D. Swinfen Eady, J.*, 377; [1904] 1 Ch. 713; 73 L. J. Ch. 405; 90 L. T. 378.

See also Bankruptcy, 8.

METROPOLIS:—

1. *Building—Drainage of houses on low-lying land—Recovery of penalty—Time for commencing proceedings—London Building Act*, 1894 (57 & 58 *Vict. c. cxxiii.*), *ss.* 122, 200, *sub-section* 9.—Section 122 of the London Building Act, 1894, enacts that "It shall not be lawful for any person upon land of which the surface is below the level of Trinity high-water mark, and which is so situate as not to admit of being drained by gravitation into an existing sewer of the council, to erect any building to be used wholly or in part as a dwelling-house . . . except with the permission of the council."

Low-lying land, if it is situate at such a level that the drainage from it finds its way by gravitation into an existing sewer of the council under the ordinary conditions of the sewer, does not come within the above prohibition merely because that sewer during a substantial number of days in each year is so surcharged with flood water that the drainage is then prevented from passing into it.

Proceedings to recover a penalty under section 200, sub-section 9, of the Act, for contravening the above section are in time if they are taken within six months of the completion of the erection of the building, although more than six months have elapsed since the commencement of the erection.—ELLIS *v.* LONDON COUNTY COUNCIL, *K.B.D.*, 381; [1904] 1 K. B. 283; 73 L. J. K. B. 151; 90 L. T. 206.

2. *Building—Raising party-wall by building owner—Lease of premises—Subsequent user of raised party-wall by adjoining owner—Right of lessee to proportion of expense of raising wall—London Building Act*, 1894 (57 & 58 *Vict. c. cxxiii.*), *ss.* 88-95.—The owner of a house in London, acting under the powers of the London Building Act, 1894, raised at his own expense the party-wall separating that house from the adjoining one. Subsequently he granted a lease of the house to the appellant for twenty-one years. The respondent, who was the owner of the adjoining house, being desirous of rebuilding the house, served notice on the appellant of the work which he proposed to execute, and which included the use of the raised party-wall beyond the use thereof made by him before the alteration. The appellant did not express his consent to the notice, and the matters in difference were thereupon referred to arbitration in accordance with the provisions of the Act. The appellant claimed (*inter alia*), under section 95, sub-section 2, of the Act, a proportion of the original expense of raising the party-wall, such claim being made in respect of the increased user thereof by the respondent. The arbitrators awarded the appellant a sum of money in respect of this claim.

Held, that the arbitrators had no jurisdiction to entertain the claim, as the Act only contemplated a proportion of the original expense of raising the party-wall being paid to the person who actually incurred the expense, and not to a person who became tenant after the expense had been incurred.—STONE AND HASTIE, RE, *C.A.*, 130; [1903] 2 K. B. 463; 72 L. J. K. B. 846; 89 L. T. 353.

3. *Contract between members of the corporation and a company—Interest of a member as shareholder—"Interested or concerned in any company"—City of London Sewers Act*, 1848 (11 & 12 *Vict. c clxiii.*), *s.* 42—*City of London Sewers Act*, 1851, *s.* 53.—The 42nd section of the City of London Sewers Act, 1848, provides that any contract entered into by any commissioner of sewers or member of the corporation, by or on behalf of the commissioners, who is "directly or indirectly interested or concerned" therein shall be void. The prohibition of such contracts extends to the case where members of the corporation are shareholders in a company at the time when the contract with the City Corporation is entered into, but does not apply where members subsequently become shareholders in a company to which the contract is transferred.

Decision of the Court of Appeal (49 W. R. 306, [1901] 1 Ch. 602) affirmed.—CITY OF LONDON ELECTRIC LIGHTING CO. *v.* LONDON CORPORATION, *H.L.*, 158; [1903] A. C. 434; 72 L. J. Ch. 737; 89 L. T. 310.

4. *Drain or sewer—Combined system under order—Authority given to surveyor to approve by sanitary authority.*—In 1868 the owner of certain houses applied, in pursuance of the Metropolis Management Act, 1855, for permission to drain the houses by means of a combined drain.

The application was filed in a book and signed by the surveyor of the sanitary authority as approved, in pursuance of a resolution passed by such sanitary authority authorizing the surveyor "to grant applications for house drainage when they are regular, involving no special point for the consideration of the board."

There was no other evidence of the approval of the sanitary authority or of an order.

Held, that the pipe draining the houses was a sewer and not a drain.—HIGH *v.* BILLINGS, *K.B.D.*; 89 L. T. 550.

5. *"Drain" or "sewer"—Order for combined drainage—Plan—Connection not shown on plan—Unauthorized act.*—A metropolitan vestry passed a resolution adopting a plan for the combined drainage of two contiguous houses, Nos. 27 and 29, in a street. The plan merely showed that the drains, which were represented by single lines, passed diagonally underneath the houses and united in front of them before entering the sewer in the street; it did not show in detail all the particular drains which were intended to be provided within the combined area. On the drains being constructed, a connection was made between the drain of No. 29 and a sink at the back of No. 27. It was found as a fact that this connection had been made with the approval of the vestry's surveyor.

Held, that the drain of No. 29 was a "drain" and not a "sewer" within section 250 of the Metropolis Management Act, 1855.—HEAVER'S EXECUTORS *v.* FULHAM BOROUGH COUNCIL, *K.B.D.*; [1904] 2 K. B. 383; 73 L. J. K. B. 715.

6. *Drainage—Removal of old disused drains—Byelaw or regulation and direction—Metropolis Manage-*

ment Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 76, 83.—By regulation 29 of the respondents all disused drains were to be broken up and destroyed, and the materials and foul earth removed and dry earth, ballast, or brick rubbish substituted.

By section 83 of the Metropolis Management Act, 1855, a penalty is provided if any drain thereinbefore mentioned is found not to have been provided according to the directions or regulations of the respondents.

The appellants constructed new drains, which were connected with the respondents' sewer. On the premises were old and disused drains which were not physically joined or connected with the new drains. The old drains were not taken out.

Held, that the regulation was rightly made, and the appellants were properly convicted for constructing the new drain not in accordance with the directions of the respondents.—LONDON SCHOOL BOARD *v.* FULHAM BOROUGH COUNCIL, *K.B.D.*; 90 L. T. 116.

7. *Drains—Bye-laws—Reconstruction of drain of old building—Necessity of intercepting trap—Work "in any building"—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 202.—By a bye-law made under the powers of the Metropolis Management Act, 1855, it was provided that every person who should construct or reconstruct any pipe or drain, or other means of communicating with sewers, so far as he should effect any such works "in any building" erected before the confirmation of the bye-laws, should provide in such drain a suitable and efficient intercepting trap.

Held, that the word "in"—in the words "in any building"—meant, not "inside the building," but "in connection with the building," and that consequently the bye-law applied to the reconstruction of a drain in connection with an old building erected before the confirmation of the bye-laws, as the reconstruction of the drain was a work "in" such building, although such drain was outside the building, and that such drain ought to be reconstructed with an efficient intercepting trap, as required by the bye-law.—KINGSLAND *v.* HABEN, *K.B.D.*; 90 L. T. 449.

8. "*Dwelling-house*"—"*To be inhabited or adapted to be inhabited by persons of the working class*"—*Intention and adaptation of houses for persons of working class only—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 13 (5), 150—*London Building Act*, 1894 (*Amendment*) *Act*, 1898 (61 & 62 *Vict. c. cxxxvii.*), *s.* 4.—By section 13 (5) of the London Building Act, 1894, a person may under the conditions therein prescribed, without the consent of the London County Council, alter or re-erect a building or structure existing at the time of the passing of the Act, but so that such re-erected building shall not be within the prescribed distance from the centre of the roadway except in so far as the existing building was within the prescribed distance; and the sub-section ends with the proviso, as amended by section 4 of the London Building Act, 1894 (Amendment) Act, 1898: "Provided always, that no dwelling-house to be inhabited or adapted to be inhabited by persons of the working class shall without the consent of the council be erected or re-erected within a distance of twenty feet from the centre of the roadway to a height exceeding the distance of the front or nearest external wall of such building from the opposite side of such street."

Held, that the words "to be inhabited" mean "intended to be inhabited," and that, with regard to such intention, the proper test to apply is: If the builder constructs the houses in such a way that it is practically certain that when constructed they would ultimately be inhabited by persons of the working class, and that their ultimate destination would be to become working-class tenements, although they might be in the hands of intermediate tenants, then they are "dwelling-houses to be inhabited by the working class"; and the mere fact that the builder had no intention that the houses should be occupied by persons of the working class only, but that he intended them for occupation by anyone who might take them, does not prevent them from being "dwelling-houses to be inhabited by the working class."

Held, further, with regard to the question of adaptation, that the proper test as to whether the houses are "adapted to be inhabited" by persons of the working class is not whether the houses are specially adapted for habitation by persons of the working class only, but whether they are, by reason of their structure, substantially adapted for habitation by persons who live in the same way as the working class live—that is, in small flats or separate tenements in the same house—and who would be liable to the same danger of overcrowding.—CROW *v.* DAVIS, *K.B.D.*; 89 L. T. 407.

9. *Notice before beginning to build—Authority conferred on dock company by private Act inconsistent with public Act—Surrey Commercial Dock Act*, 1894 (57 & 58 *Vict. c. clxxii.*), *s.* 4—*Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 76.—The appellants, a dock company incorporated by Act of Parliament, obtained in 1894 statutory authority to extend and alter their works. In order to carry out those alterations it became necessary for the appellants to pull down a certain building and erect another on another site within the dock premises. This work they carried out, but gave no notice to the local authority of their intention to erect the new building.

Held, that there was no duty on the part of the appellants to give such notice of their intention to build under section 76 of the Metropolis Management Act, 1855, which section provides that before beginning to lay or dig out the foundations of any new building seven days' notice is to be given to the local authority by the person intending to build, as the control of the local authority under that Act was inconsistent with the powers conferred upon the appellants under their statutory authority.—SURREY COMMERCIAL DOCKS CO. *v.* BERMONDSEY CORPORATION, *K.B.D.*, 446; [1904] 1 K. B. 474; 73 L. J. K. B. 293; 90 L. T. 123.

10. *Obstruction—Information laid by an inspector of streets—"On behalf of" borough council—Validity.*—An inspector of streets may lay an information for an offence under section 60 (7) of the Metropolitan Police Act, 1839, and it makes no difference that it purports to be laid "on behalf of" a borough council.—ALLMAN *v.* HARDCASTLE, *K.B.D.*; 89 L. T. 553.

11. *Open space—Hoarding—Adjoining landowner—Access of light—Building—Right to sue without joining Attorney-General—Metropolitan Open Spaces Acts*, 1877 (40 & 41 *Vict. c.* 35), *s.* 1; 1881 (44 & 45 *Vict. c.* 34), *s.* 7; 1887 (50 & 51 *Vict. c.* 32), *s.* 4—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.—A local authority has, under the Metropolitan Open Spaces Acts, 1877, 1881, and 1887, and the Disused Burial Grounds Act, 1884, control over open spaces for limited purposes only. It cannot, for example, use its interest in a disused burial ground either for the purpose of compelling an adjoining owner to give the public

a right of way elsewhere or to prevent the acquisition by an adjoining owner of any rights in respect of any new building he may erect.

B., an adjoining landowner, erected flats overlooking an open space. The local authority threatened to erect a hoarding in the open space which would interfere with B.'s lights. B. thereupon brought an action for an injunction to restrain the council from erecting any such screen as would interfere or cause damage to himself and the tenants of his flats.

Held, that B. was entitled to an injunction.

Judgment of Buckley, J. (51 W. R. 109), reversed. —BOYCE *v.* PADDINGTON BOROUGH COUNCIL, *C.A.*, 114; [1903] 2 Ch. 556; 72 L. J. Ch. 695; 89 L. T. 383.

12. *Public health—Nuisance—Intimitation notice threatening proceedings—Repair of sewer in consequence of such notice—Right of owner to recover cost of work from sanitary authority—Voluntary work—Work done under compulsion—Public Health (London) Act,* 1891 (54 & 55 *Vict. c.* 76), *ss.* 3, 4.—The plaintiff, the owner of certain premises, was served by the defendants with an intimation notice under section 3 of the Public Health (London) Act, 1891, of the existence of a nuisance on his premises, and requiring him to abate the same within seven days, failing which the sanitary authority would commence proceedings against him by the service of a statutory notice. The nuisance was specified as a defective "drain." The plaintiff complied with the notice, and during the course of the work it was discovered that the so-called "drain" was in fact a "sewer," which was legally repairable by the defendants. The plaintiff thereupon brought an action to recover from the defendants the money he had expended in complying with their notice.

Held, that the plaintiff could not recover such expenses, because work done in compliance with an intimation notice under section 3 of the above Act, as distinguished from an abatement notice under section 4, must be regarded as work done voluntarily, and not under compulsion.

Thompson and Norris Manufacturing Co. v. *Hawes*, 59 J. P. 580, followed —OLIVER *v.* CAMBERWELL CORPORATION, *K.B.D.*, 511; 90 L. T. 285.

13. *Public health—Public convenience—Approaches—Subway—Trespass—Subsoil of roadway and footway—Injunction—Public Health (Metropolis) Act,* 1891 (54 & 55 *Vict. c.* 76), *s.* 44.—By the Public Health (London) Act, 1891, s. 44, power was given to a sanitary authority to construct and maintain public sanitary conveniences in situations where they deem the same to be required, and to defray the expense of providing such conveniences and of any damage occasioned to any person by the construction thereof, and the expense of keeping the same in good order; and for this purpose the subsoil of the road, exclusive of the footway adjoining a building, was vested in the sanitary authority.

A sanitary authority constructed under the middle of a public thoroughfare public lavatories, which were so built as to infringe upon the subsoil of the plaintiffs, who were the owners of certain premises on one side. On each side of the street were staircases which communicated with subways, which ran from side to side of the street, and so communicated with the convenience. The subways were capable of being used as the means of persons passing from one side of the street to the other, and were wider than was absolutely necessary for persons using these conveniences. The statute did not empower the sanitary authority to construct subways.

Held, that, as it appeared from the evidence, the real object of the defendants was to construct a means of passage by which persons could cross the road in safety, it was a subway; that they had exceeded their statutory powers, and that the plaintiffs were entitled to an injunction against the defendants.

Decision of Joyce, J. (50 W. R. 268, [1902] 1 Ch. 269), reversed.—LONDON AND NORTH-WESTERN RAILWAY CO. *v.* WESTMINSTER CORPORATION, *C.A.*, 596; [1904] 1 Ch. 759; 73 L. J. Ch. 386; 90 L. T. 461.

14. *Rates—Lands taken compulsorily—Assessment for poor rate—Liability for deficiency in general rate—Lands Clauses Consolidation Act.* 1845 (8 & 9 *Vict. c.* 18), *s.* 133—*London Government Act,* 1899 (62 & 63 *Vict. c.* 14), *s.* 10 (2).—Section 10 of the London Government Act, 1899, under which the general rate and poor rate are to be made and levied as one rate as if it were a poor rate, does not increase the liability imposed by section 133 of the Lands Clauses Consolidation Act, 1845, on promoters of undertakings to make good the deficiency in the poor rate caused by their taking lands for the purposes of their undertaking, and they are only liable to make good the deficiency in that proportion of the general rate which represents the poor rate.

Decision of Wright, J. (51 W. R. 255) affirmed. —ISLINGTON CORPORATION *v.* LONDON SCHOOL BOARD, *C.A.*, 115; [1903] 2 K. B. 354; 72 L. J. K. B. 677; 89 L. T. 53

15. *Smoke—Chimney of club—Smoke from cooking ranges and heating apparatus—"Private dwelling-house"—Public Health (London) Act,* 1891 (54 & 55 *Vict. c.* 76), *s.* 24 (b).—The chimney of a club of 750 members, such club containing the usual club accommodation, emitting smoke from the cooking ranges and the furnaces of a vertical boiler used for heating the premises, is not the chimney of a "private dwelling-house" within the exception contained in section 24 (*b*) of the Public Health (London) Act, 1891.—MCNAIR *v.* BAKER, *K.B.D.*; [1904] 1 K. B. 208; 73 L. J. K. B. 120; 90 L. T. 24.

16. *Smoke nuisance—Notice to abate—Notice to prevent recurrence—Prohibition order—Specifying works—Evidence—Public Health (London) Act,* 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 5, 130, *Schedule III.*—Before a notice is served under section 4 (2) of the Public Health (London) Act, 1891, requiring the person served to do what is necessary for preventing a recurrence of the nuisance, it is not necessary that a notice requiring such person to abate the nuisance under section 4 (1) shall have been served previously or included in such notice. Therefore, a notice having been given under section 4 (2), a court of summary jurisdiction can make an order under section 5 prohibiting a recurrence of the nuisance and specifying works to be executed, where the only notice served has been under section 4 (2), if such court is satisfied that the nuisance, although abated, is likely to recur.

On the hearing of informations and complaints under section 5 (1) (*b*), the respondents proved the nuisances alleged, but offered no evidence as to how the black smoke which caused the nuisances had been caused or as to what works were necessary to abate or prevent such nuisances.

The appellants' witnesses stated that the black smoke might have been caused by two furnace doors being open at the same time.

The magistrate determined that the respondents were entitled to a prohibition order, and thereupon the appellants required that the order should specify

the works they were to execute under section 5 (5), but insisted that, the case being closed, the magistrate was precluded from hearing further evidence as to the works necessary. The magistrate therefore added to his prohibition order a direction to the appellants to fit up apparatus to prevent the furnace doors being opened simultaneously.

Held, that the order was valid. — CENTRAL LONDON RAILWAY *v.* HAMMERSMITH CORPORATION, *K.B.D.*; 90 L. T. 645.

17. *Street opened by water company—Reinstatement of street by contractor employed by local authority—Power of local authority to recover expenses of supervising and superintending the works—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 114. —Where the soil of a street in the metropolis has been opened up by a water company, the local authority can, by virtue of section 114 of the Metropolis Management Act, 1855, recover the expenses of superintending and supervising the filling in and making good the soil so opened up.—NEW RIVER CO. *v.* WESTMINSTER CORPORATION, *K.B.D.*; 90 L. T. 792.

18. "*Uniting*" *of buildings—Blocks of flats commenced as separate buildings but finished as single building.*—Section 77, sub-section 1, of the London Building Act, 1894, which prohibits the "uniting" of buildings except where they are wholly in one occupation or are constructed or adapted to be so, applies only to the uniting of buildings completely erected, in the first instance, as separate structures, and does not apply to the uniting of separate buildings in the course of erection for the purpose transforming them into and finishing them as a single separate structure.

Semble, that pushing a covered way between two buildings is not "uniting" the buildings within the sub-section.—GOODCHILD *v.* MATTHEWS, *K.B.D.*; 89 L. T. 369.

See also Gas, 1; Highway, 7; Landlord and Tenant, 11; Local Government, 6, 7, 9.

MINES:—

1. *Owner—Duty to fence—Public well in shaft of disused mine—Metalliferous Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 77), *ss.* 13, 41—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s* 64.—By section 64 of the Public Health Act, 1875, it is provided that all existing wells "shall vest in and be under the control of" the local authority.

By section 13 of the Metalliferous Mines Regulation Act, 1872, it is provided that "Where any mine . . . is abandoned, or the working thereof discontinued . . . the owners thereof, and every other person interested in the minerals of the mine, shall cause the top of the shaft . . . to be kept securely fenced for the prevention of accidents."

By section 41 of the same statute "the term 'mine' includes . . . all the shafts . . . in and adjacent to a mine . . . and belonging to the mine"; and "the term 'owner' . . . means any person or body corporate, who is the immediate proprietor, or lessee, or occupier of any mine . . . but does not include a person or body corporate who . . . is merely the owner of the soil and not interested in the minerals of the mines."

The shaft of an abandoned mine having become flooded with water, was used as a public well, and as such became vested in the defendants, the local authority. Owing to the top of the shaft being unfenced a horse belonging to the plaintiff fell down the well and was injured. In an action to recover from the defendants damages arising, owing to their negligence in not fencing the wall as required by section 13 of the Metalliferous Mines Regulation Act, 1872,

Held, that the defendants were not the "owners" of the mine or of the shaft within the meaning of section 41 of that Act, and were, therefore, not liable in an action for damage sustained owing to the top of the shaft not having been fenced as required by section 13.—KNUCKEY *v.* REDRUTH RURAL COUNCIL. *K.B.D*, 558; [1904] 1 K. B. 382; 73 L. J. K. B. 265; 90 L. T. 226.

2. *Right to let down surface—Inclosure Act—Award—Manorial rights.*—By an Inclosure Act and award certain waste land was allotted amongst commoners. The Act provided that nothing therein contained should be construed to diminish the rights of the lord of the manor in respect to his seignory and royalties except in respect of his ownership of the soil to be enclosed. And the Act further provided that the lord and his successors should hold and enjoy all mines and quarries under the waste together with the liberty of searching for, winning and working the same, as fully and freely as if that Act had not been passed, and that without making or paying any satisfaction for so doing. And the Act further provided a summary means by which any person injured through the lord's working of the mines should be compensated by the occupiers of allotments in the same township.

Held, in action brought by surface owners against an assign of the lord to restrain by injunction any injury to the surface by mining operations, that there was nothing in the Inclosure Act to deprive a surface owner of his common law right of support (the clause as to compensation in the Act relating to surface user only), and that consequently the plaintiffs were entitled to an injunction.—BISHOP AUCKLAND INDUSTRIAL SOCIETY *v.* BUTTERWORTH COLLIERY, *Ch.D. Farwell, J.*; 90 L. T. 149.

MISTAKE:—

Banker—Customer—Money paid under mistake of fact.—The defendants, who were foreign bankers, were in the habit of making advances to K., who then purchased goods which the defendants held as security; when K. found a purchaser he assigned the right to receive the purchase-money to the defendants, who accordingly released the goods. K. also carried on the same system with B. & Co. The plaintiffs bought from K. two parcels, the one released by the defendants and the other by B. & Co. K. instructed the plaintiffs to pay the defendants and B. & Co. respectively for the goods so purchased. By mistake the plaintiffs paid both sums to the defendants, who credited K.'s account, notifying K. of their having done so. The defendants acting *bonâ fide* continued to make advances to K., who knew of the mistake, but did not disclose it, and afterwards became bankrupt. The plaintiffs sought to recover from the defendants the sum which should have been paid to B. & Co. as money paid under mistake of fact.

Held, that the defendants were liable to refund the money which had been paid to them under a mistake of fact, even though they had paid it away to a third party in ignorance of the mistake.

Judgment of Bigham, J. (51 W. R. 541), affirmed —CONTINENTAL CAOUTCHOUC AND GUTTA PERCHA CO. *v.* KLEINWORT, *C.A.*, 489; 90 L. T. 474.

See also Company, 13.

MORTGAGE:—

1. *Assignment—Mortgage debt—Assignment by way of sub-mortgage—Notice of assignment given by executors of sub-mortgage—Validity of notice—Judica-*

ture Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6—*Mortgage by client to solicitor—Receipt for sum exceeding actual advance—Right of assignee to rely on receipt—Constructive notice—Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 3, *sub-section* 1.—The defendants, who were clients of H., a solicitor, executed a mortgage deed in favour of L., who was a clerk in the service of H., to secure £9,500, the receipt of which sum they thereby acknowledged. L. assigned the mortgage debt and security to H., and H. by way of sub-mortgage assigned the debt and security to E., who was also a client of his, to secure an advance of £6,000. Neither H. nor E. gave the defendants notice of either assignment. After the death of E. his executors gave notice in writing to the defendants of both the assignments, and brought an action on the covenant for repayment contained in the original mortgage.

Held, that the notice given by the plaintiffs to the defendants was good notice under section 25, sub-section 6, of the Judicature Act, 1873; and that, even if a less sum than £9,200 had actually been advanced to the defendants, the plaintiffs were entitled to rely on the statement by the defendants in the original mortgage that they had received that sum in full.

Bickerton v. *Walker*, 34 W. R. 141, 31 Ch. D. 151, followed.—BATEMAN *v.* HUNT, *C.A.*, 609.

2. *Clog on equity of redemption—Security for loan—Stipulation that mortgagee may purchase at fixed price within definite time.*—A stipulation in a mortgage that the mortgagee is to have the option of purchasing the whole or any part of the mortgaged security within a definite time is invalid, as a clog on the equity of redemption, and the rule applies to a mortgage by a company of its debenture stock.

Decision of the Court of Appeal (51 W. R. 439, [1903] 2 Ch. 1) affirmed.—SAMUEL *v.* JARRAH TIMBER CORPORATION, *H.L.*, 673; [1904] A. C. 323; 73 L. J. Ch. 526; 90 L. T. 731.

3. *Equitable mortgage—Deposit of title deeds with letters—Subsequent mortgage—Registration—Priority—Consideration—Irish Registry Act* (6 *Anne, c.* 2).—Equitable charges on land are within the Irish Statute of Anne (6 Anne, c. 2).

S., whose account with the respondent bank was overdrawn, was being pressed by the manager to reduce his overdraft. At that time S. had contracted to purchase an estate, and S. undertook by letter to lodge the deed of conveyance, when executed, with the bank for the purpose of securing his overdraft, and further wrote for forbearance and that he would put his account in order. Later on, in 1895, the estate was conveyed to S., subject to a mortgage (as to which there was no question), and he shortly afterwards deposited the conveyance with the respondent bank without further memorandum, and no registration of letters or any other document was made. The charge of the appellants (trustees of S.'s marriage settlement) was created by a deed of mortgage dated and registered in 1896. The appellants had no notice of the bank's transaction with S.

Held, that forbearance was for a reasonable time extended to S., who expressly or impliedly asked for it, and that the letters amounted to a valid charge in equity which attached to S.'s interest in the estate when the property was conveyed to him, and constituted a transfer of his interest by way of security to the bank; that this was a conveyance within the Registration Act (6 Aune, c. 2), and not having been registered must be postponed to the appellants' registered mortgage.

Alliance Bank v. *Broom*, 2 Dr. & Sm. 289, approved.

Decision of the Court of Appeal in Ireland, *sub. nom. In re Stevenson's Estate.* [1902] 1 Ir. Rep. 23, reversed.—FULLERTON *v.* PROVINCIAL BANK OF IRELAND, *H.L.*, 238; [1903] A. C. 309; 72 L. J. P. C 79; 89 L. T. 79.

4. *Foreclosure—Account—Receiver—Repairs—Mortgagee not in possession—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 24, *sub-section* 8 (*i.*) (*ii.*) (*iii.*).—A receiver, not in possession of mortgaged premises, has no power to make repairs without the written authority of the mortgagee, and then only to the extent of the rents and profits. In taking an account, therefore, in foreclosure proceedings, the mortgagee is not entitled to the cost of such repairs made without such written authority.—WHITE *v.* METCALF, *Ch.D. Kekewich, J.*, 280; [1903] 2 Ch. 567; 72 L. J. Ch. 712; 89 L. T. 164.

5. *Freeholds—Mortgagee in possession—Mortgagor barred after death of mortgagee—Devolution of mortgaged land from person entitled at date of bar—Realty or personalty—Trust for sale.*—A mortgagee of freeholds under an instrument, which was in the form of a trust for sale, entered into possession in 1861, and so remained until his death. He died in 1864, leaving all his property to his wife (whom he appointed executrix) for life, but otherwise intestate. His brother was his heir-at-law and sole next-of-kin. His wife entered into possession and so remained until her death in 1900. The equity of redemption was barred in 1879.

Held, that on the death intestate in 1880 of the brother, his moiety of the mortgaged premises, having become realty in 1879, passed to his coheiresses.—LOVERIDGE, RE, PEARCE *v.* MARSH, *Ch.D. Buckley, J.*, 138; [1904] 1 Ch. 518; 73 L. J. Ch. 15; 89 L. T. 503.

6. *Guarantee—Principal and surety—Covenant by mortgagor and surety to pay mortgage debt—Surety's liability limited—Covenant by mortgagor alone to insure debt against loss—Contract with insurance office—Co-surety.*—In a mortgage D. joined with the mortgagor in a joint and several covenant for repayment on demand, on failure to comply with which demand the statutory power of sale was to be exercisable without further notice. D.'s liability was limited to £1,000. The mortgagor alone covenanted with the mortgagees to insure in their names the debt and interest against loss with the plaintiff corporation. In a proposal for insurance made to the corporation, D.'s suretyship was mentioned, and this proposal was incorporated in and was to be deemed the basis of the "contract of "insurance" intended by, a contract (headed "Mortgage Insurance Policy") by which the corporation agreed that if the mortgagees should become entitled to exercise their power of sale, and should give notice thereof to the corporation, the latter would, after six months from receipt of a claim from the mortgagees, pay to them the principal moneys for the time being owing under the mortgage and the interest within a specified limit. Thereupon the mortgage debt and interest were to be transferred to the corporation, with all securities for the same. This contract contained no express mention of D.'s suretyship or of his being a party to the mortgage. The mortgagor having been made default, D. having died, and a sale of the property under the power having produced less by £984 12s. 6d. than was owing, the corporation, who had paid that sum, brought this action to recover it from D.'s estate under his guarantee. D.'s executrix claimed contribution from the corporation as being co-sureties with D.

Held, (1) that the contract was one of guarantee and not of insurance, but (2) (reversing the decision of Swinfen Eady, J., *ante*, p. 93, [1903] 2 Ch. 670), that the corporation were not co-sureties with D., but were sureties for him and the mortgagor, on the principle of *Craythorne* v. *Swinburne*, 14 Ves. 160, and that D.'s estate was not entitled to contribution, but must bear the whole deficiency.—DENTON'S ESTATE, RE, LICENSES INSURANCE CORPORATION *v* DENTON. *C.A.*. 484; [1904] 2 Ch. 178; 73 L. J. Ch. 465; 90 L. T. 698.

7. *Leaseholds — Mortgage by sub-demise prior to Conveyancing Act*, 1881 —*Statutory transfer subsequent to Act—"Benefit of mortgage"—Legal estate—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 27, *Schedule III., Part II.*—On granting or assigning a term of years a deed will pass the legal estate in the term, however inartistic, untechnical, or uncertain the words may be, provided that the intention that the legal estate shall pass is apparent from the terms of the deed, but in the absence of technical or proper words to pass the legal estate it will not be held to pass unless the intention to part with the possession is plain. Thus where a lessee executed a mortgage of his leaseholds by sub-demise before the Conveyancing and Law of Property Act, 1881, and the executors of the mortgagee, after the passing of that Act, by a transfer in the statutory Form A. given in Part II. of Schedule III., conveyed and transferred "the benefit of the said mortgage" to one of themselves,

Held, that the legal estate in the mortgaged leaseholds did not pass to the transferee.—BEACHEY, RE, HEATON *v.* BEACHEY, *C.A.*, 309; [1904] 1 Ch. 67; 73 L. J. Ch. 68; 89 L. T. 685.

8. *Mortgage to friendly society—Sale by mortgagees —Purchase by official of society—Sale set aside.*—In a sale by mortgagees, who were the trustees of a friendly society, the mortgaged property was purchased by a member of the investment committee which had charge of realising the mortgage securities. At the sale the mortgagor had bid more than sufficient to cover principal, interest, and costs. In an action by the mortgagor against the mortgagees and the purchaser,

Held, that under the circumstances under which the sale was carried out the plaintiff had not been fairly treated; that the *onus* lay on the defendants of proving the *bona fides* of the transaction, and that as this *onus* had not been discharged the sale must be set aside, following *Farrar* v. *Farrars*, 37 W. R. 196, 40 Ch. D. 395, and *Martinson* v. *Clowes*, 30 W. R. 795, 21 Ch. D. 857.—HODSON *v.* DEANS, *Ch.D. Joyce, J.*, 122; [1903] 2 Ch. 647; 72 L. J. Ch. 751; 89 L. T. 72.

9. *Priority—Equitable charge—Future property—Expectancy under will—Notice—Renunciation of sole executor—Executor mortgagor—Administrator—Property in court in lunacy.*—Notice cannot be given so as to affect the priorities of incumbrances to a person who is himself the mortgagor both in the case of the incumbrance first created and of the subsequent incumbrances. The priorities of incumbrancers of future property are regulated by the order in which notices of their charges are in fact given to the legal holder of the property, after it has come into existence, and as between incumbrancers who have so given notice on the same day, in the order of the creation of their charges; the fact that the earlier incumbrancer has not been guilty of any negligence in the giving of his notice at a later date than the notice given by the later incumbrancer, is immaterial.

Whether, where the property charged is an expectancy under a will, an effective notice can be given to a sole executor who afterwards renounces probate, *quære.*

Decision of Buckley, J. (*ante*, p. 313), affirmed.—DALLAS, RE, *C.A.*, 567; 73 L. J. Ch. 365; 90 L. T. 177.

10. *Priority—Portion—Mortgage pursuant to order of court to raise two out of three portions charged on real estate.*—Under the will of a testator, who died in 1851, three sums of £5,000, for children's portions, were charged on his real estate. In 1880 two of the portions had become raiseable, and in an action brought for the purpose of clearing the estate from charges an order was made in 1882 directing that the two portions should be raised by a mortgage of the estate to a person who was willing to lend the money, such mortgage to be settled by the judge. The proposed mortgagee was aware of all the circumstances and of the purposes for which the money to be advanced was required. The mortgage as settled contained recitals of the title to the portions and of the proceedings in the action, and was expressed to be without prejudice to any charge which might be subsisting in the mortgaged hereditaments under the will. The money was paid by the mortgagee into court, and was afterwards distributed among the persons interested. In an action by the mortgagee claiming priority over the persons interested in the third portion,

Held, that, having regard to the circumstances of the action and the actual terms of the mortgage, the mortgagee was only entitled to a charge on the estate for the two sums of £5,000, *pari passu* with the third sum of like amount.

Decision of Kekewich, J. ([1902] 2 Ch. 117), affirmed.—NIGHTINGALE *v.* REYNOLDS, *C.A.*, 2; [1903] 2 Ch. 236; 72 L. J. Ch. 564; 88 L. T. 654.

11. *Tacking — Transfer — Covenant to pay as collateral security—Construction of transfer deed.*—Certain lands were mortgaged to secure £1,500. The equity of redemption in the said lands was, with other property, subsequently mortgaged to secure £2,500. The £1,500 mortgage security was transferred to the £2,500 mortgagee. The tenant for life of all the mortgaged property was a party to the deed of transfer, and thereby covenanted to pay the £1,500, subject to a proviso that, as between himself and the owners of the mortgaged property, his covenant was to be only a collateral security, but notwithstanding the mortgagee was at liberty to enforce either security.

The representatives of the mortgagee brought an action against the representatives of the tenant for life to recover the amount due upon their securities, and claimed to be entitled to tack the latter mortgage to the earlier one.

Held, by Romer and Stirling, LJJ. (Vaughan Williams, L.J., *dissentiente*), that on the true construction of the transfer the tenant for life was, as between himself and the mortgagee, a principal and not a surety. Consequently there was no restriction on rights of the mortgagee in dealing with his securities, and the plaintiffs were entitled to tack the latter to the earlier mortgage.—NICHOLAS *v.* RIDLEY, *C.A.*, 226; [1904] 1 Ch. 192; 73 L. J. Ch. 145; 89 L. T. 653.

See also Apportionment, 1; Bankruptcy, 8; Company, 18; Landlord and Tenant, 7; Fixtures, 1; Inland Revenue, 3; Railway, 4; Trustee, 1; Will, 16.

NEGLIGENCE:—

Statutory powers—"Damage sustained by reason or in consequence of the exercise of such powers"—Compensation—Negligence — Burden of proof—

Telegraph Act, 1863 (26 & 27 *Vict. c.* 112), *ss.* 6, 7 —*Telegraph Act*, 1868 (31 & 32 *Vict. c.* 110), *s.* 2. —Where a public body was empowered by statute to carry out certain works and it was provided in the same statute that compensation should be paid to any person sustaining damages by reason or in consequence of the exercise of such powers, it was held that if a public body relied on the negligence of its agents or contractors as relieving it from all liability under the statute, it must discharge the onus of proving such negligence.—ST. JAMES' AND PALL MALL ELECTRIC LIGHT CO. *v.* REX, *Ch.D Farwell, J.*; 90 L. T. 344.

NEWFOUNDLAND, LAW of:—

1. *Newfoundland Whaling Industry Act*, 1902—*Construction—Licences.*—Licences under the Newfoundland Whaling Industry Act, 1902, can only be granted by the Governor in Council in the manner prescribed by the Act. A receipt for a licence fee, not granted by the Governor and not containing words appropriate to the grant of a licence, is not a licence, nor evidence of a contract to grant one.—NEWFOUNDLAND WHALING CO. *v.* GOVERNMENT OF NEWFOUNDLAND, *P.C.*; [1904] A. C. 399.

2. *Occupation of land—Right of occupier as against wrongdoer—License to cut timber—Effect of—Consolidated Statutes of Newfoundland* (*Second Series*), *c.* 13, *s.* 51.—The effect of a license to cut timber on Crown land under c. 13, s. 51, of the Consolidated Statutes of Newfoundland (Second Series) is to confer a title to the land and an exclusive right of occupation in the licensee, subject to the reservations contained in the Act; and therefore such licensee has lawful possession of timber lying on the land which was cut by a trespasser before the date of the license, and is entitled to damages for its removal.

Judgment of the court below affirmed.

The Winkfield, 85 L. T. Rep. 668, [1902] P. 42, approved.—GLENWOOD LUMBER CO. *v.* PHILLIPS, *P.C.*; [1904] A. C. 405; 90 L. T. 741.

NEW SOUTH WALES, LAW of:—

1. *Grant of land—Reservation to grantor—Omission from subsequent grant—Effect.*—In 1829 the Crown granted land adjoining the sea to a corporation, reserving (*inter alia*) "all such part of the said piece or parcel of land hereinbefore described as may be within 100 feet of high-water mark on the sea coast, or in any creek, harbour, or inlet." In 1830 the corporation, in execution of a previous contract, sold the land to D., through whom the respondents claimed, and D. executed a mortgage to the corporation to secure part of the purchase-money, which was then unpaid. The land was conveyed to D. "to hold the same subject to the reservation and conditions in the now recited grant" (meaning the grant of 1829 from the Crown) "contained."

In 1833 the corporation was dissolved by Order in Council, and its property thereupon reverted to the Crown, "subject to all mortgages and contracts for sale previously lawfully made."

In 1840 D. paid off the mortgage, and the Crown granted the land to him. This grant made no mention of the reservation above mentioned, and described the land as being bounded on one side "by the water of" the "harbour."

Held (affirming the judgment of the court below), that the effect of the grant of 1840 was to do away with the reservation contained in the earlier grant. —ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* DICKSON, *P.C.*; [1904] A. C. 273; 90 L. T. 213.

2. *Probate duty — Special power of appointment exercised by will—Trust property—Property "which belonged to" testator—Stamp Duties Act*, 1898 (*Act No.* 27 *of* 1898). — A special power to appoint property among a limited class of persons is so entirely different from a general power of disposition that mere general language in a probate duty statute cannot be reasonably supposed to extend to property subject to such a power.

By a settlement made on the marriage of a testatrix certain property was conveyed to trustees upon trust to pay the income thereof to the testatrix for her life, and after her death to stand possessed of the property in trust for the issue of the marriage as she should by will appoint, and, in default of appointment, equally. The testatrix by her will duly exercised the power of appointment in favour of her children.

Held (affirming the judgment of the court below), that section 49 (2) A (*a*) of the Stamp Duties Act, 1898, does not apply to property over which a deceased person has only a special power of appointment by will, and that the settled property was not liable to probate duty under the Act.—COMMISSIONER OF STAMP DUTIES *v.* STEPHEN, *P.C.*; [1904] A. C. 137; 73 L. J. P. C. 9; 89 L. T. 511.

3. *Public Works Act—Land taken for public purposes—Valuation—Costs.*—By the Public Works Act of New South Wales (1900, No. 26) land for authorized works may be taken by the Government, and persons claiming compensation are to serve a notice of the particulars of their interest in the land, and of their claims for damages. The Minister for Public Works is then required to cause a valuation to be made, and to give notice to the claimant of the amount of such valuation.

In a case in which land belonging to the respondents was taken under the Act, and the minister gave them notice of a valuation, and afterwards, at the respondents' request, reconsidered the valuation, and wrote a letter to the respondents' agent to the effect that he was prepared to pay a sum larger than the original valuation, but gave no formal notice of the increased sum under the Act, and the respondents declined the increased offer,

Held (reversing the judgment of the court below), that the letter was a sufficient amendment of the previous formal notification, and as in the subsequent proceedings the respondents only obtained a verdict for a sum equal to the amended offer made in the letter, they were not entitled to costs.—PUBLIC WORKS MINISTER *v.* HART, *P.C.*; [1904] A. C. 259; 90 L. T. 104.

4. *Sydney Harbour Trust Act*, 1900, *ss.* 27, 68—*Wharfage rates—Private wharf — Interest in land existing at the time of the passing of the Act—Payment of rent.*—By the Sydney Harbour Trust Act, 1900, s. 68, the Harbour Commissioners constituted by the Act were directed to collect in respect of all vessels berthed "at any wharf vested in the commissioners" . . . "wharfage and tonnage rates according to the provisions of the Wharfage and Tonnage Act, 1884." The Act of 1884 did not apply to private wharfs.

Held (affirming the judgment of the court below), that the rates granted by the later Act were to be levied on goods landed at a wharf vested in the commissioners though it was in the occupation of a private person.

Held, further, that the fact that the lessee of a wharf who remained in occupation of the wharf after the expiration of his lease, and had applied for a renewal of the lease, and had paid rent in advance pending such renewal, had not "an interest

in such lands" within section 27 of the Act.—LUKEY *v.* SYDNEY HARBOUR COMMISSIONERS, *P.C.*; [1904] A. C. 382; 90 L. T. 743.

NEW ZEALAND, LAW of:—

1. *Contract to execute works—Wrongful seizure of works by defendants—Plaintiff entitled to determine the contract.*

Held, that the appellants having by their conduct constituted the corporation their agents, and the delay being attributable to their acts, could not justify the seizure and re-entry of the works, and that the respondent was entitled to treat the contract as at an end and sue on a *quantum meruit.*—LODDER *v.* SLOWEY, *P.C.*; [1904] A. C. 442.

2. *Licensing Act*, 1895, *ss.* 3, 8, *sub-section* 4—*Licensing poll—Poll null and void—Renewal of existing licences.*—By the New Zealand Licensing Act, 1895, s. 3, "No licence of any description shall be granted or renewed until the electors of the district have previously determined in manner hereinafter provided (1) whether the number of licences existing in the district is to continue; (2) whether the number of licences existing in the district is to be reduced; (3) whether no licences are to be granted in the district."

By section 8, sub-section 4, if "none of the proposals respecting licences in the district is carried by the prescribed majority . . . the number of licences shall continue as they are until the next licensing poll."

A "licensing poll" was taken in the N. district, in accordance with the provisions of the Act, but was afterwards declared void on the ground of certain irregularities.

The appellant, who was the holder of a licence in the district, afterwards applied to the licensing committee for a renewal of his licence.

No objection was made to the renewal, but the committee held that, under the circumstances, they had no power to renew any licence.

Held, that the contingency of the poll taken being legally null and void was covered by section 8, sub-section 4, and that all existing licences continued in force until the next licensing poll.

Judgment of the court below reversed.—SMITH *v.* MCARTHUR, *P.C.*; [1904] A. C. 389; 90 L. T. 744.

NUISANCE:—

1. *Noise, vibration, and smell—Electrical works—Generating station—Injunction.*—By a provisional order made under the Electric Lighting Acts, and duly confirmed by Act of Parliament, the corporation of R. were authorised to supply electrical energy for public and private purposes within the area of the borough; it being provided by the order that nothing therein should exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused or permitted by them. The corporation entered into arrangements with the defendant company for the erection, maintaining, and working of a generating station within the borough; and the defendant company, in pursuance of such arrangements, acquired as a site for the proposed works a piece of land adjoining the garden of the plaintiff's house, and proceeded to erect therein the requisite engines, dynamos, and other machinery.

The plaintiff, who occupied her house as a ladies' school, complained of various annoyances to the inmates of her establishment by noise, vibration, and offensive smells or vapours produced by the operation of the defendant company's works, and instituted an action for an injunction and damages in respect of the alleged nuisance.

The court being of opinion that the annoyances complained of were not trivial or a kind to be expected from any ordinary and reasonable use by the defendant company of the land they had acquired, and, further, that, in spite of a diminution in intensity and frequency of the annoyances complained of since the commencement of the action, yet even at the date of the trial such annoyances had repeatedly and recently recurred, an injunction and damages were granted accordingly.—KNIGHT *v.* ISLE OF WIGHT ELECTRIC LIGHT CO., *Ch.D. Joyce, J.*; 73 L. J. Ch. 299; 90 L. T. 410.

2. *Overhanging trees—Damage—Injunction.*—An action lies against an adjoining landowner for allowing his trees to overhang the boundary to the damage of the plaintiff's crops.—SMITH *v.* GIDDY, *K.B.D.*; [1904] 2 K. B. 448.

3. *Smallpox hospital—Action* quia timet—*Weight and sufficiency of evidence.*—Where the site of a smallpox hospital is carefully chosen, is in a proper situation, and constitutes no appreciable danger to the public health and no nuisance to private property, and the hospital itself is properly managed and all precautions taken to prevent infection that scientific skill and knowledge require, the facts, that the hospital is within fifty-one feet of a high road and that there is some risk of infection even when the utmost care is taken, do not outweigh the benefits accruing to the public in general from the maintenance of a smallpox hospital that reduces the risk for every inhabitant of the district wherein it is situate. To warrant an injunction restraining the use of such a hospital there must be a strong probability, almost amounting to moral certainty, that the hospital will be an actionable nuisance. — ATTORNEY - GENERAL *v.* NOTTINGHAM CORPORATION, *Ch.D. Farwell, J.*, 281; [1904] 1 Ch. 673; 73 L. J. Ch. 512; 90 L. T. 308.

4. *Smoke—Funnel of steam-tug sending forth black smoke—Chimney—Public Health* (*London*) *Act*, 1891 (54 *&* 55 *Vict. c.* 76), *s.* 5, *sub-sections* 4, 5; *s.* 24, *sub-section* (b).—The funnel of a steam-tug is a "chimney" within the meaning of the Public Health (London) Act, 1891, section 24 (*b*) of which provides that "any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance" is a nuisance liable to be dealt with summarily under that Act.—TOUGH *v.* HOPKINS, *K.B.D.*, 605; [1904] 1 K. B. 804; 73 L. J. K. B. 628; 90 L. T. 672.

5. *Vibration — Electric generating station—Statutory powers of borough council—Provisional order under Electric Lighting Act—Injunction—"Temporary" nuisance.*—The defendant council, under the powers of a provisional order, erected an electric generating station in proximity to houses of which the plaintiffs were lessees or occupiers. The order provided that nothing therein should exonerate the undertakers from an action for nuisance in the event of any being occasioned by them. In an action for an injunction it was admitted by the defendants that the vibration of their machinery created an actionable nuisance unless such nuisance was excusable as being of a merely temporary nature, but they alleged that after experments and alterations of the machinery the nuisance would abate, and that as the machinery was not yet completed in its final form, but only in course of construction, an action would not lie against them.

Held, that the nuisance was not merely temporary within the principle of *Harrison* v. *Southwark*

and Vauxhall Water Co., [1891] 2 Ch. 409, 39 W. R. Dig. 140, and that the defendants were not entitled to carry out their works unless they could do so without creating a nuisance, and that an injunction must go.

One of the plaintiffs having sub-let for all his term less the last three days,

Held, entitled to an injunction in respect of damage to his reversion.—COLWELL *v.* ST. PANCRAS CORPORATION, *Ch.D. Joyce, J.*, 523; [1904] 1 Ch. 707; 73 L. J. Ch. 275; 90 L. T. 153.

See also Justices, 4; Public Health, 5.

PARTNERSHIP:—

1. *Account—Ascertaining deceased partner's share—Articles—Construction—Goodwill—Inclusion in account.*—Articles of partnership provided that a full and general annual account and valuation of all the capital, stock-in-trade, property, profits, moneys, credits, and effects whatsoever of the partnership should be made, and that if a partner should die before the expiration of the partnership his executors, administrators, and assigns should be entitled to such sum of money as his share of the capital and property of the partnership should upon the last general annual account amount to.

A partner died during the continuance of the partnership, and his executors claimed that in ascertaining the amount of his share they were entitled to have a sum for the goodwill of the partnership business, which was of considerable value, included in the account and valuation.

The articles contained no express provision as to the goodwill.

On a summons taken out to determine whether they were entitled to have a sum for the goodwill included,

Held, that there was no material difference between the present case and *Steuart* v. *Gladstone*, 40 L. T. Rep. 145, 10 Ch. D. 626, and, the principle of that decision being that, where the accounts from which the sum to be paid is to be ascertained are accounts for the purpose of ascertaining profits, the goodwill is not to be included, a sum for the goodwill ought not to be included in the account.—SCOTT *v.* SCOTT, *Ch.D. Joyce, J.*; 89 L. T. 582.

2. *Dissolution—Insufficient assets to repay capital—Question of adjustment—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-section* 1; *s.* 44.—Where the contributions of partners to the capital were unequal, but each were to share equally in profits; and in the distribution of assets upon a dissolution it was found that there was a deficiency of assets,

Held, that the assets must be applied in paying rateably to each partner what was due from the firm to him in respect of capital, account being taken of the equal contributions to be made by each towards the deficiency of capital.—GARNER *v.* MURRAY, *Ch.D. Joyce, J.*, 208; [1904] 1 Ch. 57; 73 L. J. Ch. 66; 89 L. T. 665.

3. *Dissolution—Receiver and manager—Management—Interference—Injunction.*—Two brothers carried on a business in partnership for some years, when the business began to fail, and one brother brought an action for dissolution of the partnership against the other, to whose mismanagement he attributed the failure. The plaintiff obtained an order appointing a receiver and manager of the business, who dismissed the defendant from the management, and afterwards an order was made for the dissolution of the partnership, the taking of the partnership accounts, and the realization of the partnership effects.

The defendant set up and managed a rival business under a similar name, which he alleged belonged to his sons as partners, and for which his wife and her sisters advanced the capital.

On a motion by the plaintiff for an injunction to restrain the defendant from interfering with the management of the old business by the receiver and manager, it was proved that the defendant had spread rumours to the effect that the old business would shortly be closed and sold by auction, and had induced some of the employees of the old business to leave, after giving due notice, and to enter the employment of the new business, and also had attempted to obtain from the landlord the tenancy of a field which had long been in the occupation of the old partnership, and used in the old business.

Held, that any act calculated to injure property under the control of the receiver and manager was an interference with the management of the receiver and manager whom the court was bound to protect; and an injunction was granted restricting the defendant from interfering with the management of the receiver and manager.—DIXON *v.* DIXON, *Ch.D. Swinfen Eady, J.*; [1904] 1 Ch. 161; 73 L. J. Ch. 103; 89 L. T. 272.

4. *Expulsion clause—Conduct detrimental to partnership business—Breach of duty as a partner—Conviction by police magistrate—Dishonesty—Interim injunction.*—Articles of partnership provided that in the event of either of the junior partners being "addicted to scandalous conduct detrimental to the partnership business," or being guilty of "any flagrant breach of the duties of a partner," the senior partner might give the offending partner six days' notice of expulsion from the partnership. One of the junior partners having been convicted by a police magistrate of travelling without a ticket with intent to avoid payment, and fined the full penalty, the senior partner served him with notice of expulsion. On motion by the junior partner for an interim injunction to restrain his expulsion,

Held, that, as the plaintiff had been convicted of dishonesty, the notice of expulsion was justified, and under the circumstances the court declined to interfere by interlocutory injunction.—CARMICHAEL *v.* EVANS, *Ch.D. Byrne, J.*; [1904] 1 Ch. 486; 73 L. J. Ch. 329; 90 L. T. 573.

See also Solicitor, 7.

PATENT:—

1. *Assignment of application for—Assignee's right of action—Practice—Parties—Leave to amend.*—The assignee of an application for a patent is only an equitable assignee of the patent. He cannot sue for infringement of the patent unless he joins the legal owner either as plaintiff or defendant.

Leave to amend by adding the legal owner granted.—BOWDEN'S PATENTS SYNDICATE *v.* SMITH, *Ch.D. Warrington, J.*, 630; [1904] 2 Ch. 122; 73 L. J. Ch. 522.

2. *Disconformity—Order for revocation—Terms—Form of order—Discretion of judge—Patents, Designs, and Trade-Marks Act.* 1883 (46 & 47 *Vict. c* 57), *ss.* 18, 19, 20—*Costs.*—Where a judge has exercised his discretion under section 19 of the Patents, Designs, and Trade-Marks Act, 1883, by making an order to revoke letters patent unless the specification be amended by disclaiming part thereof, the Court of Appeal will not interfere to vary the terms he may have imposed in making such order.—GEIPEL'S PATENT, RE, *C.A.*, 339; [1904] 1 Ch. 239; 73 L. J. Ch. 215; 90 L. T. 70.

3. *Infringement—Combination patent—Sale of constituent part—Intention to infringe.*—If the manufacture and sale of an article, which is

a constituent part of a patent consisting in a particular combination, are not in themselves unlawful as infringing the patent, they do not become so by reason of the sale being to a person whom the vendor knows intends to infringe the patent.

Townsend v. *Haworth*, 12 Ch. D. 831n, 48 L. J. Ch. 770n, followed.

Decision of Swinfen Eady, J., (*ante*, p. 189), affirmed. — DUNLOP PNEUMATIC TYRE CO *v.* MOSELEY & SONS, *C.A.*, 454; [1904] 1 Ch. 612; 73 L. J. Ch. 417.

4. *Infringement—Taking substance of invention.*—In an action for the infringement of a patent, where it is alleged that the defendant has taken the "substance" of the invention, the question is to be decided with reference to the existing state of knowledge of the subject at the date of the patent and the operation of the machine in question, and not simply by reading the specification.

Where the merit of the invention consists in the principle which is embodied in it, a machine which carries the same principle into effect by different means may be an infringement; but, where the merit lies in a new combination of known features, a machine which produces the same result with the omission of something which is a material element in the patented machine, not a mere detail, will not be held to be an infringement of the patent.

Judgment of the court below affirmed.—CONSOLIDATED CAR HEATING CO. *v.* CAME, *P.C.*; [1903] A. C. 509; 72 L. J. P. C. 110; 89 L. T. 224.

5. *Pending action for infringement—Amendment of specification without leave of court—Subsequent action on amended specification—Invalidity of amendment—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 18, *sub-sections* 1, 9, 10; *s.* 19—*Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 5.—Sections 18 and 19 of the Patents, &c., Act, 1883, which relate to the amendment of a specification, must be read together. Section 18 states what an applicant may do before litigation, and section 19 states what he may do whilst in litigation; and if an applicant, whilst litigation is pending and without leave of the court under section 19, amends his specification under section 18 by leave of the comptroller, the amendment is irregular and void notwithstanding sub-section 9 of section 18.

Sub-section 10 of section 18 is not limited to litigation pending between the same parties at the time when the application to amend is made, but refers to any action for infringement or petition for revocation pending at that time in relation to the patent.—J. B. BROOKS & CO. *v.* LYCETT'S SADDLE AND MOTOR ACCESSORY CO., *Ch.D. Farwell, J.*; [1904] 1 Ch. 512; 73 L. J. Ch. 319.

6. *Revocation—Petition for revocation—Practice—Court or chambers—Consent.*—An order for the revocation of letters patent for an invention cannot be obtained upon summons in chambers, even where the respondent consents to the revocation.—CLIFTON'S PATENT, RE, *Ch.D. Buckley, J.*, 629.

POLICE:—

Pension—'Approved service"—Continuous service—Police Act, 1890 (53 & 54 *Vict. c.* 45), *s.* 1.—By section 1 of the Police Act, 1890, "ever constable in a police force (*a*) if he has not completed not less than twenty-five years' approved service . . . shall . . . be entitled without a medical certificate to retire and receive a pension for life."

Held (by Collins, M.R., and Stirling, L.J., Mathew, L.J., dissenting), that "approved service" means continuous service, and that, therefore, in computing the period of twenty-five years, separate and broken periods of service cannot be added together.

Judgment of the Divisional Court (*ante*, p. 527, [1904] 1 K. B. 522) affirmed.—GARBUTT *v.* DURHAM JOINT COMMITTEE, *C.A.*, 678; [1904] 2 K. B. 514.

POOR LAW:—

1. *Rating—Appeal to quarter sessions—Right of assessment committee to appear as respondents—Consent of guardians—Notice to guardians—Sufficiency of notice—Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 2—*Divided Parishes and Poor Law Amendment Act*, 1882 (45 & 46 *Vict. c.* 58), *s.* 12.—The consent of the guardians of a union, which is required by section 2 of the Union Assessment Committee Amendment Act, 1864, before the assessment committee can appear as respondents to a rating appeal, is not such a consent in writing of a majority of the guardians of a union required under the Poor Law Acts as is mentioned in section 12 of the Divided Parishes and Poor Law Amendment Act, 1882, and it is not necessary that fourteen days' notice should be given to each guardian of the meeting at which the consent to such appearance is to be given.—SMITH *v.* LEIGH UNION, *C.A.*, 340; [1904] 1 K. B. 484; 73 L. J. K. B. 185; 90 L. T. 240.

2. *Removal of pauper—Settlement—Married woman—Husband having no settlement—Derivative settlement—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.—A pauper and her husband, who was a foreigner with no settlement, came to reside in the parish of Birmingham in January, 1901, and resided there until June, 1901, when the husband went to America with no intention of deserting his wife, and with the intention of returning. The wife and her children continued to reside in the parish of Birmingham until March, 1902, when they went into the workhouse.

Held, that the pauper and her children, who were all under the age of sixteen years, were irremovable from the parish of Birmingham.—TEWKESBURY GUARDIANS *v.* BIRMINGHAM GUARDIANS, *K.B.D.*; [1904] 2 K. B. 395; 90 L. T. 787.

3. *School district—Board—Dissolution—Transfer of Consolidated Stock—Poor Law Amendment Act* 1844 (7 & 8 *Vict. c.* 101), *ss.* 40, 42, 45—*Dissolved Boards of Management and Guardians Act*, 1870 (33 & 34 *Vict. c.* 2), *ss.* 1, 12.—A school district and a board for such district were constituted under the Poor Law Amendment Act, 1844. The district was dissolved. At the date of the dissolution there was standing in the books of the Bank of England a sum of 2½ per cent. Consolidated Stock, which represented surplus assets of the board of management.

Held, that the corporate body remained in existence either by implication from section 1 of 33 & 34 Vict. c. 2, or according to the common law rule so long as any one of the corporators remained alive. The plaintiffs, the last acting managers, were not entitled to claim that the property was vested in them automatically under 33 & 34 Vict. c. 2, s. 12, and it would be necessary that the transfer of the Consolidated Stock be executed under the corporate seal of the board.—MORTON *v.* BANK OF ENGLAND, *Ch.D. Farwell, J.*, 393; [1904] 1 Ch. 664; 73 L. J. Ch. 503; 90 L. T. 375.

4. *Settlement—Addition to parish—Divided*

Parishes Act, 1876 (39 & 40 *Vict. c.* 61)—*Poor Law Act*, 1879 (42 & 43 *Vict. c.* 54).—Where a pauper has acquired a settlement in a parish, and subsequently by an order of the Local Government Board, made under the Divided Parishes and Poor Law Amendment Act, 1876, as amended by the Poor Law Act, 1879, a part of an adjoining parish has been added to the former parish, the identity of the original parish is not destroyed, and the pauper's settlement is not lost.

Reg. v. *Tipton Inhabitants*, 3 Q. B. 215, and *St. Saviour's Union* v. *Dorking Union*, 46 W. R. 309. [1898] 1 Q B. 594, distinguished.

Decision of the Court of Appeal (50 W. R. 275, [1902] 1K. B.562) affirmed.—WEST HAM UNION *v.* LONDON COUNTY COUNCIL, *H.L.* 465; [1904] A. C. 40; 73 L. J. K. B. 85; 89 L. T. 614.

5. *Settlement — Irremovability — Residence — "Hospital"—Poor Removal Act*, 1846 (9 & 10 *Vict. c.* 66), *s.* 1.—An institution partially endowed by a private person and founded with the object of providing a home and medical treatment, together with suitable employment and recreation, for persons suffering from epilepsy, the main part of the expenses being defrayed by payments of the inmates, is a "hospital" within the proviso to section 1 of the Poor Removal Act, 1846.

Judgment of the Divisional Court ([1903] 1 K. B. 19) affirmed. — ORMSKIRK UNION *v.* CHORLTON UNION, *C.A.*; [1903] 2 K. B. 498; 72 L. J. K. B. 721; 89 L. T. 256.

6. *Settlement—Three years' residence—Child under sixteen—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.—Where a child has, while under the age of sixteen, resided with its parent in a parish for three years in such manner and under such circumstances in each of such years as render a person irremovable, the child may, on attaining the age of sixteen, claim the benefit of the three years' residence as giving it a settlement in the parish under section 34 of the Divided Parishes Act, 1876.

Judgment of the Divisional Court (*ante*, p. 30, [1903] 2 K. B. 627) affirmed.

Reg. v. *Elvet*, 7 W. R. 586, 2 E. & E. 266, followed. —WEST HAM UNION *v.* HOLBEACH UNION, *C.A.*, 513; [1904] 2 K. B. 121.

See also Rating, 1, 5-8.

POWER:—

1. *Appointment—General testamentary power—Loan to donee—Covenant to exercise power—Priority of lender as to appointed fund over other creditors.*—Property appointed by will under a general power is assets for payment of the debts of the appointor.

The donee of a general testamentary power of appointment exercised the power in favour of a mortgagee, in pursuance of a covenant contained in the mortgage deed. At the death of the donee of the power, his estate proved to be insolvent.

Held (affirming the judgment of the court below), that the mortgagee had no priority over the general creditors of the estate as against the appointed fund.

Rule laid down by Knight-Bruce, L.J., in *Fleming* v. *Buchanan*, 3 De G. M. & G. 976, approved and followed.—BEYFUS *v.* LAWLEY, *H.L.*; [1903] A. C. 411; 72 L. J. Ch. 781; 89 L. T. 309.

2. *Excessive appointment — Appointment under special power to uses of existing settlement, or such as are "capable of taking effect"—Validity of limitation —Remoteness—Construction of will.*—Where under a special power of appointment a testator appoints to the uses or trusts of an antecedent instrument or such of them as are "capable of taking effect," the phrase "capable of taking effect" may be construed as meaning what the law allows to take effect, and need not be confined to a reference to the uses or trusts which, by reason of the deaths of parties and other intervening circumstances, are still in fact existing, or capable of coming into existence; and if therefore some of the uses or trusts fail by reason of the *cestuis que trust* not being objects of the power, or by reason of the rule against perpetuities being infringed, those uses or trusts may be treated as excluded from the appointment.

Dictum of Jessel, M.R., in *Line* v. *Hall*, (1873) 43 L. J. Ch. 107, 108, considered and applied.—FINCH AND CHEW'S CONTRACT, RE, *Ch.D. Kekewich, J.*; [1903] Ch. 486; 72 L. J. Ch. 690; 89 L. T. 162.

See also Trustee, 2, 3; Vendor and Purchaser, 4.

PRACTICE:—

1. *Appeal—Court of Appeal—Action referred by consent of parties to master—Judgment entered by master—Right of appeal to Court of Appeal—Rules of Supreme Court, ord.* 14, *r.* 7.—When in an action in the High Court the whole action has been referred, under ord. 14, r. 7, to a master, and judgment has been entered in pursuance of his direction, an appeal from the judgment does not lie to the Court of Appeal.—FRASER *v.* FRASER, *C.A.*, 147; [1904] 1 K. B. 56; 73 L. J. K. B. 6; 89 L. T. 491.

2. *Appeal—Official referee—Reference of Chancery action—Motion to set aside judgment—Jurisdiction.*—Where an action in the Chancery Division is referred to an official referee, and judgment is entered by direction of the official referee, the proper course for the unsuccessful party is to apply in the Chancery Division to set aside the judgment and not in the first instance to appeal to the Court of Appeal. — WYNNE-FINCH *v.* CHAYTOR, *C.A.*, 24; [1903] 2 Ch. 475; 72 L. J. Ch. 723; 89 L. T. 123.

3. *Appeal—Special leave—Abstract point of law.*—Special leave will not be granted to appeal from a judgment which is not impeached, merely with a view to have an abstract point of law, not arising in case, decided by their lordships. — REX *v.* LOUW, *P.C.*; [1904] A. C. 412.

4. *Appeal* in formâ pauperis—*Certificate of counsel.*—On an application for leave to appeal *in formâ pauperis* it is not necessary that the application should be supported by the certificate of an independent counsel who did not appear for the applicant in the court below.—MITCHELL *v.* NEW ZEALAND LOAN AND MERCANTILE AGENCY CO., *P.C.*; [1904] A. C. 149; 73 L. J. P. C. 17; 89 L. T. 83.

5. *Costs — Action settled — "Record withdrawn. No costs on either side"—Costs of interlocutory proceedings ordered to be paid by plaintiff—Right of defendant to tax after settlement of action* —During the progress of an action several orders were made upon interlocutory applications, that the plaintiff should pay the defendants' costs in some cases "in any event."

The action was subsequently settled upon the terms indorsed on the briefs of counsel. "Record withdrawn. No costs on either side," the question of the costs of the interlocutory proceedings not being present to their minds.

Held (dismissing the appeal), that after the settlement of the action the defendants were entitled to taxation and payment of their costs of the interlocutory proceedings which the plaintiff had been

ordered to pay.—WALTER *v.* BEWICKE, MORRING, & Co., *C.A.*; 90 L. T. 409.

6. *Costs before action—Threat of proceedings—Preparation for defence before issue of writ—Taxation—R. S. C.*, 1883, *ord.* 65, *r.* 27, *sub-rule* 29.—Defendant, being threatened with an action for being party or privy to a fraud disclosed in a previous action to which he was not a party, obtained a transcript of the speeches, evidence, and judgment therein before the issue of the writ in the present action, with a view to defending the same. The present action was subsequently dismissed for want of prosecution.

Held, that the defendant was entitled under ord. 65, r. 27, sub-rule 29, to the costs of only so much of the transcript of the evidence and judgment as related to the issue in the present action.—BRIGHT'S TRUSTEE *v.* SELLAR, *Ch.D. Swinfen Eady, J.*; [1904] 1 Ch. 369; 73 L. J. Ch. 245; 90 L. T. 155.

7. *Costs—Copies of documents for the judge.*—Where the court is asked to construe the terms of a document, a copy should be provided for its use, and the costs of such copy should be allowed on taxation.—HOUSTOUN'S SETTLEMENT, RE, *Ch.D. Farwell, J.*, 61; 89 L. T. 469.

8. *Costs—Defendant joined in the alternative—Liability of unsuccessful co-defendant to pay costs of successful co-defendant—Judicature Act*, 1890, *s.* 5—*R. S. C.*, 1883, *ord.* 16, *r.* 4; *ord.* 65, *r.* 1.—In an action brought against two defendants in the alternative, and tried with a jury, the judge held that there was not good cause to deprive one of the defendants of costs as against the plaintiff, but yet was of opinion that the costs so occasioned ought properly to be borne by the other defendant. He accordingly ordered the plaintiff to pay these costs in the first instance and then to add them to his own, and to have them paid to him by the other defendant.

Held, that the judge had jurisdiction to make such an order.—SANDERSON *v.* BLYTH THEATRE Co, *C.A.*, 33; [1903] 2 K. B. 533; 72 L. J. K. B. 761; 89 L. T. 159.

9. *Costs — Extraordinary expenses of repairing highway—Action in High Court—Sum not exceeding £250 recovered—High Court costs—Locomotives Act* (61 *&* 62 *Vict. c.* 29), *s.* 12 (1).—Section 12, sub-section 1 (*a*), of the Locomotives Act, 1898, provides that the expenses incurred by a highway authority in repairing a highway damaged by extraordinary traffic which are recoverable from the person ordering the traffic "may be recovered if not exceeding £250 in the county court, and if exceeding that sum in the High Court." In an action in the High Court brought by a highway authority to recover a sum exceeding £250 for damage caused by extraordinary traffic, the jury assessed the damages at £60, and the judge at the trial ordered judgment to be entered accordingly with costs, and gave a certificate that there was sufficient reason for bringing the action in the High Court.

Held, that the High Court had jurisdiction to entertain the action, and that as the trial was with the jury the costs followed the event and the plaintiffs were entitled to High Court costs.—CHESTERFIELD RURAL COUNCIL *v.* NEWTON, *C.A.*, 129; [1904] 1 K. B. 62; 73 L. J. K. B. 24; 89 L. T. 466.

10. *Costs—Indemnity—Costs of action—Costs of appeal.*—A person who has agreed to indemnify another from a liability is not *primâ facie* liable to pay to the person indemnified the costs incurred by him in an unsuccessful appeal from the judgment of a court of first instance establishing his liability.

Third party ordered to pay defendants' costs of trial as between party and party.—MAXWELL *v.* BRITISH THOMSON HOUSTON CO., *K.B.D.*; [1904] 2 K. B. 342; 73 L. J. K. B. 644.

11. *Costs—Inspection of property the subject of the action—Inspection without an order—Taxing-master's discretion—R. S. C., ord.* 50, *r.* 3.—The fact that an inspection of property, the subject-matter of an action, has been carried out by an arrangement between the solicitors of the parties and not in pursuance of an order is not of itself sufficient reason why the costs of such inspection should be disallowed. — ASHWORTH *v.* ENGLISH CARD CLOTHING CO. (No. 1). *Ch.D. Joyce, J.*, 507; [1904] 1 Ch. 702; 73 L. J. Ch. 274; 90 L. T. 262.

12. *Costs—Interest—Action dismissed with costs—Payment of costs and interest—Order reversed by Court of Appeal—Return of costs and interest—Order of Court of Appeal reversed by House of Lords—Second return of costs and interest—Right to further interest.*—On the 22nd of June, 1901, the plaintiff's action was dismissed by Joyce, J., with costs; and on the 26th of March, 1902, the plaintiff accordingly paid the defendants' costs, together with interest thereon.

On the 11th of July, 1902, the Court of Appeal reversed the order of Joyce, J.; and on the 21st of July, 1902, the defendants repaid to the plaintiff the costs and interest.

On the 9th of November, 1903, the House of Lords reversed the order of the Court of Appeal and restored the order of Joyce, J. The plaintiff returned the costs and interest to the defendants.

Held, that the defendants were also entitled to interest on the costs as from the 21st of July, 1902.—ASHWORTH *v.* ENGLISH CARD CLOTHING CO. (No. 2), *Ch.D. Joyce, J.*; [1904] 1 Ch. 704; 73 L. J. Ch. 282; 90 L. T. 263.

13. *Costs—New trial—Misdirection.* — If a new trial is granted by the Court of Appeal on account of the misdirection of the jury the costs of the application rest entirely in the discretion of that court.

Bray v. *Ford*, [1896] A. C. 44, 44 W. R. Dig. 131, discussed.—HAMILTON *v.* SEAL *C.A.*, 581; [1904] 2 K. B. 262; 73 L. J. K. B. 560; 90 L. T. 592.

14. *Costs—Party and party—Refresher fees to counsel—Ord.* 65, *rr.* 29, 48—On a party and party taxation refresher fees to counsel may be allowed in excess of the maximum set out in ord. 65, r. 48.—STEWART *v.* WEBBER, *K.B.D.*; 89 L. T. 559.

15. *Costs—Payment into court of a lump sum with denial of liability as to part of claim and admission of liability as to part—Cost of issues found for plaintiff—Issue not going to the whole cause of action—R.S.C.*, 1883, *ord.* 22., *rr.* 1, 6.—In an action for wrongful dismissal the plaintiff claimed, amongst other things, three months' full pay and nine months' half pay. The defendants admitted liability for three months' full pay and six months' half pay, and whilst denying any further liability paid a sum of money into court. At the trial the plaintiff obtained a verdict and judgment for a sum in excess of the sum paid into court. Upon an application by the defendants for judgment or new trial, the court held that the plaintiff was entitled to less than the sum paid into court and gave judgment for the defendants, but they decided the issue of six months' or nine months' half pay in favour of the plaintiffs.

Held, on the principle of *Wagstaffe* v. *Bentley*,

[1902] 1 K. B. 124, that the defendants, while entitled to the general costs of the action, must pay the cost of the issue on which they had failed, although it was not an issue going to the whole cause of action.

Semble, per Cur.: Under order 22 payment into court of a lump sum with a denial of liability as to part of the claim and an admission of liability as to part cannot be pleaded as a defence to an action. —HUBBACK *v.* BRITISH NORTH BORNEO CO., *C.A.*; [1904] 2 K. B. 473; 73 L. J. K. B. 654.

16. *Costs — Rating appeals — Appeal to quarter sessions—Parochial Assessments Act*, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 6.—In an appeal to quarter sessions under the Parochial Assessments Act, 1836, the court has power to give to the successful party the costs incurred in the court below as well as the costs of the appeal.—REX *v.* CORNWALL JUSTICES, *K.B.D.*, 31; [1903] 2 K. B. 178; 72 L. J. K. B. 622; 88 L. T. 775.

17. *Costs—Set-off—"Parties"—Independent proceedings—Ord.* 65, *r.* 14; *r.* 27, *sub-rule* 21.—Ord. 65, rr. 14 and 27 (21), do not allow a set-off of costs in separate actions.—DAVID *v.* REES, *C.A.*, 579; [1904] 2 K. B. 435.

18. *Costs—Summons under ord.* 14, *r.* 1—*Reference to master—Costs of the action—Costs of the reference and award—Ord.* 65, *r.* 12—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.—In an action brought to recover a balance of account on a tradesman's bill, the plaintiffs took out a summons under ord. 14, r. 1, for leave to sign final judgment. Upon the hearing of the summons no order was made, but the action was referred to a master for trial in accordance with rule 7 of the same order. After twenty-one days from the service of the writ the master, having tried the action, made an order giving the plaintiffs leave to sign judgment for £23 15s., "with £7 costs of the action, and also with costs of the reference to the master and his award, such costs to be taxed by the taxing-master on the High Court scale." From this order the defendants appealed to Phillimore, J., sitting at chambers.

Held, by that learned judge in court, that as regards the costs of the action, judgment not having been given within twenty-one days, and that period not having been extended by a judge under section 116 of the County Courts Act, 1888, the plaintiffs were only entitled to costs on the county court scale, and the appeal should be allowed in that respect; but with regard to the costs of the reference to the master and his award, the order made was correct, as the master must be deemed an arbitrator, having the same discretion as to costs, including the power to certify for High Court costs, as an arbitrator has.—HAYDOCKS (LIMITED) *v.* MULHOLLAND, *K.B.D.*, 400; [1904] 1 K. B. 145; 73 L. J. K. B. 125; 90 L. T. 88.

19. *Costs—Taxation—Assessment—Objections to the taxing-master's findings — Certificate—Summons to review—Construction of ord.* 65, *r.* 27 (38a)—*Ord.* 65, *r.* 27 (39) (41).—This was a summons to vary a taxing-master's certificate.

Upon a petition seeking for payment out of certain funds in court the consent of the company, as an incumbrancer with a stop order on the fund in question, was necessary. After carefully considering the matter, which was of a complicated nature, the company duly consented. On taxation, however, of the bill of costs carried in by the company's solicitors, only a small part of the amount claimed was allowed by the taxing-master.

It appeared that the taxing-master began by taxing the costs item by item; then he ceased to do so, excluded the remaining items entirely, and allowed instead a lump sum of ten guineas for the professional services of the solicitors. The taxing-master stated, in answer to an inquiry by the judge, that he had assessed under ord. 65, r. 27 (38*a*).

No objections to the taxing-master's findings were ever carried in, but after he had signed his certificate this summons was taken out.

Held, that the taxing-master had not taxed in accordance with ord. 65, r. 27 (39), nor could he be taken to have assessed a lump sum under ord. 65, r. 27 (38*a*). Assessment was by the sub-rule only permissible where there had been some dishonesty or misconduct on the part of the solicitors whose bill was under consideration; this was clearly so in each specific case mentioned in the sub-rule, and the subsequent general words "from any other cause" must be treated as *ejusdem generis* with the preceding words. If the taxing-master intended to exercise this delicate question, he must say so in definite terms and upon proper evidence. Consequently the taxation was wrong in principle, and in such a case the summons to vary need not be preceded by objections to the taxing-master's findings.

In re Castle, 36 Ch. D. 194, followed.—JOHNSTON, RE, MILLS *v.* JOHNSTON, *Ch.D. Farwell, J.*; [1904] 1 Ch. 132; 73 L. J. Ch. 17; 89 L. T. 497.

20. *Costs—Taxation—Party and party—Refresher fees—Discretion—R. S. C.*, 1883, *ord.* 65, *rr.* 8, 27 (29) (48).—In a taxation of costs between party and party the taxing-master has a discretion to allow the payment of refresher fees in excess of those prescribed by ord. 65, r. 27 (48).

In re Ermen, 51 W. R. 475, [1903] 2 Ch. 156, and *Stewart & Co.* v. *Weber*, 19 Times L. R. 722, followed.—CAVENDISH *v.* STRUTT, *Ch.D. Buckley, J.*, 333; [1904] 1 Ch. 524; 73 L. Ch. 247; 90 L. T. 500.

21. *Costs—Taxation—Solicitor and client—Action against public authority—Action in respect of construction of contract—Act done in pursuance of an Act of Parliament or of public duty or authority—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.—By an agreement a public authority had, in pursuance of statutory authority, given to the plaintiffs certain powers, reserving to itself the right, by duly giving notice, to determine those powers. The public authority gave notice to the plaintiffs to determine the powers. In an action by the plaintiffs against the public authority, seeking declarations that the notice to determine had not been duly given, and that, by reason of the subsequent passing of an Act of Parliament, the public authority had become incapacitated from determining the powers, the plaintiffs were unsuccessful.

Held, that the act done by the public authority which gave rise to the action was not done in pursuance of an Act of Parliament or of any public duty or authority, and that the plaintiffs were liable to pay to the public authority costs taxed as between party and party alone, and not as between solicitor and client.—NATIONAL TELEPHONE CO. *v.* KINGSTON-UPON-HULL CORPORATION, *Ch.D. Buckley, J.*, 26.

22. *Discovery—Interrogatories—Action for libel—Defence of fair comment — Interrogatories as to previous statements concerning plaintiff—Leave to administer—Ord.* 31, *rr.* 1, 2.—In an action for damages for libel in respect of a criticism, published in the defendants' paper, of an opera composed by the plaintiff, the defendants pleaded that the words

complained of were fair and *bonâ fide* criticism of and comment on the opera, and were published without malice.

The plaintiff applied for leave to deliver interrogatories to the defendants asking them whether they had not previously published an incorrect statement about the plaintiff, what information they had which induced them to believe that statement was true, from whom they derived such information, whether it was derived from the same source as the article complained of, and what steps they had taken to verify it.

Held (dismissing the appeal), that leave to deliver the interrogatories had been properly refused as not being relevant to the question of malice.—CARYLL *v.* DAILY MAIL PUBLISHING CO., *C.A.*; 90 L. T. 307.

23. *Discovery — Production — Privilege — Further affidavit—Sufficiency—Omission of statement by party that documents for which protection is claimed contain nothing impeaching his own case.*—In an action to enforce the right to profit made upon an alleged joint purchase and resale of land and an account, defendant had counterclaimed for specific performance of an alleged agreement between him and the plaintiff as to certain properties purchased by defendant and, as alleged, by the plaintiff and defendant jointly and payments to be made, for a sale, and the execution of a proper conveyance.

Defendant in an affidavit of documents had sworn that he objected to produce certain documents on the ground that they related only to his own case, and did not tend to prove or support the plaintiff's case.

Held, that the affidavit, according to the *dicta* in the case of *Morris* v. *Edwards*, 63 L. T. Rep. 26, 15 App. Cas. 309, in the House of Lords, as followed by the Court of Appeal in *Attorney-General* v. *Mayor and Corporation of Newcastle-upon-Tyne*, 81 L. T. Rep 311, [1899] 2 Q. B. 478, was technically sufficient, although not containing the statement that the documents for which privilege was claimed contained nothing impeaching his own case.—JOHNSON *v.* WHITAKER, *Ch.D. Kekewich, J.*; 90 L. T. 535.

24. *Leave to defend—Security to satisfaction of master—Decision of master as to sufficiency of security —Appeal—R. S. C.*, 1883, *ord.* 14, *r.* 6; *ord.* 54, *r.* 21.—Where an order has been made under ord. 14, r. 6, granting the defendant leave to defend on giving security to the satisfaction of the master, there is no appeal from the decision of the master on the question of the sufficiency of the security tendered by the defendant.—HOARE *v.* MORSHEAD, *C.A.*, 87; [1903] 2 K. B. 359; 72 L. J. K. B. 724; 89 L. T. 125.

25. *New trial—Railway accident—Damages—Application for a new trial—Excessive damage—Personal injuries—Loss of income—Misdirection of jury—Wrong measure adopted by jury.*—If a jury in awarding damages to a plaintiff injured in a railway accident applied a wrong measure or took into consideration matters which they ought not to have taken into consideration in contravention of the direction of the judge, and the court can draw such an inference from the amount awarded and all the circumstances of the case, a new trial may be ordered, although the court is not in a position to say that the mere *quantum* of excess was so large that no reasonable jury could have arrived at such an amount. But if the jury in estimating the amount took into consideration the fact that the plaintiff would be debarred from following the profession for which he had fully qualified himself, and other revelant matters, then, although the amount awarded appears excessive, it is not for the court to traverse the verdict, and an application for a new trial on the ground of excessive damage will be refused.

The decision of the Court of Appeal, laid down in *Praed* v. *Graham*, 38 W. R. 103, 24 Q. B. D. 53, although it binds the court, does not prevent the court from looking at other decisions of the Court of Appeal—viz., *Phillips* v. *London and South-Western Railway Co.*, 27 W. R. 797, 4 Q. B. D. 403, 28 W. R. 10, 5 Q. B. D. 78, as construing *Praed* v. *Graham* in the light of those decisions.

Decision in *Rowley* v. *London and North-Western Railway Co.*, 21 W. R. 869, L. R. 8 Exch. 221, adopted.—JOHNSTON *v.* GREAT WESTERN RAILWAY CO., *C.A.*, 612; [1904] 2 K. B. 250; 73 L. J. K. B. 568.

26. *Parties—Trustee—Breach of trust—Claim for replacement of property—Executors of trustee—Representatives of trust estate.*—In an action by a *cestui que trust* against the executors of a deceased trustee (who was not the last surviving trustee) for the replacement of trust property alleged to have been lost by breaches of trust, the representatives of the trust estate must be made parties to the action. If there are no such representatives, and there is a power of appointing new trustees, that power must be exercised and the new trustees joined as parties. — JORDAN, RE, HAYWARD *v.* HAMILTON, *Ch.D. Byrne, J.*, 150; [1904] 1 Ch. 260; 73 L. J. Ch. 128; 90 L. T. 223.

27. *Power of court to take notice of illegality—New trial—Questions not raised in court below.*—It is the right and duty of the court at any stage of a cause to consider, and, if it be proved, to act upon, an illegality which may be fatal to the contention of either party to the litigation, so as to prevent the process of the court from being used to establish a claim which ought not to be enforced. But in a case in which a court of appeal, after argument and before judgment, raised of its own motion the question of the illegality of the contract upon which the action was brought, which had not been raised in argument before them, the Judicial Committee, though considering the circumstances very suspicious, declined to give judgment upon questions which had not been raised in the court below, and sent the case back for a new trial.—CONNOLLY *v.* CONSUMERS' CORDAGE CO., *P.C.*; 89 L. T. 347.

28. *Review—Action of review—Charging order—Error in law apparent on face of order.*—The High Court has no jurisdiction, by means of an independent action, to review its own order on the ground that the order is erroneous in law upon its face.—BRIGHT & CO. *v.* SELLAR, *C.A.*, 148; [1904] 1 K. B. 6; 72 L. J. K. B. 809; 89 L. T. 431.

29. *Service of writ—Scottish corporation carrying on business in England—Ord.* 9, *r.* 8.—The writ in an action against the Bank of Scotland was served upon the manager of a branch of the defendant bank at the office of the branch in London. The defendant bank was constituted under statute which contained no provision for service of process upon the bank.

Held, that the service was valid under ord. 9, r. 8.— LOGAN *v.* BANK OF SCOTLAND, *C.A.*; [1904] 2 K. B. 495.

30. *Service of writ out of the jurisdiction—Ord.* 11, *rr.* 1, 4—*Primâ facie evidence of breach within jurisdiction.*—Where application is made for leave to serve a writ out of the jurisdiction, or to dis-

charge an order for such service, the court is not called upon to try the merits of the action, but the affidavits should show a *primâ facie* cause of action within the jurisdiction, and disclose a substantial question which the plaintiff *bonâ fide* desires to try. Sufficient information should be given to make clear the ground on which the court is asked to proceed.

Judgment of the Court of Appeal affirmed.—CHEMISCHE FABRIK, &c. *v.* BADISCHE ANILIN, &c., *H.L.*; 90 L. T. 733.

31. *Service out of the jurisdiction—Summons to enforce award—Submission to jurisdiction—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 47), *s.* 12—*R. S. C.*, 1883, *ord.* 11.—A contract between the appellants, who were foreigners carrying on business abroad, and the respondent contained an arbitration clause. The respondent instituted arbitration proceedings the appellants, and appointed an arbitrator. The appellants did not appoint an arbitrator, and the hearing of the arbitration took place without any appearance on the part of the appellants before the sole arbitrator, who made an award in favour of the respondent. The respondent applied for leave to serve on the appellants out of the jurisdiction a summons to enforce the award under section 12 of the Arbitration Act, 1889.

Held, that the court had no power to allow service out of the jurisdiction of such a summons.—RASCH & Co. *v.* WULFERT, *C.A.*, 145; [1904] 1 K. B. 118; 73 L J. K. B. 20; 89 L. T. 493.

32. *Short cause—Affidavits in support.*—In actions coming on as short causes without pleadings or notice of motion copies of the affidavits in support should be left with the papers for the use of the judge.—CHURCH STRETTON MINERAL WATER CO., RE, *Ch. D. Byrne, J.*, 375.

33. *Staying proceedings—Frivolous and vexatious action—Interlocutory application in county court—Subsequent action in High Court raising same question—Ord.* 25, *r.* 4.—Where an action was brought in good faith to try a legal point which ought to be tried, a motion, under ord. 25, r. 4, to dismiss the action as frivolous and vexatious and an abuse of the process of the court, on the ground that the point was *res judicata*, having been raised and determined in previous proceedings, was dismissed with costs in any event.

Decision of Swinfen Eady, J. (89 L. T. Rep. 744), affirmed.—LEA *v.* THURSBY, *C.A.*; 90 L. T. 265.

34. *Summons for directions—Order of master—Setting down for trial as short cause—Motion for judgment—Evidence by affidavit—Notice—Consent—Ord.* 16, *r.* 21; *Ord.* 30, *r.* 2; *Ord.* 36, *r.* 14; *Ord.* 40, *r.* 1; *Ord.* 52, *r.* 5.—This was a debenture-holders' action which the master set down for trial without pleadings to be heard as a short cause; judgment to be applied for on minutes; the evidence to be taken by affidavit.

Two days' notice of motion was served on the defendants, and an objection was taken at the hearing that this was not in compliance with the master's order, and that ten days' notice of trial ought to have been given under ord. 36, r. 14.

Held, that the order was defective in that it did not give the plaintiff leave to serve notice of trial, but, assuming that leave to serve such notice was implied in the order, it remained that the order was to set down the action for trial, and that ten days' notice must be given.—PRINGLE & Co., RE, *Ch.D. Buckley, J.*; 89 L. T. 743.

See also Appeal, 1, 2; House of Lords, 1, 2; Interpleader, 1.

PRESCRIPTION:—

Lost grant—Presumption—User—Acquiescence—Disentailment and resettlement—Tenant for life in possession—Implication of lost grant as against reversioner—Dedication of right of way—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 7, 8.—Where there is a tenant for life in possession of settled land, a lost grant of a right of way cannot be implied as against the reversioner merely from the user of the way during the lifetime of the tenant for life, one ground being that reversioner, not being in possession, would have no power to prevent the user; and the circumstance that the reversioner joined with the tenant for life in barring the entail, and in making a resettlement during the period of the user, does not alter the case.

Bradbury v. *Grinsell* (2 Wms. Saund. 175 (*d*) (*e*)) and *Daniel* v. *North* (11 East, 372) considered and applied.

Decision of Walton, J., affirmed.—ROBERTS *v.* JAMES, *C.A.*; 89 L. T. 282.

See also Easement.

PRINCIPAL AND AGENT:—

1. *Authority of agent—Underwriters at Lloyd's—Policy guaranteeing that drawer of bill will put acceptor in funds to meet it—Policy authorized by terms of agency, but made to benefit agent and not in the interest of the principal—Liability of principal.*—Where an agent, who is authorized to make contracts "for and on behalf of" his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted *bonâ fide*, repudiate liability, although such contract was made by the agent solely in his (the agent's) own interest and not in the interest of his principal.

Decision of Bigham, J. (51 W. R. 652, [1903] 2 K. B. 399), reversed.—HAMBRO & SON *v.* BURNAND, *C.A.*, 583; [1904] 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803.

2. *Commission—Corrupt bargain—Confirmation by principal—Evidence—Necessity of full knowledge of all facts.*—The defendant, acting through his agent, entered into a contract with the plaintiffs, who were shipbuilders, for the building of a ship. Before the contract was arranged the plaintiffs secretly agreed to give a commission to the defendant's agent.

At an interview which afterwards took place between the plaintiffs and the defendant as to the payment by him of money due under this contract, the plaintiffs informed him that they had agreed to pay commission to the agent, and the defendant, after being so informed, paid them a small sum on account. The plaintiffs afterwards brought an action to recover the balance due to them.

At the trial of the action, Bruce, J., held that, by reason of the plaintiffs' secret agreement to give a commission to the defendant's agent, the contract was one which entitled the defendant to repudiate, but that by what had occurred at his interview with the plaintiffs he had confirmed the contract and debarred himself from repudiating it (88 L. T. Rep. 286). On appeal,

Held, reversing the decision of Bruce, J., that the plaintiffs had not shown that there had been a full disclosure to the defendant of all the circumstances in connection with the plaintiffs' agreement to pay commission to the agent, and that, therefore, there had been no such confirmation by the defendant of his contract as debarred him from repudiating it.—BARTRAM *v.* LLOYD, *C.A.*; 90 L. T. 357.

3. *Commission—"When and if the purchase is completed by private treaty."*—The defendant, who

was desirous of selling a house, entered into an agreement with the plaintiff that if the latter introduced to him a person who should become the purchaser of the house, he, the defendant, would pay the plaintiff as and by way of commission a certain sum "when and if the purchase is completed by private treaty." The plaintiff introduced a purchaser who was accepted by the defendant, and a contract to purchase was signed and a deposit paid. The purchaser was unable to carry out the contract, and it was agreed between her and the defendant that he should release her from the contract in consideration that he should retain the deposit, and this was accordingly done.

Held, that the plaintiff was entitled to his commission, as the purchase was "completed by private treaty" so far as he was concerned.—CHAPMAN *v.* WINSON, *K.B.D.*, 478; 90 L. T. 159.

4. *Secret commission—Breach of duty—Right of agent to commission.*—The relation of principal and agent implies that the agent will act solely on behalf of his principal. If, therefore, in breach of his duty as agent, he receives a secret commission from the other side, he is not only liable to refund the secret commission, but he is not entitled to any commission; and the principal is entitled to recover any commission that he has paid the agent.—ANDREW *v.* RAMSAY, *K.B.D.*, 126; [1903] 2 K. B. 635; 72 L. J. K. B. 865; 89 L. T. 450.

See also Limitations, Statute of, 2.

PRINCIPAL AND SURETY.—See Mortgage, 6.

PROBATE:—

1. *Administration—Person entitled to administration missing—Length of absence—Citation—Applicant entitled—Special circumstances—Probate Act,* 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—When an application is made to the court for a grant of letters of administration by a person who is not primarily entitled to the grant, the special circumstances of the case will be taken into consideration, and the court will use its discretion in granting or refusing administration under section 73 of the Probate Act, 1857.

Where the special circumstances are such as to justify the court in coming to the conclusion that the person who would be entitled to a grant of letters of administration in priority to the applicant is dead, or may reasonably be presumed to be dead, the grant of administration will be made to the applicant upon his swearing that he believes himself to be the next-of-kin of the deceased.

In the Goods of Reed, 29 L. T. Rep. 932, and *In the Goods of Callicott,* 80 L. T. Rep. 421, [1899] P. 189 followed and approved.—CHAPMAN, IN THE GOODS OF, *P.D. & Ad.D.*; [1903] P. 192; 72 L. J. P. 62; 89 L. T. 308.

2. *Colonial Probates Act,* 1892 (55 & 56 *Vict. c.* 6) —*Resealing—Limited grant.*—A Colonial grant, though limited, may be resealed in the United Kingdom, provided that the proper conditions prescribed by the Colonial Probates Act, 1892, have been complied with.—SMITH, IN THE GOODS OF, *P.D. & Ad.D.*; [1904] P. 114; 73 L. J. P. 28; 90 L. T. 169.

3. *Corporate body—Grant to corporate body and to individuals—Jurisdiction—Bodies Corporate (Joint Tenancy) Act,* 1899 (62 & 63 *Vict. c.* 20)—*Practice.*—The court will not make a grant of probate to a body corporate and to one or more individuals, all of whom have been appointed executors by a will.—MARTIN, IN THE GOODS OF, *P.D. & Ad.D.*; 90 L. T. 264.

4. *Costs—Practice—Rule* 41 (*Contentious Rules,* 1862)—*R. S. C., ord.* 21, *r.* 18—*Suit for revocation of probate—Notice by plaintiff to cross-examine.*—In construing ord. 21, r. 18, the principles which guided the old Ecclesiastical Courts, and afterwards the Probate Court, ought to be considered; and, following out those principles, a distinction is to be drawn between a party who seeks to call in and obtain revocation of probate, and a party who enters a caveat and takes the ordinary steps in opposing a will being admitted to proof.

A notice given under ord. 21, r. 18, by a plaintiff who claimed revocation of probate, held bad.

Beale v. *Beale,* (1874) L. R. 3 P. & M. 179, approved.—TOMALIN *v.* SMART, *P.D. & Ad.D.*; [1904] P. 141; 73 L. J. P. 37; 90 L. T. 171.

5. *Execution of will—Presence of witnesses—Attestation clause—Evidence—Presumption.*—Where a will appears to be duly signed and witnessed, it is a presumption of law that the execution was duly carried out according to the requirement of the Wills Act, 1837, even though the witnesses may afterwards be in doubt as to what took place at the time of its execution.—WHITING *v.* TURNER, *P.D. & Ad.D.*; 89 L. T. 71.

6. *Foreign domicil, will and marriage—English domicil subsequently acquired.*—The third section of the Wills Act, 1861 (24 & 25 Vict. c. 114), is not limited in its operation to wills of British subjects, but extends to the will of a foreign testatrix made before her marriage, and in strict conformity with the law of her foreign domicil at that time, according to which marriage does not revoke a will.—GROOS, IN THE ESTATE OF, *P.D. & Ad.D.*; [1904] P. 269; 73 L. J. P. 82.

7. *Soldier's will—Military instructions—"Effects to be credited"—Wills Act* (1 *Vict. c.* 26), *s.* 11.—Where a soldier on active service makes a declaration, at the instance of the military authorities who make a note of it at the time, to the effect, in the event of his death, he desires all his "effects to be credited" to a named person, such declaration is a valid testamentary document.—SCOTT, IN THE GOODS OF, *P.D. & Ad.D.*; [1903] P. 243; 73 L. J. P. 17; 89 L. T. 588.

8. *Undue influence—Fraud—Costs.*—The court held that, inasmuch as there did not appear to be anything unreasonable in the charge of undue influence and fraud being made, it was justified in allowing the plaintiff's costs as between solicitor and client to come out of the estate, and subject thereto the costs of the defendant as between party and party to be paid out of the estate also.—WILSON *v.* BASSETT, *P.D. & Ad.D.*, 274; [1903] P. 239; 72 L. J. P. 89; 89 L. T. 586.

9. *Universal devisee and legatee—No executor named—Administration or probate—Title of administrator to real estate—Probate Court—Land Transfer Act,* 1897 (60 & 61 *Vict. c.* 65), *s.* 1, *sub-section* 1; *s.* 24, *sub-section* 2.—The universal devisee and legatee of a testamentary paper in which no executor is named is entitled to administration with the will annexed, but not to probate according to the tenor of the will. The practice of the Probate Court hitherto prevailing in this respect has not been altered by the Land Transfer Act, 1897.

Per Stirling, L.J.: The title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death both as to real estate (by virtue of section 1, sub-section 1) as well as to personalty.—PRYSE, IN THE GOODS OF, *C.A.*; [1904] P. 301; 73 L. J. P. 84; 90 L. T. 747.

PUBLIC AUTHORITY :—

1. *Action against—Tramway system acquired by county council — Public undertaking or commercial enterprize—Acquired and carried on with funds provided by the rates—Accident to passenger—Time within which action must be brought — Public Authorities Protection Act,* 1893, *s.* 1 (a).—The defendants, a local authority, acquired under an Act of Parliament power to purchase and work the undertaking of a tramway company with funds provided out of the rates. The plaintiffs received personal injuries owing to the alleged negligence of the defendants' servants, whereby the tramcar on which they were travelling collided with another tramcar. In an action to recover damages commenced more than six months after the accident, the defendants pleaded that the action could not be maintained by reason of the provision in section 1 (*a*) of the Public Authorities Protection Act, 1893.

Held, that the local authority could avail themselves of the protection afforded to public authorities, and that the action, therefore, not having been brought within six months, was barred.—PARKER *v.* LONDON COUNTY COUNCIL, *K.B.D.*, 476; [1904] 2 K. B. 501; 73 L. J. K. B. 561; 90 L. T. 415.

2. *Action against justice—Issue of distress warrant —Limitation of action—Time of conviction or distress—Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1.—The defendant, a police magistrate, convicted the plaintiff of an offence, and ordered him to pay a fine. The plaintiff having failed to pay, the defendant issued a distress warrant by virtue of which the plaintiff's goods were distrained upon. The conviction was subsequently quashed. The plaintiff then brought an action against the defendant for damages for illegal distress. The action was commenced more than six months after the conviction, but less than six months after the distress warrant was issued.

Held, that the action was not barred by the Public Authorities Protection Act, 1893.—POLLEY *v.* FORDHAM, *K.B.D.*; [1904] 2 K. B. 345; 73 L. J. K. B. 687; 90 L. T. 755.

3. *Payment of debt — Public duty—Damages— Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61)—*Poor Law (Payment of Debts) Act,* 1859 (22 *&* 23 *Vict. c.* 46).—Where a contractor brought an action under a building contract against a public authority for payment for work done and damages after the expiration of the time limited by the above-mentioned Acts for the suing of a public authority in respect of acts done in the performance of a public duty,

Held, that the public authority was not entitled to the protection given by the said Acts, and that the plaintiff could recover.

Guardians of West Ham v. *Churchwardens of St. Matthew's, Bethnal Green,* [1896] A. C. 477, 45 W. R. Dig. 111, followed. — SHARPINGTON *v.* FULHAM GUARDIANS, *Ch.D. Farwell, J.*, 617.

PUBLIC HEALTH :—

1. *Bye-law — Continuing offence — Evidence — Reasonableness.*—The appellants, having been convicted of permitting a new building, executed in contravention of a bye-law, which bye-law did not contain any provision allowing the local authority to dispense with its provisions in any particular case, to continue to exist in such state as to be in contravention of the bye-law, the only evidence given was that one of the appellants had been convicted of originally erecting the building contrary to the bye-law, and that it was in the same condition as then, and that both appellants resided in the house to which the building in question was attached.

Held, that the bye-law was reasonable; that the conviction for the original offence was not evidence of the continuing offence; and that the justices had power under section 16 of the Summary Jurisdiction Act, 1879, to deal with an offence against the bye-laws if they thought fit to do so.—POMEROY *v.* MALVERN URBAN COUNCIL, *K.B.D.*; 89 L. T. 555.

2. *Dangerous structure—Costs incurred by authority —Towns Improvement Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 34), *s.* 75—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 160, 257—*Costs of appellant where respondent does not appear — Practice.*— Section 257 of the Public Health Act, 1875, does not apply to section 75 of the Towns Improvement Clauses Act, 1847, incorporated in the Act of 1875 by section 160.

Expenses of putting up a hoarding under section 75 of the Act of 1847 can be therefore recovered, although three months have not elapsed since the demand.

Costs may be granted in a proper case against a respondent, the defendant before the justices, even although he does not appear upon the appeal.—USK URBAN COUNCIL *v.* MORTIMER, *K.B.D.*; 90 L. T. 25.

3. *Drain on private ground—Draining several houses—Drain or sewer—"Single private drain"— Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act,* 1890 (53 *&* 54 *Vict. s.* 59), *s.* 19.—J. was the owner of twelve houses, at the rear of which runs a main or common drain with which each of the houses connects.

The sewage is conveyed from the main or common drain through a branch drain into the public sewer.

The sewage of four other houses, belonging to two other owners, is conveyed by the main or common drain, which also runs at the rear of those four houses, into the said branch drain.

Both the main or common drain and the branch drain are constructed wholly on private property, and it was admitted that the branch drain was a "single private drain" within the meaning of section 19 of the Public Health Acts Amendment Act, 1890.

Held, that the main or common drain running at the rear of J.'s houses was a sewer and was not a "single private drain" within section 19 of the Public Health Acts Amendment Act of 1890.—JACKSON *v.* WIMBLEDON URBAN COUNCIL, *K.B.D.*; [1904] 2 K. B. 359; 73 L. J. K. B. 428; 90 L. T. 417.

4. *Meat—Meat going bad while stored—Meat not set out or offered for sale—"Intended for the food of man"—Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 116, 117.—On a Monday morning, shortly after twelve o'clock at noon, an inspector of nuisances visited the shop where the appellant carried on the business of a butcher. The shop contained a safe which the inspector found closed. It was opened by him and found to contain some meat which showed signs of decomposition. Business was carried on in the plaintiff's shop up to midnight on the previous Saturday, when all the meat remaining unsold was placed in the safe, and was then sound and fit for the food of man. On the Monday in question the safe had not been opened after midnight on the previous Saturday until the inspector's visit, a period of thirty-six hours.

In the ordinary course of the appellant's busi-

ness all the meat contained in the safe would have been examined before setting it out for sale, and any part found to have been unsound would have been removed.

Held, that there was no evidence that the meat was deposited on the appellant's premises for the purpose of sale and intended for the food of man.

Mallinson v. *Carr*, 63 L. T. Rep. 459, 17 Cox C. C. 228, [1891] 1 Q. B. 48, distinguished.—WIELAND *v.* BUTLER-HOGAN, *K.B.D.*; 90 L. T. 588.

5. *Nuisance—Private drain draining several houses—Drain emptying into cesspool—Undertaking by owner to treat drain and cesspool as private and to cleanse same—Nuisance at cesspool—Liability of owner as "person by whose act, default, or sufferance nuisance arises"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 95, 96.—The appellant, a builder who had built houses on each side of a certain road, submitted plans to the local authority for a scheme of drainage for the houses, and the plans were accepted subject to the appellant entering into an undertaking with the local authority, which he did; and accordingly a drain or sewer, with which each house was connected by a single pipe, was constructed along the middle of the road for a distance of about 1,200ft., communicating with the surface by manholes and terminating in the road at a point at which it was connected with a large cesspool constructed on the adjoining land of which the appellant was lessee in possession. Several of the houses were connected with the drain and were drained through the drain into the cesspool as the ultimate outfall. The appellant was not the occupier of any of the houses, but was, within the meaning of the Public Health Acts, the owner of six of them and of the land on which the cesspool was built; and in the undertaking given to the local authority he undertook that the drains should, for all purposes of the Public Health Acts, be private drains, and that the drains and cesspool should be cleansed and maintained by him. A nuisance existed at the cesspool from the overflowing therefrom of sewage.

Held, on the authority of *Meader* v. *West Cowes Local Board*, 67 L. T. Rep. 454, [1892] 3 Ch. 18, that the appellant was the person by whose act, default, or sufferance the nuisance arose, and that the obligation to clean out the cesspool and abate the nuisance was upon him and not upon the local authority, notwithstanding that the drain received the drainage of more than one house.—BUTT *v.* SNOW, *K.B.D.*; 89 L. T. 302.

6. *Sewer or drain—"Single private drain"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.—T. was the owner of a block of seven houses in a street, and adjacent to these were two blocks of six houses each, belonging to another owner. There were two private passages between the blocks leading to the backs of the houses.

A 6in. pipe passed through the two blocks and across the two passages, passing into a 9in. pipe passing through the block belonging to T., and out into the main sewer in a street running at right angles to the street in which the three blocks were situated.

Held, that the 9in. pipe was a sewer and not a drain, and so was repairable by the local authority.—THOMPSON *v.* ECCLES CORPORATION, *K.B.D.*; [1904] 2 K. B. 1; 73 L. J. K. B. 497; 90 L. T. 507.

7. *Street not repairable by inhabitants at large—Expenses of sewering and paving—Liability of owner of premises—Owner at date of completion of work not owner at date of demand—Liability of person not owner at date of demand—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.—Under section 150 of the Public Health Act, 1875, notices were served by an urban authority upon the owners of premises fronting or abutting on a street (not being a highway repairable by the inhabitants at large) to sewer, pave, and make up the street. These notices not having been complied with, the urban authority executed the necessary works and apportioned the expenses upon the owners of premises fronting on the street, the appellant, both at the time of the notice to pave and at the time of the completion of the works by the urban authority, was the owner of premises fronting the street; but before the date of the notice of apportionment and of the demand upon him to pay the amount apportioned on his premises, he had ceased to be owner, having sold the premises, and upon the date of demand of such amount he was not owner of the premises.

Upon summary proceedings before justices to recover the amount apportioned on the premises from the appellant as being the "owner in default" within the meaning of section 150,

Held, but only upon the authority of the case of *Reg.* v. *Swindon New Town Local Board*, 4 Q. B. D. 305, that, notwithstanding the words in section 257 of the Act that such expenses may be recovered by the local authority "from any person who is the owner of such premises when the works are completed," the appellant not having been the owner at the date of the demand upon him to pay the apportioned amount, was not the "owner in default" within the meaning of section 160, although he was the owner of the premises at the time when the works were completed, and that therefore he was not liable to pay the expenses. To be the "owner in default" in such cases, a person must be the owner not only at the time when the works are completed, but also at the time when the apportioned amount is demanded from him.

Reg. v. *Swindon New Town Local Board* followed but questioned.—MILLARD *v.* BALBY-WITH-HEXTHORPE URBAN COUNCIL, *K.B.D.*; 90 L. T. 489.

See also Highway, 5; Inland Revenue, 13; Landlord and Tenant, 5, 10; Local Government, 6, 7, 11, 14-16; Metropolis, 12-16; Nuisance, 4.

RAILWAY:—

1. *Bye-law—Intermediate station—Passenger breaks journey at a junction where it was necessary for her to change—Right of company to treat contract ended and to require ticket to be given up if passenger leaves the station.*—The plaintiff took a return ticket, available for seven days on the defendant's line from Chorley to Manchester. She returned the same day by a train from Manchester which only brought her as far as Bolton, where she had to change and wait some half-hour for the next train to Chorley. She therefore determined to visit a friend in the town and to return in the evening by a later train. On quitting the station the ticket collector informed her that, as the next train would be leaving for Chorley shortly, if she did not go by it but left the station and returned by a later train, she must give up her ticket and re-book. She gave up her ticket under protest, and on completing her return journey by a subsequent train took a ticket to Chorley, for which she paid 11½d. In an action by her to recover the sum so paid,

Held, that in the absence of special terms a contract by a railway company to carry a passenger from one station to another does not give the passenger a right to break the journey, although

the station where the passenger desires to alight and stay for a time is a junction at which he or she was obliged to change trains. Therefore, in the present case, the sum paid for a ticket from Bolton to Chorley could not be recovered back by the plaintiff from the company.—ASHTON *v.* LANCASHIRE AND YORKSHIRE RAILWAY CO., *K.B.D.*, 655; [1904] 2 K. B. 313; 73 L. J. K. B. 701.

2. *Carriage of goods—Owner's risk note—Failure to carry goods by route specified.*—Fish, in barrels, was consigned by the plaintiff to the defendant railway company to be carried from Brixham to Jersey, *viâ* Southampton, upon terms that the plaintiff, in consideration of his being charged a reduced rate, relieved the defendants from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that it arose from wilful misconduct on the part of the company's servants. The defendants by a mistake carried the fish past Exeter, the station at which they ought to have transferred the barrels to the London and South-Western Railway Co.'s system, and the mistake was not discovered until the fish arrived at Taunton. It was then sent from Taunton *viâ* Weymouth to Jersey, with the object of lessening the damage. In consequence of this mistake the arrival of the fish at its destination was delayed, and the plaintiff suffered damage.

Held, that the defendants were protected by the terms of the contract.

Mallet v. *Great Eastern Railway Co.*, 47 W. R. 334, [1899] 1 Q. B. 309, distinguished.—FOSTER *v.* GREAT WESTERN RAILWAY, *K.B.D.*, 685; [1904] 2 K. B. 306; 90 L. T. 779.

3. *Goods consigned by shippers for carriage over several companies' lines under their special contract with railway company—Goods lost by fire while on rail—Privity of contract—Alternate rates—Owners' risk—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.—Where two or more railway companies agree together to carry through goods at a special rate in consideration that the goods are conveyed at owners' risk on their respective lines, and goods are lost or damaged, the sender has no cause of action, although the loss or damage to the goods occurred through the negligence of one of the companies other than that to which the sender or his agent consigned the goods on these terms.—BARRATT *v.* GREAT NORTHERN RAILWAY, *K.B.D.*, 479.

4. *Parliamentary deposit fund—Abandoned undertaking—Mortgage by sureties, owners of the fund—Payment out of court—Costs of owners having conduct of proceedings.*—The sureties of a railway company, owners of the parliamentary fund deposited in court, mortgaged the fund. On the abandonment of the undertaking the usual inquiries were directed and the sureties had the conduct of the proceedings. On application for payment out,

Held, they were not entitled to their costs incurred in the proceedings wherein the inquiries were directed.—LANCASHIRE, DERBYSHIRE, AND EAST COAST RAILWAY ACTS, RE, *Ch.D. Farwell, J.*, 26; [1903] 2 Ch. 711; 72 L. J. Ch. 789.

5. *Rates — Carriage — Pitwood — Measurement weight or actual weight.*—Under the Great Western Railway Co. (Rates and Charges) Order Confirmation Act, 1891, the company are not bound to carry pitwood for mining purposes by measurement weight at the rates specified in the schedule thereto as applicable to goods in Class C.—GREAT WESTERN RAILWAY *v.* CASWELL, *K.B.D.*; [1904] 2 K. B. 508.

6. *Rates—Carriage of non-perishable goods by passenger train—Absence of statutory duty to so carry—Inclusive charge for collection, carriage, and delivery—Right of company to impose its own terms—Equality clause—Midland Railway Co. Act*, 1844 (7 & 8 *Vict. cxviii.*), *s.* 203—*Railway Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 90—*Midland Railway Co. Act (Rates and Charges) Order Confirmation Act*, 1891 (54 & 55 *Vict. c. cxix.*), *Part V., clause* 3.—By section 203 of the Midland Railway Co. Act, 1844, it was enacted that "all tolls for the use of the railway shall be at all times charged equally to all persons, and after the same rate. . . ."

By the Midland Railway Co. (Rates and Charges) Order Confirmation Act, 1891, it was provided that "the company shall not be under obligation to convey by passenger train, or any similar service, any merchandise other than perishables." By the same Act a provisional order fixing maximum rates for the conveyance of goods was fixed.

Held, that both section 203 of the Act of 1844 and section 90 (the "equality clause") of the Railway Clauses Act, 1845, apply only to tolls which the defendant railway company were authorized by their Act to take, and that as the company were under no statutory obligation to carry non-perishable goods by passenger train, they were entitled to demand from persons who wished to send such goods by passenger train a special rate, including collection, carriage, and delivery, although the collection had been in fact made by the sender himself.—STONE *v.* MIDLAND RAILWAY CO., *C.A.*, 491; [1904] 1 K. B. 669; 73 L. J. K. B. 392; 90 L. T. 194.

7. *Rates—Undue preference—Shipment rate and works rate—Works rate for same services higher than shipment rate—Right of trader to apply for reduction of works rate—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 27.—The mere fact that a railway company charge a higher rate for carriage of coal over the same length of line to traders' works—all traders being charged an equal rate—than they do for coal for shipment, is not of itself sufficient to give a trader a right to apply to the court for reduction of the works rate, and such difference between the works rate and the shipment rate does not necessarily show an undue preference or an undue prejudice within the meaning of the Railway and Canal Traffic Acts.—SPILLERS *v.* TAFF VALE RAILWAY CO., *K.B.D.*; 90 L. T. 713.

8. *Receiver — Rolling stock — Proceeds of sale—Debenture-holders — Priority — Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 4, 23.—Rolling stock and other chattels of an insolvent railway company were sold to another railway company under the provisions of a statutory agreement, which directed the proceeds of sale to be paid to a receiver already appointed under section 4 of the Railway Companies Act, 1867, and gave the purchasing company the exclusive right of working the insolvent company's railway for ten years on certain terms.

Held, that the proceeds of sale constituted money received by the receiver within the meaning of section 4, and the holders of mortgage debentures charging the undertaking were therefore entitled to those proceeds under section 23, in priority to unsecured creditors.

Yorkshire Railway Wagon Co. v. *Maclure*, (1882) 21 Ch. D. 309, 314, and *In re Hull, Barnsley, and West Riding Junction Railway Co.*, (1888) 40 Ch. D. 119, 130, applied.—LISKEARD AND CARADON RAIL-

WAY CO., RE, *Swinfen Eady, J.*; [1903] 2 Ch. 681; 72 L. J. Ch. 754; 89 L. T. 437.

9. *Taking lands—Compulsory powers—Duration of—Computation of time—"Three years from the passing of this Act"—Exclusion of day of passing of Act—West Metropolitan Railway Act*, 1899 (62 & 63 *Vict. c. ccl.*), *s.* 29.—By section 29 of the West Metropolitan Railway Act, 1899, "the powers of the company for the compulsory purchase of lands for the purposes of this Act shall cease after the expiration of three years from the passing of this Act."

The Act passed on the 9th of August, 1899, and notice to treat for part of the land was served on the 9th of August, 1902.

Held, that in computing the three years the day of the passing of the Act must be excluded, and that therefore the compulsory powers of the company did not cease until midnight of the 9th of August, 1902.—GOLDSMITHS' COMPANY *v.* WEST METROPOLITAN RAILWAY CO., *C.A.*, 21; [1904] 1 K. B. 1; 72 L. J. K. B. 931; 89 L. T. 428.

See also Carrier, 2.

RATING:—

1. *Collector — Poor rate collector (Ireland)—Transfer of existing officers to county council—Scheme for collection of poor rate—Remuneration—Local Government (Ireland) Act*, 1898, *c.* 37, *s.* 115, *sub-sections* 10-16, 18.—Sub-section 18 of section 115 of the Local Government (Ireland) Act, 1898, does not apply to poor rate collectors transferred to a county council, at any rate so far as the fixing the amount of their remuneration is concerned. Provision for their remuneration is made by sub-section 11.

So held by the Earl of Halsbury, L.C., and Lords Macnaghten, Davey, and Robertson, Lord Lindley dissenting.

The decision of the Court of Appeal (I.) ([1902] 2 I. R. 637) reversed, and the order for the *mandamus* discharged.—LOCAL GOVERNMENT BOARD FOR IRELAND *v.* MCKAY, *H.L.*; [1903] A. C. 402; 72 L. J. P. C. 100; 89 L. T. 277.

2. *General district rate—Proportion of assessment—Rating Act*, 1874 (37 & 38 *Vict. c.* 54) *ss.* 3, 6—*Public Heath Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211.—Where a right of sporting over land which is used as "arable, meadow, or pasture ground only, or as woodlands," is let apart from the land, the lessee of that right is not the "occupier" of such land within the meaning of section 211, sub-section 1 (*b*), of the Public Health Act, 1875, so as to entitle him to be assessed in respect of the same to the general district rate in the proportion of one-fourth part only of the net annual value thereof; he is the occupier of a special hereditament—namely, the sporting right, and is liable, under section 6 of the Rating Act, 1874, to be assessed in respect thereof on the full rateable value of that hereditament.—ALTON URBAN COUNCIL *v.* SPICER, *K.B.D*, 624; [1904] 1 K. B. 678; 73 L. J. K. B. 280; 90 L. T. 576.

3. *General district rate—Publication—Local Act—Power to order making of rate by overseers in same manner as poor rate—Necessity of publication of combined rate—Objection on application for distress warrant—Derby Corporation Act*, 1901 (1 *Ed.* 7, *c. cclxvii.*), *s.* 180—*Poor Rate Act*, 1743 (17 *Geo.* 2, *c.* 3), *s.* 1.—By a local Act a corporation were empowered, instead of themselves making, assessing, and levying any general district rate, to order such rates to be made, assessed, and levied as a borough rate, and to enforce payment from the overseers in the same manner as a borough rate, and if such order were made such rates were to be made, assessed, and levied by the overseers in the same manner and under the same provisions as in the case of the poor rate, and the overseers were to recover and enforce the poor rate in the same manner as the general district rate under the Public Health Act, 1875.

A rate which comprised both poor rate and general district rate was duly made by the corporation under the Act, and was duly allowed by two justices, but was not published.

Held, that "publication" was essential to the validity of the rate, as in the case of a poor rate under section 1 of the Poor Rate Act, 1743, and that the defence of non-publication could be raised in answer to a summons for a distress warrant for non-payment of the combined rate, as in the case of a distress warrant for non-payment of a poor rate.—BEESON *v.* DERBY OVERSEERS, *K.B.D.*; 89 L. T. 47.

4. *House—Occupation—Caretaker*—51 *Geo.* 3, *c.* 150.—By 51 Geo. 3, c. 150, after reciting an Act of 12 Car. 2, c. 37, whereby a yearly sum of £250 was charged upon the houses of the inhabitants of the parish of St. Paul, Covent-garden, for the support and benefit of the rector, curate, clerk, and sextons for the time being of that parish, that charge of £250 was repealed, and in lieu thereof a yearly sum of £520 was charged upon all houses within the said parish to be assessed by the churchwardens and paid by the occupiers of such houses respectively.

Held, that houses consisting of the offices, warehouses, store-rooms, and counting-houses of publishers, some rooms in which were occupied by caretakers and their families, such caretakers having internal access to the whole of the premises, were chargeable under this statute.

Surman v. *Darley*, 14 M. & W. 181, considered.—LEWIN *v.* NEWNES, *K.B.D.*; 90 L. T. 160.

5. *Payment—"A term not exceeding three months"—Tenancy from week to week—Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 1, 2.—A tenancy from week to week determinable by a week's notice on either side is a tenancy for "a term not exceeding three months" within section 1 of the Poor Rate Assessment and Collection Act, 1869.—HAMMOND *v.* FARROW, *K.B.D.*; [1904] 2 K. B. 332; 73 L. J. K. B. 726.

6. *Poor law—Part payment—Issue of distress warrant for balance*—12 & 13 *Vict. c.* 14.—A ratepayer who was summoned for non-payment of a rate tendered a substantial portion of the rate in court, which tender was refused.

Held, that the magistrate was justified in refusing to issue a distress warrant except for the balance of the rate over and above the amount so tendered.—REX *v.* GILLESPIE, *K.B.D.*, 367; [1904] 1 K. B. 174; 73 L. J. K. B. 106; 90 L. T. 15.

7. *Poor rate—Application for distress warrant—Tender of part of rate—Jurisdiction of justices to issue distress warrant for whole rate—Jurisdiction to issue warrant of commitment for whole rate—Distress for Rates Act*, 1849 (12 & 13 *Vict. c.* 14), *ss.* 1, 2.—Where, upon a summons for a distress warrant for a poor rate, the person liable to pay the same tenders a part of the rate in court before the justices, the justices have, notwithstanding such tender in court, jurisdiction to issue a distress warrant for the whole amount of the rate, and, in default of sufficient distress to satisfy the whole amount, to issue a warrant of commitment in respect of the whole amount, notwithstanding a subsequent tender of part.

Rex v. *Gillespie*, [1904] 1 K. B. 174, explained.—WILES, EX PARTE, *K.B.D.*; 90 L. T. 225.

8. *Recovery of rates—Illegal distress—Liability of overseers—Poor Relief Act*, 1819 (59 *Geo.* 3, *c.* 12), *s.* 7—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 5, *sub-section* 1; *s.* 19, *sub-section* 5; *s.* 33.—Where a justices' warrant of distress for rates is handed by one of the overseers to the assistant overseer, who, by the terms of his appointment, is authorized to perform all the duties of an overseer, and the assistant overseer, in the execution of the warrant, is guilty of an illegal and excessive distress, the overseers are not liable for the assistant overseer's conduct.—BAKER *v.* WICKS, *K.B.D.*, 556; [1904] 1 K. B. 743; 73 L. J. K. B. 410; 90 L. T. 706.

9. *Volunteer drill hall and storehouse—Part occasionally let for other purposes—Exemption from rates—Crown purposes.*—Certain premises were used as a storehouse, drill hall, &c., for a volunteer battalion, the whole of the property being in the occupation of, and vested in, the commanding officer. Certain portions of the premises were occasionally let for lectures, balls, &c., but such letting was subservient to the use of the premises for military purposes.

The appellant was the caretaker, and did not reside on the premises, but the musical and dramatic licences were taken out in the name of the appellant. The appellant was rated in respect of such portions of the premises as were let out for the above-mentioned purposes.

Held, that, although the appellant was not the proper person to be rated, as he was only a servant, yet those portions of the premises which were let out were properly rateable.—LEWIS *v.* DURHAM UNION, *K.B.D.*; 90 L. T. 383.

See also Poor Law, 1.

RECEIVER:—

1. *Administrator* pendente lite—*Indemnity—Costs of defending action—Charges of personal misconduct—Defence of the action no benefit to the estate.*—Although an administrator *pendente lite* and a receiver is entitled to an indemnity from the estate for his costs in an action brought against him as such administrator or receiver in respect of the estate, where he is defending the estate, yet he is not entitled to his costs incurred in defending a personal action in which he is charged with fraud and personal misconduct where his defence cannot result in any benefit to the estate.

S. was appointed administrator *pendente lite*, and subsequently receiver, of an estate in an administration action. He had an action brought against him charging him with misconduct as such administrator and as such receiver. He applied as such receiver for leave to defend, but leave was not granted. The action was dismissed with costs, which, however, he did not obtain owing to the want of means of the plaintiff. Upon the administration action coming on for further consideration S. asked for indemnity from the estate for those costs.

Held, that as the action was brought against him personally, and as his defence could not have benefited the estate, S. was not entitled to such indemnity.—DUNN. RE, BRINKLOW *v.* SINGLETON, *Ch.D. Byrne, J.*, 345; [1904] 1 Ch. 648; 73 L. J. Ch. 425.

2. *Equitable execution—Subsequent mortgagees and judgment creditors—Stop order—Charging order—Priority.*—An order appointing a receiver prevents the debtor from dealing with the moneys, over which the receiver has been appointed, to the prejudice of the execution creditor, and prevents any subsequent execution creditor from gaining priority over the creditor obtaining the order, if at the date when the order appointing the receiver was obtained, the property of the judgment debtor can not be taken in execution or made available by any other legal process.

Persons obtaining charging orders or stop orders on a fund in court paid in subsequently to the date of the receiving order do not obtain a priority.—ANGLESEY, RE, DE GALVE *v.* GARDNER, *Ch.D. Swinfen Eady, J.*, 124; [1902] 2 Ch. 727; 72 L. J. Ch. 782; 89 L. T. 584.

3. *Practice—Land in possession of receiver—Leave to issue writ for recovery of possession—Writ of possession issued without leave—Injunction.*—Leasehold land was in the possession of a receiver appointed by the court on behalf of a mortgagee of the lessee. Leave was given by the court to the lessor to issue a writ against the lessee for the recovery of possession of the land. The lessor obtained judgment and, without obtaining further leave from the court, attempted to execute his judgment by issuing a writ of possession.

Held, that the leave given by the court did not extend beyond leave to obtain judgment, and, consequently, that the lessor could be restrained by injunction from interfering with the possession of the receiver.—MORRIS *v.* BAKER, *Ch.D. Buckley, J.*, 207; 73 L. J. Ch. 143.

4. *Practice—Writ of possession—Time—Ord.* 41, *r.* 5—*Ord.* 47, *r.* 2.—Where an order was made directing delivery of certain premises into the possession of a receiver appointed by the order, but no time within which delivery of possession was to be made was specified in the order, it was held that a writ of possession could not issue because ord. 41, r. 5, had not been complied with.—SAVAGE *v.* BENTLEY, *Ch.D. Farwell, J.*; 90 L. T. 641.

See also Mortgage, 4; Partnership, 3; Railway, 8; Vendor and Purchaser, 5.

RESTRAINT OF TRADE:—

1. *Covenant — Agent — Construction — Limited to particular business—Reasonableness.*—An agent of an insurance society, who was employed as agent in a particular district, by his contract of service, agreed that he would not "interfere directly or indirectly with the business" after resigning or being dismissed from his agency.

Held (dismissing the appeal), that, upon the true construction of the contract, the restraint was limited to the business of the society in the district in which the agent had acted for them, and was therefore reasonable and valid.—BARR *v.* CRAVEN, *C.A.*; 89 L. T. 574.

2. *Music-hall artist—Covenant not to sing at any town within twenty miles of Manchester—Restraint to continue for six months after close of engagement—Reasonable restraint.*—By an agreement in writing the defendant agreed to appear at the plaintiffs' theatre at Manchester at a salary of £60 per week. The agreement contained the following clause: "Prior to the commencement of this engagement and during its continuance, or within six months afterwards, no artist shall perform at any place of entertainment within twenty miles of Manchester . . . without the written consent of the director . . ." The defendant having been billed to appear at a theatre at Salford, in violation of this agreement and after leave to appear there had been refused her, the plaintiffs brought this action, claiming an injunction.

Held, on the evidence, that the restraint was

reasonable, and therefore that the injunction claimed should be granted.

Nordenfelt v. *Maxim-Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, followed.—TIVOLI, MANCHESTER (LIMITED) *v.* COLLEY, *K.B.D*, 632.

See also Contract, 11; Covenant, 5; Goodwill, 1; Solicitor, 6.

RIVER:—

Ownership of soil—Presumption and medium filum aquæ—*Island.*—The plaintiffs were incorporated by the Great Torrington Commons Act, 1889; and by that Act there were vested in the plaintiffs certain common and waste lands freed and discharged from manorial rights, but nevertheless upon the trusts and for the purposes in the Act declared.

The lands in question were bounded on one side by a river. In the river at that part was an island (probably as old as the banks themselves) of some length, and occupying a considerable portion of the breadth of the river. The plaintiffs were unable to establish an express title to this island, nor was it shown that there was any such title in any other person.

In an action against the defendants for an injunction to restrain the defendants from removing gravel from the bed of the river at a spot near and on the common's side of the island,

Held, that the rule—that where a stream flows between two manors or properties, in the absence of evidence to the contrary, the boundary is to be taken to be the *medium filumaquæ*—should here be applied on behalf of the plaintiffs by drawing the *medium filum* through that part of the river which flowed between the island and the plaintiffs' lands; so that, as the spot from which the gravel was being removed fell beyond the *medium filum* so drawn, the plaintiffs were not entitled to an injunction.—GREAT TORRINGTON COMMONS CONSERVATORS *v.* MOORE STEPHENS, *Ch.D. Joyce, J.*; [1904] 1 Ch. 347; 73 L. J. Ch. 124; 89 L. T. 667.

See also Water, 1, 2.

SALE OF GOODS:—

1. *Agreement for credit—Agreement to give bills—Refusal to give bills—Action for price of goods—Liability.*—If there is an agreement on the sale of goods that credit should be given, and as a security an agreement by the purchaser to give an acceptance, even although the purchaser refuses to give such acceptance, the period of credit still stands.

Semble, there may be an action for refusing to accept the bill if damage can be proved.—RABE *v.* OTTO, *K.B.D.*; 89 L. T. 562.

2. *Contract to sell at minimum price—Principal and agent—Contract—Who is agent?*—A retail dealer of merchandize is not bound by conditions as to its retail price that were imposed upon its wholesale dealer by its manufacturer, in the absence of an express contract in respect thereto made with the wholesale dealer. A wholesale dealer who, having bought goods, resells them for his own profit, is not an agent of his vendor; and he is not made so, because the contract between them provides that he shall be deemed an agent in the event of a sale by him to a retail dealer.—TADDY *v.* STERIOUS, *Ch.D. Swinfen Eady, J.*, 152; [1904] 1 Ch. 354; 73 L. J. Ch. 191.

3. *Custom—Right to reject—Custom limiting right—Validity—Custom incorporated in contracts—Powers of trade arbitrators.*—By a custom a buyer of barley was not entitled to reject for difference or variation in quality unless the same was excessive or unreasonable and was so found by arbitration under the contract.

Held, that the custom was good.

Semble, that where a custom applicable to contracts in a certain trade comes to be incorporated as an express term in the contracts of that trade, the proper inference to be drawn is that it destroys that custom as a custom.

Apart from custom or contract, an arbitrator has no jurisdiction to award a money compensation instead of rejection, where such right to reject exists. — WALKERS, WINSER, & CO. *v.* SHAW, *K.B.D.*; [1904] 2 K. B. 152; 73 L. J. K. B. 325; 90 L. T. 454.

4. *Implied condition—Breach—Measure of damages—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 11, 13, 14, *sub-section* 2; *s.* 53, *sub-section* 2.—The defendants contracted to sell by description to the plaintiffs sulphuric acid, commercially free from arsenic. The plaintiff did not make known to the defendants, either expressly or by implication, the purpose which they required the acid. In breach of the implied condition that the acid should correspond with the description in the contract, the defendants supplied to the plaintiffs sulphuric acid which was not commercially free from arsenic. The plaintiffs by the exercise of ordinary care might have discovered the presence of arsenic in the acid; but they did not do so, and, in ignorance of the fact, used the acid in the manufacture of brewing sugar in the shape of invert and glucose, which they sold to brewers who used it in the brewing of beer. The beer thus made was rendered poisonous, and the brewers suffered loss in respect of which the plaintiffs were liable to them. The plaintiffs also lost the price of the acid, which was rendered worthless to them, and the value of other goods spoilt through being mixed with the acid; and the goodwill of their business was damaged.

Held, that the plaintiffs were entitled to recover from the defendants the price of the acid and the value of the goods spoilt, but not the damages payable by the plaintiffs to the brewers or the damage to the goodwill of the plaintiffs' business.—BOSTOCK & CO. *v.* NICHOLSON & SONS, *K.B.D.*; [1904] 1 K. B. 725; 73 L. J. K. B. 524.

5. *Materials for ship in course of construction—Bankruptcy of shipbuilder—Property in goods.* — A firm of shipbuilders contracted to build a ship for respondents, to be classed 100 A 1 at Lloyd's, and built under their superintendence. The contract contained a clause to the effect that "The vessel as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase-money." The contract further provided that in default of delivery it should be competent for the owners to take possession of the vessel, and of all materials intended for her, and to complete her themselves. Before the vessel was completed the shipbuilders became bankrupt. At the date of the bankruptcy there was in the shipbuilding yard a quantity of plates intended for use in the construction of the ship. They had been passed by Lloyd's surveyor at the makers' works, and had been marked with the number of the ship for which they were intended, and with the position they were to

occupy in her. They had been seen in the shipbuilding yard by the shipowners so marked, but not been specially inspected or approved by them.

Held, that the case was governed by the decision in *Seath* v. *Moore*, 54 L. T. Rep. 690, 11 App. Cas, 350, and was not affected by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and that the trustee in the bankruptcy was entitled to the plates as against the shipowners.

Judgment of the First Division of the Court of Session in Scotland reversed.—REID *v.* MACBETH, *H.L.*; [1904] A. C. 223; 90 L. T. 422.

SCOTLAND, LAW of:—

1. *Entail — Restriction — Provision for widow—Deduction from free rental—Entail Provisions Act*, 1824 (*Aberdeen Act*) (5 *Geo.* 4, *c.* 87), *s.* 1.—By section 1 of the 5 Geo. 4, c. 87, it was provided that the annuity to the widow of the deceased heir of entail "shall not exceed one third part of the free yearly rent of the said lands and estates where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, life-rent provisions, the yearly interest of debts and provisions, including the interest of provisions to children . . . and the yearly amount of other burdens of what nature sover affecting and burdening the said lands and estates, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value therof to such heir of entail in possession, all as the same may happen to be at the death of the grantor."

Held, affirming the decision of the Second Division of the Court of Session (1902, 5 F. 48), that on the calculation of the widow's annuity the heir of entail in possession was not entitled to make deduction for upkeep of estate, buildings, and fences, or for management and superintendence of the estate, these outgoings not being, in the sense of the statute, burdens affecting either the estate or its rents.—EARL OF GALLOWAY *v.* DOWAGER COUNTESS OF GALLOWAY, *H.L.*; [1904] A. C. 50.

2. *Landlord and tenant—Forfeiture of lease—Condition to take over sheep at expiration of lease.*—A tenant, in a letter offering to take a lease of a farm for ten years from 1897, stipulated that at his "awaygoing at the expiration of the lease" the landlord should take over the sheep at a valuation. The lease contained a clause that the lease should be forfeited for non-payment of rent, and, the tenant having failed to pay five half-years' rent, the landlord put an end to the lease in February, 1902, and refused to take over the sheep.

Held, reversing the decision of the Second Division of the Court of Session, reported as *Stewart* v. *Breadalbane* (*Marquis of*), [1903] 5 F. 359, that "awaygoing" must be taken to mean the legal expiration of the lease, and that the landlord on the tenant's default was not bound to take over the sheep.—MARQUESS OF BREADALBANE *v.* STEWART, *H.L.*; [1904] A. C. 217.

3. *Remuneration of procurator fiscal—Preliminary inquiries into non-prosecuted cases—County General Assessment Act*, 1868 (31 & 32 *Vict. c.* 82), *s.* 3, *sub-sections* 2, 3—*Rogue Money Act*, 1724 (11 *Geo.* 1, *c.* 26), *s.* 12.—In an action for debt, the debt must be established either by contract or at common law or by statute.

Held, reversing the decision of the Second Division of the Court of Session, *Hart* v. *County Council of the County of Lanark*, [1902] 40 S. L. R. 117, that it could not be said that in the county of Lanark "it was in use" to pay these fees at the date of the Act of 1868, and therefore the county was not liable.—LANARK COUNTY COUNCIL *v.* HART, *H.L.*; [1904] A. C. 235.

See also Divorce, 7; Fishery, 1.

SET-OFF:—

See Company, 9; County Court, 2; Practice, 17.

SETTLED LAND:—

1. *Compound settled—Heirlooms—Sale—Application of proceeds—Discharge of incumbrance—Heirlooms vested in tenant in tail—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 37, *sub-sections* 1, 2; *s.* 2, *sub-section* 9; *s.* 21, *sub-section* (ii.); *s.* 53.—By this will S. bequeathed pictures and heirlooms to trustees upon trust to permit the same to be used and enjoyed by the person who, under S.'s marriage settlement, should for the time being be entitled to certain landed estates, but so that they should not vest absolutely in any tenant in tail male by purchase of the said landed estates who should not attain twenty-one or die under that age leaving male issue at death. Under the said marriage settlement the said landed estates stood settled to X. for life, remainder to Y. for life, remainder to Z. in tail. One of the pictures had been sold and the proceeds paid to the trustees of the will and invested by them. It had been held that the settlement and will constituted a compound settlement. X. directed the trustees of the compound settlement to apply part of the said proceeds in discharge of a mortgage on the said landed estates,

Held, that the said proceeds were, under the Settled Land Act, 1882, s. 37, sub-section 2 (2), capital money arising under the Act; that they were applicable under section 21, sub-section (*ii.*); that the trustees of the compound settlement had not yet invested the said proceeds; and that X. was entitled, in virtue of the discretion conferred upon him by section 53, to direct the trustees of the compound settlement to apply part of the said proceeds in discharge of the said mortgage.—STAFFORD'S SETTLEMENT, RE, GERARD *v.* STAFFORD, *Ch. D. Warrington, J.*, 536; [1904] 2 Ch. 72; 73 L. J. Ch. 560.

2. *Compound settlement—Trusts to pay annuities—Remainder in trust for settlor—Will of settlor—Confirmation of trusts—Residue in trust for sale—Settlement of proceeds—Settled Land Acts*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 20, 63; *and* 1884 (47 & 48 *Vict. c.* 18), *s.* 7.—P. conveyed and assigned his freeholds and leaseholds to himself and M. in trust, reserving a power of appointment, and by a subsequent deed he appointed that after his death the trustees should hold the same in trust out of the rents and profits to pay certain annuities, and that the surplus —and after the determination of the annuities, the whole—of the rents and profits should be in trust for and belong to himself, his heirs, and his executors. By his will P. confirmed the said trusts, and, subject thereto, devised and bequeated his real and personal estate to other trustees upon trust for sale and conversion, with power to postpone, and directed the proceeds to be held on trusts under which X. was tenant for life in possession.

Held, that the case was undistinguishable from *In re The Marquis of Ailesbury and Lord Iveagh*, 41 W. R. 644, [1893] 2 Ch. 345, and that on the principle of that case, as approved in *In re Mundy and Roper's Contract*, 47 W. R. 226, [1899] 1 Ch. 275, the two deeds and the will must be regarded as a compound settlement, and that X., as tenant for life thereunder, must be granted leave, under section 7 of the Act of 1884, to exercise the powers of the Settled Land Acts, and must be let into

possession on his undertaking to keep down the annuities. — PHILLIMORE, RE, PHILLIMORE *v.* MILNES, *Ch.D. Farwell, J.*, 682.

3. *Heirlooms—Family portraits—Sale by tenant for life in impecunious position through no fault of his own—Opposition by remainderman*—Pretium affectionis—*Discretion of court—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 37, 53.—A nobleman, tenant for life of settled estates to which but for a settlement, to which he had himself been a party, he would have been entitled as tenant in tail was, through no fault of his own, in an impecunious position and unable to marry. The sale of certain heirlooms, including family portraits, some of historical interest, would put him in a better pecuniary position, and he applied under the Settled Land Act, 1882, for leave to sell the same. A remainderman, who was older than the tenant for life, but who would succeed him as tenant for life in the event of his not having male issue, opposed the sale of any family portraits or any portraits of persons connected connected with the family.

Held, under the circumstances of the case, that the court ought to allow the sale of all the heirlooms, including the portraits.—TOWNSHEND'S SETTLEMENT, RE, *Ch.D. Farwell, J.*; 89 L. T. 691.

4. *Housing of the Working Classes Acts—Improvements—Cottages for labourers, &c.—Additions or alterations to enable house to be let—"Available for the working classes"—"Building not injurious to the estate"*—37 & 38 *Vict. c.* 38, *s.* 25 (*x.*, *xx.*); 48 & 49 *Vict. c.* 72, *s.* 11 (1) (b); 53 & 54 *Vict. c.* 70, *s.* 74 (1) (b); 53 & 54 *Vict. c.* 69, *ss.* 13 (*ii.*) *and* 18.—Section 13 (ii.) of the Settled Land Act, 1890, which authorizes, as improvements under the Act, "the making of additions to or alterations in buildings reasonably necessary or proper to enable the same to be let," refers to a future letting. Therefore, where a scheme submitted by a tenant for life to trustees included additions to a house occupied by a tenant.

Held, that the trustees would have discretion to approve the work if the present tenant should give notice to quit, or even if they were satisfied he was resolved to do so.

The expression "available for the working classes" in section 74 (1) (*b*) of the Housing of the Working Classes Act, 1890 (replacing a repealed enactment), means "actually available," and cannot apply to dwellings which are in the occupation of persons whom the Acts do not define as belonging to those classes.

The condition in the same sub-section limiting it to dwellings, "the building of which, in the opinion of the court, is not injurious to the estate," applies only where it is desired to build, and does not restrict the powers conferred by section 25 (xx.) of the Settled land Act, 1882.

Semble, a cottage occupied by a labourer, farm servant, or artizan is substantially within section 25 (x., xx.) of the Settled Land Act, 1882, notwithstanding that it is rented in the name which his wife formerly bore as widow of a man not answering any of those descriptions.—CALVERLEY'S SETTLED ESTATES, RE, *Ch.D. Farwell, J.*, 206; [1904] 1 Ch. 150; 73 L. J. Ch. 25; 89 L. T. 500.

5. *Sale by tenant for life—Undervalue—Action by remainderman to set aside sale—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 4 (1), 53, 54.—The mere fact that, upon a sale by a tenant for life under the powers of the Settled Land Acts, the purchase is at an undervalue is not of itself sufficient to invalidate the sale.

In 1902 a tenant for life, purporting to act under the powers conferred upon him by the Settled Land Acts, sold the freehold of certain public-house property to W. for the sum of £2,000.

At the time of the sale the property was subject to a lease which had been granted as from Christmas, 1892, for a term of twenty-one years at a rent of £63 per annum.

Within a few days after the sale W. contracted to resell the property for £3,000, although it was doubtful whether £3,000 was not in excess of the true value of the property.

W. had not, before making the original purchase, made any inquiry as to whether the trustees or tenant for life had had any valuation made.

Held, that these circumstances were not sufficient to sustain an action by a remainderman to set aside the sale.—HURRELL *v.* LITTLEJOHN, *Ch.D. Joyce, J.*; [1904] 1 Ch. 689; 73 L. T. Ch. 287; 90 L. T. 260.

6. *Settlement by will—Power to jointure and raise portions—Re-settlement—Life estate assigned—Compound settlement—Sale by tenant for life under original settlement—Power of trustee of original settlement to give discharge for purchase-money—Settled Land Acts*, 1882 (45 & 46 *Vict. c.* 38), *s.* 50, *and* 1890 (53 & 54 *Vict. c.* 69), *s.* 4.—Where, in consequence of re-settlement, lands are subject to a compound settlement, but the original settlement is still subsisting, a tenant for life who has parted with his beneficial interest and whose life estate under the original settlement has not been restored, can exercise his statutory power of sale under the original settlement, and the trustees thereof can give a valid discharge for the purchase-money.

In re Cornwallis-West and Munro's Contract, 51 W. R. 602, [1903] 2 Ch. 150, distinguished.—WIMBORNE, RE, *Ch.D. Swinfen Eady, J.*, 334; [1904] 1 Ch. 480; 73 L. J. Ch. 270; 90 L. T. 540.

7. *Tenant for life—Capital money—Improvements—Order of the court—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22, 25, 26, *sub-section* 2 (*iii.*).—A scheme for improvements had been approved by the trustees for the purposes of the Settled Land Acts; the scheme had been carried out by the tenant for life, and capital money was in the hands of the trustees.

Held, that under section 22, sub-section (2) (iii.) of the Act of 1882, the court should exercise its discretion as to whether the scheme was a provident one before authorizing repayment by the trustees to the tenant for life.—KECK'S SETTLED ESTATES, RE, *Ch.D. Farwell, J.*, 362; [1904] 2 Ch. 22; 73 L. J. Ch. 262; 90 L. T. 113.

SETTLEMENT:

1. *Capital and income—Cost of repairs—How borne as between them.*—Where repairs are done in accordance with the provisions of the Public Health (London) Act, 1891, to property subject to a marriage settlement, by persons other than the trustees of the settlement—who are not in a position to execute them—the costs cannot be claimed by the trustees as representing the corpus.—FARNHAM'S TRUSTS, RE, *Ch.D. Kekewich, J.*, 535.

2. *Cohabitation, trust for wife during—Validity—Policy of the law—Husband and wife—Post-nuptial settlement.*—By a post-nuptial settlement the husband assigned certain leaseholds to trustees upon trust to pay the rents to his wife for life, or so long as she should continue the cohabiting wife or the widow of the settlor, for her separate use, and upon the determination of the trust in favour of the wife the husband took an interest in the

settled property. Some years after the date of the settlement the husband and wife separated by mutual consent, and they had not since cohabited,

Held, that the restriction of the wife's enjoyment of the rents to the period of cohabitation was not void as against the policy of the law, and that the trust in her favour determined upon her ceasing to live with the husband.

Cartwright v. *Cartwright*, (1853) 3 D. M. & G. 982, and *H.* v. *W.*, (1857) 3 K. & J. 382, distinguished.—HOPE JOHNSTONE, RE, HOPE JOHNSTONE *v.* HOPE JOHNSTONE, *Ch.D. Kekewich, J.*; [1904] 1 Ch. 470; 73 L. J. Ch. 321; 90 L. T. 253.

3. *Condition subsequent—Marriage of beneficiary at any time—Consent of third party necessary—Gift over.*—A condition subsequent in a settlement, providing for forfeiture of the interest of a beneficiary and her issue in the settled property, if she should marry at any time without the consent of a specified person, is good, provided there is a gift over of the settled property.—WHITING, RE, WHITING *v.* DE RUTZEN, *Ch.D. Warrington J.*, 653.

4. *Construction—Gift to A. for life and to "children or child or remoter issue" at his death—Substitutionary gifts* per stirpes.—In a settlement where property is given in default of appointment to "children or any the child or remoter issue" of A. on the happening of certain contingencies, a child living at the happening of such contingencies will take to the exclusion of his issue.

In re Cleland's Trusts, 7 L. Rep. Ir. 74, followed. —LUND'S SETTLEMENT, RE, *Ch.D. Farwell J.*; 89 L. T. 606.

5. *Marriage settlement—After-acquired property—Covenant to settle—Scots domicil*—Jus relictæ—Spes successionis.—A mere *spes successionis* of a wife to succeed to her husband's personalty in the event of his death leaving her surviving, even though it be coupled with an indemnity in damages by the husband contingently upon the failure of the *spes* by reason of his change of domicil or otherwise, is not caught by, or included in, a covenant in the marriage settlement whereby it was provided that "if at any time during the coverture" the wife should "in any manner become entitled to any personal property for any estate or interest whatsoever" exceeding £200 in value, the same should be brought into settlement.—SIMPSON *v.* SIMPSON, *C. A.*, 310; [1904] 1 Ch. 1; 73 L. J. Ch. 53; 89 L. T. 542.

6. *Marriage settlement—Covenant to settle after-acquired property—Property bequeathed to wife with general power of appointment, subject thereto to herself absolutely.*—Where property is given subject to a general power of appointment, and subject thereto to the donee absolutely, then it will be caught by a covenant previously entered into by the donee to settle after-acquired property.

Steward v. *Poppleton*, W. N. (1877) 29, followed. —O'CONNELL, RE, MAWLE *v.* JAGOE, *Ch.D. Kekewich, J.*, 102; [1903] 2 Ch. 574; 72 L. J. Ch. 709; 89 L. T. 166.

7. *Marriage settlement—Covenant to settle after-acquired property of wife—Inclusion or exclusion of life annuities.*—The fact that the terms of a covenant contained in a marriage settlement for the settlement of after-acquired property of the wife are sufficiently comprehensive to cover such property as annuities or life interests is not conclusive that such property is to be included in or caught by the covenant. Regard must be had to the intention of the covenantor as shown by the nature of the trusts declared of the after-acquired property covenanted to be settled, and if such trusts, as they stand, do not fit property of the nature of annuities, such property will be deemed not to be caught by the covenant.

Townshend v. *Harrowby*, 4 Jur. N. S. 353, followed.

Scholfield v. *Spooner*, 32 W. R. 910, 26 Ch. D. 94, distinguished.—DOWDING, RE, GREGORY *v.* DOWDING, *Ch D. Kekewich, J.*, 293; [1904] 1 Ch. 441; 73 L. J. Ch. 194; 90 L. T. 82.

See also Bankruptcy, 9, 19, 20; Conflict of Laws, 2; Married Woman, 3.

SHIP:—

1. *Bill of lading—Butter carried in refrigerating chambers — Negligence in working refrigerating machinery—"Faults in management of vessel"—Harter Act (U.S. Congress, the 13th of February, 1893) incorporated in bills of lading—Meaning of seaworthy.*—By bills of lading incorporating an American Act of Congress the owners of *The Minneapolis*, conveying butter in refrigerating chambers, were relieved from liability for damage caused by faults in management of the vessel, provided she were seaworthy at the commencement of the voyage. The refrigerating machinery was in good order and the chambers properly cooled at starting, but through negligence in working the said machinery the butter became damaged during the voyage.

Held, by Kennedy, J., that "seaworthy" meant, in the present case, "fit to carry the butter safely," that *The Minneapolis* was seaworthy in this sense, that the damage arose from faults in management of the vessel, and that her owners, therefore, were not liable.

Held, on appeal, that inasmuch as the machinery was not intended for cooling the butter only, but other parts of the cargo and the ship as well, it was part of the ship, and that its mismanagement was a fault in the management of the vessel which relieved the owners by virtue of the Act.—ROWSON *v.* ATLANTIC TRANSPORT CO., *C.A.*, 85; [1903] 2 K. B. 666; 72 L. J. K. B. 811; 89 L. T. 204.

2. *Bill of lading—Charter-party—Exceptions—Accident caused by negligence of servants of shipowner—Use of reckless means of unloading by stevedore's men.*—A cargo of sugar in bags was shipped under a bill of lading which incorporated a charter-party containing, *inter alia*, the following exceptions—viz., perils of the seas, barratry, collisions, stranding, and all other accidents, even though caused by the negligence of the shipowners' servants. The cargo was discharged into lighters by stevedore's employed by the ship. The stevedores' men, in order to facilitate the unloading, recklessly made use of large hooks, whereby some of the bags were torn and the sugar spilt and lost.

Held, that the loss of the sugar was due to an accident within the meaning of the exemption clause.

Judgment of Phillimore, J. ([1903] P. 35), affirmed.—"TORBRYAN," THE, *C.A.*, 40; [1903] P. 194; 72 L. J. P. 76; 89 L. T. 265.

3. *Bill of lading—Construction—Exceptions—Unseaworthiness—Unfitness of ship to receive cargo—Liability of shipowners.*—The obligation cast by the common law upon a shipowner to provide a ship which is seaworthy, not only in the sense of being fit to meet the perils of wind and waves, but also in the sense of being reasonably fit to carry cargo, can only be got rid of by clear and unambiguous words in a bill of lading. A bill of lading contained the following exceptions: "Loss or damage

arising from the consequence of any damage, breakdown, injury to or defect in hull, tackle, boilers, or machinery . . . however such damage, defect, or injury may be caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel, collision, stranding . . . or other perils of the seas, and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by . . . unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness." Cargo shipped under this bill of lading was damaged by water from a pipe used for the supply of water to a tank for domestic purposes. This pipe was broken when the cargo was put on board, and it was admitted that the ship was not fit to receive the cargo when put on board, and that all reasonable means had not been taken to provide against such unfitness.

Held, that the warranty implied by the common law on the part of the shipowners was not got rid of by the exceptions in the bill of lading, and that the shipowners were consequently liable for the damage to the cargo.—RATHBONE *v.* MCIVER, *C.A.*, 68; [1903] 2 K. B. 378; 72 L. J. K. B. 703; 89 L. T. 378.

4. *Bill of lading—Construction—Undivided portions of a bulk cargo—Error in apportioning damaged grain—Duty of shipowner—Rights and duties of consignees* inter se.—Bills of lading for undivided portions of a bulk cargo contained the following clause: "If the parcel herein signed for constitutes part of a larger bulk shipped without separation into parcels, as per bills of lading, each bill of lading shall bear its due proportion of shortage or damage and/or sweepings, if any." Impressed in the margin was the following note: "Part of a parcel, shipped without separation. Each bill of lading to bear its proportion of shortage and damage, if any." One consignee received a full quantity of sound grain. On the apportionment of the unsound grain the plaintiffs refused to accept more than their proportion of unsound grain, and sued for short delivery.

Held, that the clause and note in the bill of lading did not impose any duty on the shipowner to apportion the grain, and that the error was caused by the consignee's agents.—GRANGE *v.* TAYLOR, *K.B.D.*, 429; 90 L. T. 486.

5. *Bill of lading—Discharge of cargo—Goods to be taken "as fast as steamer can deliver"—Deficiency of railway waggons—Option of shipowner to discharge in other ways not exercised.*—Goods were shipped under a bill of lading which provided: "The goods to be taken from the ship by the consignees (at their expense) immediately after arrival, and as fast as steamer can deliver or the same will be transshipped into lighters, or landed, or warehoused at the expense and risk of the proprietors of such goods." On arrival of the vessel the consignees neither took delivery nor did the master exercise his option of landing or lightering the goods.

In an action by the charterer against the consignees for damages for detention of the vessel,

Held, that the plaintiffs were not deprived of their remedy because the master had not exercised his option as to landing or lightering the goods, and were entitled to recover.

Held, further, that the plaintiffs having made out a *primâ facie* case of delay in taking delivery by the defendants, the onus was upon the defendants to show that the delay arose from no default on their part, and was due to the want of appliances in the port, and that they had failed to do so.—"ARNE," THE, *P.D. & Ad.D.*; [1904] P. 154; 73 L. J. P. 34; 90 L. T. 517.

6. *Bill of lading—Exceptions—Marginal clause.*—The plaintiffs were indorsees of bills of lading under which a cargo of maize, barley, linseed, oats, and wheat was shipped on the defendants' steamship. By the bills of lading it was provided that "the . . . owners . . . shall not be responsible for loss, damage, or injury arising from sweating . . . or consequences arising therefrom . . . or heat. That the . . . owners . . . shall not be responsible for any loss or injury to the said goods occurring from any of the causes above mentioned . . . whether any of the perils, causes, or things above mentioned . . . or occasioned by any act or omission, negligence, default . . . of stevedores . . . or other persons in the service of the shipowners . . ." On the margin of the bills of lading under which the maize was shipped was stamped: "In no case is the steamship to be held liable for heating or any other damage occurring to the within mentioned goods." Part or the maize became heated on the voyage, and the other cargo was damaged through improper stowage.

In an action by the plaintiffs to recover damages,

Held, that the words "above mentioned" did not refer to the matters in the clause above or the marginal clause, and that the word "heat" referred to heat arising from some extraneous cause, and that the plaintiffs were entitled to judgment.

Held, further, that if the owners desired to relieve themselves from liability for the negligence of their own servants there should have been express words.

Price v. *Union Lighterage Co.*, 89 L. T. Rep. 731, 9 Asp. Mar. Law Cas. 398, [1904] 1 K. B. 412, followed.—"PEARLMOOR," THE, *P.D. & Ad.D.*; [1904] P. 286; 73 L. J. P. 50; 90 L. T. 319.

7. *Bill of lading—Exemption—Warranty of seaworthiness of ship—Fitness of ship to carry goods.*—Meat was shipped at Melbourne for carriage to London under a bill of lading which contained the following clause in large print: "Neither the steamer, nor her owners, nor her charterers, shall be accountable for the condition of goods shipped under this bill of lading nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention; nor for the consequences of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever." There was also a small print clause exempting the shipowner from liability for loss or damage resulting from (*inter alia*) "defects, latent or otherwise, in hull, tackle, boilers, or machinery, refrigeration, or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded, or at the commencement or any stage of the voyage), if reasonable means have been taken to provide against such defects and unseaworthiness." The ship had on previous voyages carried cargoes of horses, and for the purpose of cleansing the ship to receive the meat a quantity of carbolic acid was used. Upon the arrival of the meat in London it was found to

be tainted with carbolic acid. The learned judge at the trial found that the damaged condition of the meat arose from the tainted condition of the ship at the commencement of the voyage in consequence of the use of carbolic acid, and that if proper care and skill had been used at Melbourne the damage would not have occurred. He held, however, that the large print clause, notwithstanding the limited exemption in the small print clause, exempted the shipowner from liability.

Held, that the large print clause did not confer upon the shipowner a general exemption from liability for loss arising from the unseaworthiness of the ship at the commencement of the voyage, and as reasonable means had not been taken to provide against the unseaworthy condition of the ship, the small print clause did not exempt him.—BORTHWICK *v.* ELDERSLIE STEAMSHIP CO., *C.A.*, 439; [1904] 1 K. B. 319; 73 L. J. K. B. 240; 90 L. T. 187.

8. *Bill of lading—Liberty to over-carry goods if discharge cannot be effected without undue detention—Discharge prevented by delay at previous port—Delay caused by negligence of shipowner's agent—Remoteness of damage—Liability of shipowner.*—A bill of lading contained the following clause: "If in the opinion of the master discharge cannot be effected without undue detention, the steamer shall have liberty to over-carry the cargo to London at merchant's risk, and deliver there to consignees or their assigns."

The ship was delayed at a port of call in the course of her voyage by the negligence of the shipowner's agents, with the result that, on her arrival at the port where the goods were to be discharged, the master found that the discharge could not be effected without undue detention, and he therefore over-carried the goods to London.

In an action by the consignee to recover damages for the over-carriage of the goods,

Held, affirming the decision of Kennedy, J. (88 L. T. Rep. 863), that the damage was not so remote from the negligence of the shipowner's agents as to disentitle the consignee from succeeding in the action.—SEARLE *v.* LUND, *C.A.*; 90 L. T. 529.

9. *Carriage of goods—Passengers' luggage—Conditions on ticket—Stowage in lavatory—Damage by water—Fitness of ship—Seaworthiness.*—A steamship company received passengers on board a vessel at an intermediate port on her homeward voyage. The ticket issued by the company contained a condition exempting them from liability for damage to passengers' luggage although the damage be caused by negligence or default of the company's servants, or by unseaworthiness or unfitness of the ship, provided that reasonable diligence had been used by the company to render the ship at starting seaworthy and fit for the voyage.

In consequence of the crowded state of the vessel, the only available place for stowing the passengers' luggage was a lavatory, and their luggage was accordingly put in there and the lavatory locked.

This lavatory was separated from an adjoining lavatory by a bulkhead which did not quite come down to the floor. A water-closet in the adjoining lavatory became stopped up and overflowed. The overflow, running underneath the bulkhead into the lavatory in which the passengers' luggage was stowed, damaged the luggage.

In an action by the passengers against the company claiming damages for injury to the luggage, Bigham, J., at the trial was of opinion that the damage was not caused by negligence of the company's servants, but by unseaworthiness or unfitness of the ship, and that reasonable diligence had not been used by the company to render the ship at starting seaworthy and fit for the voyage, and he gave judgment for the plaintiffs. On appeal,

Held, affirming Bigham, J., that the plaintiffs were entitled to judgment.—UPPERTON *v.* UNION CASTLE STEAMSHIP CO., *C.A.*; 89 L. T. 289.

10. *Charter-party — Construction — Time for loading—Stoppage by strike—"Stoppage for six days from time of vessel being ready to coal"—Right to cancel charter.*—By a charter-party it was agreed that a ship of the appellants should load a cargo of coal for the charterers "to be loaded in 140 running hours, commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds, and ready to load." The charter-party also provided that in the event of a stoppage caused by a strike "continuing for a period of six running days from the time of the vessel being ready to load, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the steamer previous to such stoppage."

Due notice was given that the ship was ready to load, and, after the expiration of the time allowed for loading, a stoppage caused by a strike commenced, and continued for six days. No cargo had been shipped, and the charterers gave notice that the charter-party was cancelled.

Held, that the charter-party contemplated a stoppage in existence at the beginning of the loading time, and that the charterers were not entitled to cancel the charter on the occurrence of a stoppage at a later period.

Judgment of the Court of Appeal reversed.—STEEL *v.* GRAND CANARY COALING CO., *H.L.*; 90 L. T. 729.

11. *Charter-party—Demurrage—Cargo to be discharged at the average rate of not less than 210 tons per working day—Fraction of a day.*—Under a charter-party the cargo of 2,367 tons on board a ship was to be discharged at the average rate of not less than 210 tons per working day, weather permitting; the time to commence in accordance with the custom of the port; Sundays and all holidays and time lost by any cause whatever beyond the control of the consignee of the cargo not to count as discharging time. It was also provided that demurrage was "to be paid at the rate of 4d. per net registered ton per day and *pro rata* employed beyond the time allowed for discharging." The time the cargo would take to discharge would be 11¼ days. The discharge took 12¾ days, and the charterers contended that as they had rightfully broken into the twelfth day they were entitled to treat the whole of that day as a lay day, and paid demurrage calculated on that basis,

Held, that fractions of a day must be taken into account, and that the shipowners were entitled to be paid demurrage after 11¼ days.—YEOMAN *v.* REX, *C.A.*, 627; [1904] 2 K. B. 429.

12. *Charter-party—Detention at port—Loading—"Regular turn"—Custom of port—Delay caused by number of vessels chartered—Option.*—A charter-party provided that a sailing vessel was to load a cargo of coal at N. "in regular turn" from B. Colliery or any of the collieries the freighters might name. No time for loading was fixed.

At the port of N. it was necessary to obtain a loading order from the colliery before a loading berth was allotted.

When the vessel arrived, a great many vessels were waiting to load from B. Colliery, and in con-

sequence sixty-seven days elapsed before a coaling order could be given to the vessel.

The charterers, who were the owners of B. Colliery, had sold a cargo of that coal to be shipped by this vessel.

Held, that the words "regular turn" referred to the colliery turn as distinguished from the port turn both upon their proper construction and also having regard to the regulations and practice of the port;

Held, also, that the defendants had not chartered an unreasonable number of vessels to arrive at the port about the same time so as to make it impossible that the vessel should be able to load within a reasonable time; and that the probability of delay was known to and contemplated by the shipowners when they entered into the charter-party.

Held, therefore, that the charterers had not acted unreasonably, and were not liable for the detention of the vessel.

Decision of Kennedy, J., affirmed. — BARQUE QUILPUÉ *v.* BROWN, *C.A.*; [1904] 2 K. B. 264; 73 L. J. K. B. 596; 90 L. T. 765.

13. *Charter-party—Freight at rate per ton of gross weight shipped—"Payable on right and true delivery of cargo"—Loss of part of cargo—Lump sum freight—Freight on cargo delivered—Bill of lading freight collected by shipowner—Difference between freight collected and freight due for cargo delivered—Recovery of balance by charterer.*—By a charter-party a cargo of sugar in bags was to be loaded at a named port, and the ship so loaded was to proceed to another named port and there deliver the cargo "agreeably to bills of lading on being paid freight in full of all port charges . . . at the rate of 10s. 6d. per ton of 20 cwt. gross weight shipped payable on right and true delivery of the cargo." Charterers' liability was to cease "when cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled, but vessel to have a lien on the cargo for freight, dead freight, and demurrage." Any difference between the charter-party and bills of lading freight was to be settled at the port of loading on clearance of the vessel if required by the master. The amount due under this clause was ascertained at the port of loading, and paid by the charterers to the shipowners. The vessel loaded a full cargo, but on the voyage she grounded and a portion of the cargo was lost. The remainder was delivered at the port of discharge, and the bills of lading freight on the whole cargo shipped was collected by the shipowners. In an action by the charterers to recover, as money received to their use, the difference between the freight so collected by the shipowners and the amount due to them under the charter-party in respect of the cargo delivered,

Held, by Lord Alverstone, L.C.J., and Collins, M.R., Romer, L.J., dissenting, affirming the judgment of Walton, J., that under the charter-party the shipowners were not entitled to a lump sum freight, and that the balance of freight in their hands could be recovered from them by the charterers.—LONDON TRANSPORT CO. (LIMITED) *v.* TRECHMANN BROTHERS, *C.A.*; [1904] 1 K. B. 635; 73 L. J. K. B. 253; 90 L. T. 132.

14. *Charter-party—Hire—Suspension of hire—Detention by ice "caused by breakdown of steamer"—Vessel detained owing to repairs made necessary by stranding.*—By a charter-party it was provided by one clause that, in the event of loss of time from damage preventing the working of the vessel, the payment of hire should cease until she should again be in an efficient state to resume her service, and by another clause that "detention by ice should be for account of charterers unless caused by breakdown of steamer."

During the voyage the vessel stranded; the necessary repairs were effected and she resumed her voyage; owing, however, to the delay thus caused she was unable to proceed to the destined port before it was closed by ice, and she was consequently detained at an intermediate port.

Held (affirming the judgment of Ridley, J.), that there was a detention by ice "caused by breakdown of steamer," and that payment of hire ceased during that detention.—TRAAE AND LENNARD, RE, *C.A.*; [1904] 2 K. B. 377; 73 L. J. K. B. 553; 90 L. T. 407.

15. *Charter-party—Obligation of charterer to have cargo ready—No time fixed for loading—Cargo from specific source—Option of charterer—Knowledge of parties at time of contract.*—A sailing ship was chartered to load at N. a "cargo of coals as ordered by the charterers," and they afterwards directed that it should be loaded with coal from W. Colliery. No time for loading was fixed. At the port of N. it was necessary to obtain a loading order from the colliery before a loading berth was allotted. The W. Colliery had a small output, and the coal was in great demand. These facts were known to the parties at the time of the contract. In consequence of the number of ships loading from W. Colliery the ship did not obtain a loading berth for a long time, and, in addition to being delayed at N., lost a charter-party elsewhere, as she did not arrive before the cancelling date.

The owners brought an action to recover damages for the loss thus occasioned to them.

Held, that the charterers were not bound to have a cargo of coal ready for loading immediately on the arrival of the ship; that the vessel obtained a loading order in due course in her colliery turn, and there was then no delay on the part of the charterers, and therefore the cargo was provided within a reasonable time; that the option to select the particular coal was an option for the benefit of the charterers, who were not bound, in exercising it, to consider the benefit or otherwise of the shipowners; and therefore, all parties being acquainted with the practice at the port, and the charterers having acted reasonably, they were not liable for the delay.

Decision of Kennedy, J., affirmed.

Little v. *Stevenson*, [1896] A. C. 106, considered.—JONES *v.* GREEN, *C.A.*; [1904] 2 K. B. 275; 73 L. J. K. B. 601; 90 L. T. 768.

16. *Charter-party—Unseaworthiness at starting—Personal negligence of owner in lading.*—Unless the conditions of a charter-party relieve the owner as distinct from his servants and agents from the consequences of personal negligence, he is liable if his ship, in other respects seaworthy, is rendered unseaworthy in being so laden under his orders as to become topheavy at starting, with the result that her deck cargo was partly jettisoned and partly swept overboard in a gale which otherwise could have been weathered in safety.—MASTER AND OWNERS OF STEAMSHIP "CITY OF LINCOLN" *v.* SMITH, *P.C.*; [1904] A. C. 250.

17. *Coaling contract—Bill of exchange—Liability of master as drawer—Notice of dishonour—Delay.*

Held, that the defendant who was the master of a ship and who had drawn a bill of exchange on the owners of the vessel for coal, was liable for the wording of the bill did not relieve him of that liability, and that he was not discharged by the

delay in giving notice of dishonour as the special circumstances excused that delay within the meaning of sections 49 and 50 of the Bills of Exchange Act, 1882.—"ELMVILLE," THE, *P.D. & Ad.D.*; [1904] P. 319.

18. *Collision—Compulsory pilotage—Failure to stand by and give name—Limits of port of Liverpool—8 Anne, c. 8—Mersey Dock Acts Consolidation Act,* 1858 (21 *& 22 Vict. c.* 92)—*Merchant Shipping Act,* 1894 (57 *& 58 Vict. c.* 60), *ss.* 422, 586, 603, 633.—The fact of a vessel after collision with another vessel not standing by and giving her name, as required by section 422 of the Merchant Shipping Act, 1894, does not render her owners liable, if at the time she was compulsorily in charge of a pilot.

The Queen, 20 L. T. Rep. 855, 3 Mar. Law Cas. O. S. 242, L. Rep. 2 A. & E. 354, followed.

A collision occurred in the estuary of the River Mersey between the steamships *G.* and *S.*

By section 127 of the Mersey Dock Acts Consolidation Act, 1858, "every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel so far to the westward as the . . . Fairway Buoy of the Queen's Channel."

Since the date of the Act the buoy has been removed, and for the purposes of pilotage the Bar Lightship, which occupies a position outside of that occupied by the buoy, is treated as the westward limit.

The G. at the time of the collision was at anchor between the Bar Lightship and the place where the buoy used to be.

The defendants pleaded that *The S.* was at the time of the collision compulsorily in charge of a pilot.

Held, that, the Fairway Buoy having been removed, the Bar Lightship occupied the same place relatively for the purposes of section 127 of the Act of 1858, and that pilotage was therefore compulsory.—"SUSSEX," THE, *P.D. & Ad.D.*; [1904] P. 236; 73 L. J. P. 73; 90 L. T. 549.

19. *Collision—Compulsory pilotage—London district—"Constant trader"—Pilotage Act,* 1825 (6 *Geo.* 4, *c.* 125), *s.* 59—*Order in Council, the* 18*th of February,* 1854—*Merchant Shipping Act,* 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 353, 379—*Merchant Shipping Act,* 1894 (57 *& 58 Vict. c* 60), *ss.* 603, 625.—The Order in Council of the 18th of February, 1854, extending the exemptions from compulsory pilotage contained in section 59 of the Pilotage Act, 1825, has not been repealed by the subsequent Merchant Shipping Acts.

To entitle a vessel to come within the exemptions from compulsory pilotage given by the above Order in Council it is not necessary that she should be a "constant trader" to the ports or countries mentioned therein. In order to constitute a vessel a "constant trader" to ports between Boulogne (inclusive) and the Baltic it is not necessary that she should trade exclusively to ports within those limits.

The defendants, a British steamship company, ran a line of steamers from London *via* Antwerp to America and back. A new vessel belonging to them was on her second voyage from London *via* Antwerp to certain Mexican ports, carrying a general cargo and one passenger, when she came into collision in the estuary of the Thames with a vessel belonging to the plaintiffs. At the time of the collision the defendants' steamer was carrying a duly licensed Trinity House pilot. In an action for damage brought by the plaintiffs against the defendants, in which the latter pleaded compulsory pilotage, their pilot was found alone to blame.

Held, affirming the decision of Barnes, J. ([1902] P. 216), that the defendants were liable as their vessel was exempt from compulsory pilotage as she was a "constant trader" within the exemptions contained in section 59 of the Pilotage Act, 1825, which was supplemented by the above Order in Council and kept alive by section 353 of the Merchant Shipping Act, 1854, for which is now substituted section 603 of the Merchant Shipping Act, 1894.

Earl of Auckland (10 W. R. 124, 15 Moo. P. C. 304, held binding and followed.—"CAYO BONITO," THE, *C.A.*, 133; [1903] P. 203; 72 L. J. P. 70; 89 L. T. 260.

20. *Collision—Compulsory pilotage—Port of Liverpool—Vessel proceeding through the port to Manchester—8 Anne, c.* 8—*Mersey Dock Acts Consolidation Acts,* 1858 *and* 1899 (21 *& 22 Vict. c.* 92 *and* 62 *& 63 Vict. c.* 172)—*Upper Mersey Navigation Act,* 1876 (39 *& 40 Vict. c.* 104), *ss.* 4, 51—*Manchester Ship Canal Act,* 1885 (48 *& 49 Vict. c.* 188)—*Merchant Shipping Act,* 1894 (57 *& 58 Vict. c.* 60), *ss.* 605, 633.—Pilotage is compulsory on a vessel inward bound from the sea through the port of Liverpool to Manchester until she enters the Ship Canal at Eastham.

Section 128 of the Mersey Dock Acts Consolidation Act, 1858, requires that "the pilot in charge of any inward bound vessel shall cause the same (if need be) to be properly moored at anchor in the River Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool."

The fact that a vessel anchors for the purpose of waiting for the tide does not put an end to the compulsory services of the pilot.

Semble, pilotage is also compulsory on vessels going out from Eastham through the port of Liverpool to the sea.—"MERCEDES DE LARRINAGA," THE, *P.D. & Ad.D.*; [1904] P. 215; 73 L. J. P. 65; 90 L. T. 520.

21. *Collision—Compulsory pilotage—Rules* 46 *and* 49 *Thames Regulations.*—Those who rely on a plea of compulsory pilotage must establish the fact that the fault of the pilot was the fault of the pilot alone, otherwise the court will not act in finding that the fault was that of the pilot.

The Velasquez, 1 P. 494, approved.—"BENMOHR," THE, *P.D. & Ad.D.*; 686.

22. *Collision—Damage—Freight—Substituted expense.*—A steamship chartered by the Admiralty to carry a cargo of coal from the Tyne to Capetown came into collision with another steamship and put into the Thames for repairs. By agreement between the Admiralty and the owners of the cargo was unshipped in London and sold, and a sum of £1,000 was paid by the Admiralty to the owners of the vessel as a "substituted expense" in lieu of the estimated greater expense of storage and re-shipment on board the vessel after the necessary repairs had been effected. Both ships were held to blame for the collision, and at the reference a moiety of the claim by the owners of the collier was paid by the owners of the other vessel, but at the reference as between that other vessel and the Admiralty, the claim made by the Admiralty for an adjuster proportion of the sum paid as "substituted expense" was disallowed by the registrar.

The Court, affirming the report of the registrar, held that that claim failed, because it was not a loss sustained by the Admiralty directly in consequence of the wrong-doing of the other vessel.—"MINNETONKA," THE, *P.D. & Ad.D.*, 672; [1904] P. 202; 73 L. J. P. 62; 90 L. T. 354.

23. *Collision—Damage to pier—County Courts Admiralty Jurisdiction Acts,* 1868 *and* 1869—*Prohibition.*

The Court held that damage done by a ship to a pier is not "damage by collision" within the meaning of section 3, sub-section 3, of the County Courts Admiralty Jurisdiction Act, 1868, and that, therefore, a county court had no Admiralty jurisdiction in respect of such damage. —"NORMANDY," THE, *P.D. & Ad.D.*, 634; [1904] P. 187; 73 L. J. P. 55; 90 L. T. 351.

24. *Collision—Limitation of liability—Foreign vessel—Foreign certificate of registry—Order in Council—Double bottom—Water ballast—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *ss.* 81, 84, 543, 745.—In an action for limitation of liability by owners of a French steamship, the French certificate of registry supported by affidavit, and the Order in Council of the 5th of May, 1873, extending the provisions of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), as to measurement to French vessels, were put in. A further affidavit was filed that the double bottom for water ballast was not used for the purpose of carrying cargo, stores, or fuel.

Held, that this was sufficient, and that it was not necessary that the certificate of a Board of Trade surveyor under section 81 of the Merchant Shipping Act, 1894, should be also adduced.

The Zanzibar, 68 L. T. Rep. 297, 7 Asp. Mar. Law Cas. 258, [1892] P. 233, followed.—"CORDILLERAS," THE, *P.D. & Ad.D.*; [1904] P. 90; 73 L. J. P. 13; 89 L. T. 673.

25. *Collision—Manchester Ship Canal—Fog—Application of sea rules—Duty to stop and reverse on hearing whistle of approaching vessel—Art.* 16—*Regulations for Preventing Collisions at Sea, arts.* 16 *and* 30—*Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *s.* 418 (1).

Semble, the Regulations for Preventing Collisions at Sea do not apply to the Manchester Ship Canal.

Even assuming that they do apply, a vessel coming down the canal in a fog is not necessarily to blame under art. 16 of the regulations if she does not stop her engines on hearing the whistle of an approaching vessel forward of her beam; for the approaching vessel must be in the canal, and it may be assumed that she is being navigated on her right side, and her position is therefore, under the circumstances, sufficiently ascertained. —"HARE," THE, *P.D. & Ad.D.*; 73 L. J. P. 47; 90 L. T. 323.

26. *Collision—River Mersey—Vessel coming out of dock—Duty to keep out of the way—Regulations for Preventing Collisions at Sea, art.* 19.—A steamship coming out of Prince's Dock into the River Mersey came into collision with another steamship coming down the east side of the river in tow of two tugs.

Held, that art. 19 of the Regulations for Preventing Collisions at Sea did not apply, and that there was no duty on the down-coming vessel to keep out of the way.—"SUNLIGHT," THE, *P.D. & Ad.D.*; [1904] P. 100; 73 L. J. P. 25; 90 L. T. 32.

27. *Collision—Tug and tow—Fog—Duty of tug to stop on hearing whistle of approaching steamship—Art.* 16 *of Regulations for Preventing Collisions at Sea—Proceedings in foreign courts—Judgment by default—Estoppel.*—Art. 16 requires a steam vessel hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained, to, so far as the circumstances of the case admit, stop her engines.

A steam tug with a vessel in tow, on hearing the whistle of an approaching steamship in a fog forward of her beam, is not justified in proceeding if she can stop without encountering any difficulty with regard to her tow.

The Lord Bangor, [1896] P. 28, 73 L. T. Rep. 414, 8 Asp. Mar. Law Cas. 217, distinguished.

Where the plaintiffs, in order to prevent the arrest of their vessel in Belgium, gave security to answer any judgment that might be obtained against them in France, and the defendants, having obtained a judgment in France against the plaintiffs in default of appearance, took proceedings in Belgium to have the French judgment made executory there, and the plaintiffs appeared to such proceedings, and the Belgian courts, without inquiring into the merits, declared the French judgment executory in Belgium,

Held, that the plaintiffs were not debarred from bringing an action for damages in respect of the same collision.—"CHALLENGE," THE, and "THE DUC D'AUMALE," *P.D. & Ad.D.*; [1904] P. 41; 73 L. J. P. 2; 89 L. T. 481.

28. *Collision—Vessel "not under command"—Duty to keep course—Regulations for Preventing Collisions at Sea, art.* 4 (a) (b) (c).—A vessel exhibiting two red lights under art 4 (*a*) of the Collision Regulations as a signal that she is "not under command" ought to keep her course when approaching another vessel so as to involve risk of collision.

A collision occurred between the brigantine *R.* and the barque *H.* *The R.* was at the time close-hauled on the starboard tack; *The H.* was sailing free, but, having been recently in collision with a steamship, was exhibiting "not under command" lights. The helm of *The R.* was put up in order to pass ahead of *The H.*, while the helm of *The H.* was ported.

Held, that *The H.* ought to have kept her course and let *The R.* get out of her way.—"HAWTHORNBANK," THE, *P.D. & Ad.D.*; [1904] P. 120; 73 L. J. P. 18; 90 L. T. 293.

29. *Demurrage—Lay days—Grain cargoes—London Corn Trade Association Contract—Construction—Number of days to be allowed in discharging.*—The London Corn Trade Association Contract, No. 22, provided as to the discharge of grain cargoes from vessels, "Sufficient days to be left for unloading," and, by clause 4, "Sufficient days (counting quarter days) shall be as follows: One running day for every 400 tons up to 2,800 tons of grain, and for all quantities in excess 500 tons per day (as provisionally invoiced)," but in no case were less than five days to be allowed.

Held, upon the construction of this clause, that for all vessels of whatever size the time to be allowed for discharging the cargo was one day for every 400 tons of cargo up to 2,800 tons, and one day for every 500 tons above 2,800 tons, subject in every case to the minimum of five days; and that consequently, in discharging a grain cargo of 3,800 tons, one day was to be allowed for every 400 tons up to 2,800 tons—that is, seven days—and one day for every 500 tons for the excess above 2,800 tons—namely, 1,000 tons—making in all nine days.—TURNER, BRIGHTMAN, & Co. *v.* BANNATYNE & SONS, *K.B.D*; 89 L. T. 507.

30. *Practice—Action* in personam—*Specially indorsed writ—Judgment by default—Ord.* 13, *r.* 3.—The practice of the Admiralty Division as to the procedure in default actions under ord. 13, r. 3, is the same as in other divisions. Where, therefore, the plaintiffs issued a specially indorsed writ in an action *in personam* in the Admiralty Division.

Held, that they were entitled to enter final judgment on the expiration of the time allowed to the defendants to appear.—"MADELEINE" AND "ANDRÉ THÉODORE," THE, *P.D. & Ad.D.*; 73 L. J. P. 24; 89 L. T. 675.

31. *Property of Colonial Government—Salvage—Action* in rem—*Liability of property of Crown to arrest.*—An action *in rem* is a method of impleading the owners of a vessel, and if the owner is the King the action cannot be maintained.

A vessel which is the property of a Colonial Government, although built to be used as a ferry boat for the purpose of carrying passengers and merchandize for hire between one part of a railway owned by the Government and another, enjoys the same immunity from arrest as the property of the Crown, and is not liable to an action for salvage.

The Cybele, 37 L. T. Rep. 773, 3 Asp. Mar. Law Cas. 532, 3 P. D. 8, discussed.—YOUNG *v.* STEAMSHIP "SCOTIA," *P.C.*; [1903] A. C. 501; 72 L. J. P. C. 115; 89 L. T. 374.

32. *Salvage—Appeal—Reduction of award—Costs.*—There is no hard-and-fast rule as to the costs of a successful appeal in a salvage action.

Where the defendants succeeded on appeal in getting the amount of the award considerably reduced,

Held, that they were entitled to the costs of the appeal, the costs in the court below remaining as they were.—"PRINCE LLEWELLYN," *P.D. & Ad.D.*; [1904] P. 83; 73 L. J. P. 22; 89 L. T. 489.

33. *Salvage—Exhorbitant terms demanded—Agreement quashed by court.*—While two large sailing vessels were weather-bound in Holyhead Harbour, one of them dragged her anchors and came in dangerous proximity to the other. The master of the dragging vessel hailed a tug, but the master of the tug demanded £1,000, and would take nothing less before rendering assistance. The master of the sailing vessel offered £100, but rather than foul the other ship agreed to pay £1,000, and he was towed into a position where he held on to his anchors. The owners, master, and crew of the tug brought an action against both vessels, their cargoes and freights, upon the agreement in the one case and for a salvage award in the other.

The Court quashed the agreement, on the ground that it was an exorbitant and an inequitable one, which was improperly forced upon the master of the sailing vessel, and therefore could not be sustained. It ordered a sum of £200 to be paid, and gave costs on the county court scale. The action against the other vessel the court dismissed with costs, it being of opinion that no salvage service had been rendered to her by the tug.—"PORT CALEDONIA" AND "ANNA," THE, *P.D. & Ad.D.*, 223; [1903] P. 184; 72 L. J. P. 60; 89 L. T. 216.

34. *Salvage—Launchers of lifeboats.*—In this case it was held that as the master of *The Cayo Bonito* engaged the coxswains and crews of the lifeboats to perform salvage services, and those services were of some benefit, the tender was inadequate, and they were entitled to an award of £400. As regarded the launchers, the effect of the evidence seemed to be that, when the lifeboats were launched, the launchers took their chance whether there might be only service to life or whether there might be service to property. In the present case the launchers had substantiated their claim against the defendants, the owners of *The Cayo Bonito*, and were entitled to an award of £100.—"CAYO BONITO," THE (No. 2), *P.D. & Ad.D.*; [1904] P. 310.

35. *Salvage—Signals of distress—Proper interpretation of section* 434, *sub-section* 2, *of the Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60).—Section 434 (2) of the Merchant Shipping Act, 1894, which penalizes the master of a vessel who wrongfully uses or displays signals of distress, does not apply when such signals have been properly used.

Where, therefore, signals of distress were properly displayed, and a vessel put off in response to them, and on her arrival her services were not required,

Held, that she was not entitled to be compensated for the labour undertaken or loss sustained in consequence of answering the signals.—"ELSWICK PARK," *P.D. & Ad.D.*; [1904] P. 76; 72 L. J. P. 79; 89 L. T. 217.

36. *Salvage—Stranding of salved vessel—Value for purposes of award.*—A steam trawler towed a disabled steamship into Aberdeen Bay, and signals were made for a pilot and a tug. A tug came up in response and offered to pilot and tow the vessel into harbour, but the offer was refused by her master, and the tug sent back for a pilot. In the meanwhile the hawser parted, and the vessel drifted ashore. Her value at the time the services of the tug were offered was £8,580. The costs of refloating were £1,150, and of the repairs in consequence of the stranding £5,600. In an action for salvage by the owners, master, and crew of the trawler,

Help, on the facts, that they were entitled to salvage, and to an award of £750, and that, for the purposes of arriving at a proper award, the value of the salved property must be taken at £8,500.

Held, further, that the steamship ought to have taken the services of the tug when offered.—"GERMANIA," THE, *P.D. & Ad.D.*; [1904] P. 131; 73 L. J. P. 59; 90 L. T. 296.

37. *Salvage—Tug in tow—Rights of innocent parties.*—A tow was brought into distress by the negligence of the master of her tug, and the tug thereupon salved her.

The Court held that nobody connected with the tug could claim as salvors.—"DUC D'AUMALE," THE, *P.D. & Ad.D.* 319; [1904] P. 60; 73 L. J. P. 8; 89 L. T. 486.

38. *Seaman—Distressed seaman—Provisions for relief—Expenses of maintenance and passage home—"Sufficient evidence"—Wages paid abroad in excess of such expenses—Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 190, 191, 193—*Merchant Shipping (Mercantile Marine Fund) Act*, 1898 (61 *&* 62 *Vict. c.* 44), *s.* 4.

Held, that a seaman might nevertheless be a "distressed seaman" abroad within the meaning of section 191 of the Merchant Shipping Act, 1894, although the wages due and paid to him abroad exceeded the amount of the expenses incurred on his behalf for maintenance and passage home.

Held, further, that although the mere fact that a seaman has been shipwrecked abroad is not conclusive evidence of distress, yet that in the present case there being evidence on which the learned judge could find (as he did) that the seamen were distressed, it was unnecessary to decide whether the "sufficient evidence" mentioned in section 193 meant "conclusive evidence."—BOARD OF TRADE *v.* "GLENPARK" SAILING SHIP, *C.A.*, 646; [1904] 1 K. B. 682; 73 L. J. K. B. 315; 90 L. T. 360.

39. *Seaman—Master and servant—Illegal deductions—Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 31, 221, 232.—No deduction from the wages of a seaman can be made for the offence of desertion, except by a court of summary jurisdiction, in accordance with sections 221 and 232 of the

Merchant Shipping Act, 1894; and any private arrangement with the seamen that such deductions should be made is illegal.—KESLAKE *v.* BOARD OF TRADE, *K.B.D.*, 127; [1903] 2 K. B. 453; 72 L. J. K. B. 829; 89 L. T. 534.

40. *Wharf—Negligence—Damage to vessel lying in berth—Liability of wharf-owner.*—Judgment of Bucknill, J. (51 W. R. 590), on the facts affirmed.—"VILLE DE ST. NAZAIRE," THE, *C.A.*, 68.

SLANDER:—

Accusation of bringing "blackmailing" action—Imputation of criminal offence—Action for slander maintainable.—An action for slander founded upon an accusation that the plaintiff had brought a "blackmailing" action was held to be maintainable on the ground that the words spoken might fairly be interpreted by hearers as imputing to the plaintiff an indictable offence.—MARKS *v.* SAMUEL, *C.A.*; [1904] 2 K. B. 287; 73 L. J. K. B. 587; 90 L. T. 590.

See also Injunction, 1.

SOLICITOR:—

1. *Costs—Lease by vicar and others acting by different solicitors—Lessee's liability—Error in taxation—Disallowed costs of additional solicitors excluded from one-sixth—Objections—Ord. 65, r. 27, sub-rules 39, 41—Costs of taxation.*—Where a lessor can only grant a lease with the consent of third parties, and such parties act by different solicitors, the lessee is not, in the absence of agreement express or implied, liable to pay more than one set of costs. In taxing a solicitor's bill of costs, some of the items in which represent payments made by him to other solicitors, which the client is liable to pay and would have been entitled to tax if sent in to him direct by such other solicitors, any sums taxed off such items are, no less than sums taxed off the solicitor's own charges, to be reckoned as taxed off his bill for the purpose of ascertaining who is to pay the costs of taxation.

Ord. 65, r. 27 (sub-rules 39, 41), which requires objections to be carried in before the taxing-master, does not apply to objections raised against the principle adopted by the master in the taxation.

In re Remnant, 11 Beav. 603, distinguished.—FLETCHER AND DYSON, RE, *Ch.D. Swinfen Eady, J.*, 27; [1903] 2 Ch. 688; 72 L. J. Ch. 791; 89 L. T. 473.

2. *Costs—Statute of Limitations—Lien—Set-off—Appropriation of payments.*—In an action by a solicitor against his client on a bill of costs extending from 1878 to 1899, the defence of the Statute of Limitations was pleaded. At the trial the defence of the statute was held good as to all items before 1893, and the bill of costs was referred for taxation, the taxing-master to take the cash account from 1893, and the plaintiff to give credit for all sums received by him for or on account of the defendant in respect of or which ought to be treated as reducing or discharging, the bill so taxed. In the bill of costs there was an item of £66 3s. 8d. which the plaintiff had received for the defendant in May, 1894, in an action brought by the defendant in that year against a firm of Rigby & Co. Before the judgment in the present action no appropriation of this sum to the statute-barred item in the bill of costs had in fact been made; and no costs were due to the plaintiff in respect of the action against Rigby & Co. The taxing-master held that this sum was not received for or on account of the defendant in respect of, or which ought to be treated as reducing or discharging, the bill of costs; and that it ought to be treated as applied in payment of what was due to the plaintiff in May, 1894, in respect of the statute-barred items.

Held, that neither on the ground of lien, set-off, nor appropriation could this sum be applied in payment of what was due to the plaintiff in May, 1894, in respect of the statute-barred items.—SMITH *v.* BETTY, *C.A.*, 137; [1903] 2 K. B. 317; 72 L. J. K. B. 853; 89 L. T. 258.

3. *Costs—Taxation—Commission for the collection of rents.*—The taxing-master allowed a lump sum by way of commission to remunerate solicitors for the collection of certain rents.

Held, that the commission should be treated as struck out of the bill as an item improperly included, the solicitors remaining entitled to their proper remuneration for the work done.—SHILSON, COODE, & Co., RE, *Ch.D. Swinfen Eady, J.*, 556; [1904] 1 Ch. 837; 73 L. J. Ch. 541; 90 L. T. 641.

4. *Costs—Taxation—Third party—Bill of mortgagee's solicitor taxed by mortgagor—Application for review — Certificate of taxing-master — Practice—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.—Under section 38 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), where a third party taxes a bill, this taxation is on the footing of a taxation between the solicitor and the client, and if the third party be only interested in and liable to pay the costs of one matter, under this section, as a matter of principle, he can obtain taxation of the bill so far as concerns that one matter only, and on the footing of being liable to pay only the taxed costs of that matter.

Where in the taxation of a solicitor's bill of costs incurred by him under a mortgage transaction, if the third party is a mortgagor and he is only interested in the relations between the solicitor and his client, a mortgagee, so far as they concern the position of the client strictly in his character of mortgagee, the mortgagor is entitled under this section to have taxation of the solicitor's bill of costs limited to the items of costs incurred by the client strictly in his position of mortgagee.

Decision of Kekewich, J. (reported W. N. 1904, p. 78), affirmed.—LONGBOTHAM & SONS, RE, *C.A.*, 660; [1904] 2 Ch. 152; 90 L. T. 801.

5. *Costs—Taxation—Winding up of estate—Costs special to particular beneficiaries—Costs in anticipation—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 39.—In the taxation, under section 39 of the Solicitors Act, 1843, of the bill of costs of the solicitor of trustees engaged in dividing an estate between beneficiaries the special costs incurred with respect to the share of one of the beneficiaries are chargeable against the estate as a whole.

In the final settlement of an estate between the beneficiaries, the trustees are entitled to include by anticipation such reasonable charges as will be incurred in carrying out the final division.—MILLS, RE, *Ch.D. Swinfen Eady, J.*, 47; [1903] 2 Ch. 518; 72 L. J. Ch. 704; 88 L. T. 863.

6. *Covenant in articles of clerkship not to practice within certain radius—Breach—Work usually done by solicitors.*—The defendant had bound himself to a solicitor practising at M by articles for a term, and covenanted that he would not at any time do any work or act for or on behalf of any persons usually done by solicitors within a radius of fifteen miles from M without written permission. The defendant took proceedings to obtain probate of the will of a person within the prohibited radius, and corresponded from H with a witness within the prohibited radius with a view to obtaining his evidence in order to enable probate to be obtained. He signed the præcipe directing a plaint note to be

issued for a county court summons at a court in the prohibited area on behalf of a plaintiff residing therein, and conducted the proceedings until receipt of the amount paid into court. He prepared the will of a testatrix residing within the area on instructions received outside the area, and received a small fee therefor, but was present when she executed it within the area; and, lastly, he advertised in a paper circulating within but published outside the area a farm for letting within the prohibited district.

Held, in an action to restrain the defendant from practising within the prohibited limit, that the covenant might be broken although the defendant or his clerks did not go professionally within such limit. That therefore the proceedings in connection with the collection of the debt through the county court infringed the covenant. Also the acts done in relation to the execution of the will, which must be held to have been done by defendant in his character of a solicitor, constituted a breach of such covenant, but that those as to advertising the farm did not break it.

Quære, as to applying for the proof of evidence infringing the covenant.—EDMUNDSON *v.* RENDER, *Ch.D. Kekewich, J.*; 90 L. T. 814.

7. *Partnership—Fraud of partner—Liability of partners—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 11 (b).—J. & G., who were solicitors, entered into a partnership deed, by which all appointments held by G. were to be comprised in the business. G. was secretary to a company. The company, for purposes of their own, had property bought by them conveyed into the name of G., who retained the title-deed. The transaction was carried through by the firm of J. & G. It was no part of the duty of G., as secretary, to take a conveyance of real estate of the company or to take charge of the title-deeds of the company. G. raised money on deposit of the title-deeds, and subsequently executed a legal mortgage to N. J. had no notice of the conveyance to G., except in so far as the firm of J. & G. had acted for the purchasers in the matter.

Held, that J. & G., being partners only as far as the secretaryship of the company was concerned, and the company, by vesting the legal estate in G., having thus enabled him to withdraw the deed in his capacity as trustee, there was no implied contract that the firm of J. & G. were to be responsible for the deed after it had been handed over to G. as the legal owner; and, consequently, that J. was not liable for his partner's fraud.—TENDRING HUNDRED WATERWORKS CO. *v.* JONES, *Ch.D. Farwell, J.*, 61; [1903] 2 Ch. 615; 73 L. J. Ch. 41.

See also Company, 38; County Court, 2.

SPECIFIC PERFORMANCE.—See Company, 3; Contract, 12; Vendor and Purchaser, 6, 7.

STAMPS.—See Company, 27; Inland Revenue, 15-19.

STATUTE:—

Private Act—Construction—Restraint on alienation—Exception in favour of jointures—Jointure appointed by will—Validity of exercise of power—Construction of earlier statute by law as existing at later time.—By a private Act (27 Hen. 8, c. xvi.) certain estates were settled upon certain persons and the heirs of their bodies, and it was provided that none of the persons so entitled should "alyen, bargayn, give or selle any of the . . . premysses . . . nor any other thing do which should be to the hurt or disinheritance of the heirs of any of them . . . but only for the joynter of wyfe or wyfes for the term of lyfe or lyves of any husband."

Held, that, on the true construction of the Act, a power of jointuring was conferred which could be exercised by any instrument for the time being being known to the law, and not only by fine or recovery, or since the Fines and Recoveries Act by disentailing assurance; and that, on the authority of *Vernon's case*, 4 Co. Rep. 1*a*, 4*b*, it was well created by testamentary instrument, though at the time of the passing of the Act a will had no operation upon land, the statutes which enabled land to be devised by will being later in date.—BOLTON ESTATES, RE, RUSSELL *v.* MEYRICK, *C.A.*, 87; [1903] 2 Ch. 461; 72 L. J. Ch. 605; 88 L. J. 851.

STREET:—

Building line, Infringement of—Statutory remedy—Penalty — Conviction — Subsequent action by Attorney-General for injunction—Laches—*Mandatory order to pull down — Local government — Urban authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 158, 251—*Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.—The penalty prescribed by section 3 of the Public Health (Buildings in Streets) Act, 1888, for a breach of the prohibition in the first part of the section against infringing the building line is not the only remedy for the offence. It is a public general Act, and an injunction will lie at the suit of the Attorney-General on behalf of the public to restrain the infringement of the building line, and in a proper case a mandatory order to pull down will be made even although the offender has been previously convicted and fined under the section for the offence by a court of summary jurisdiction.

Attorney-General v. *Ashbourne Recreation Ground Co.*, [1903] 1 Ch. 101, followed.

Observations on imputing *laches* to the Attorney-General and the relators in an action for injunction where the latter are a local authority.—ATTORNEY-GENERAL *v.* WIMBLEDON HOUSE ESTATE CO., *Ch.D. Farwell J.*; [1904] 2 Ch. 34; 73 L. J. Ch. 593.

TITHE.—See Landlord and Tenant, 15.

TRADE-MARK:—

1. *Invented word—Passing off—Infringement.*—No word can be said to be an invented word if it is like any known word; it must be one coined for the first time, and must not be descriptive. But if it is an English word with merely the suffix "ine" added, it is not an invented word.—CHRISTY *v.* TIPPER, *Ch.D. Joyce, J.*, 414; [1904] 1 Ch. 696; 73 L. J. Ch. 212; 90 L. J. 85.

2. *Passing off goods as those of another trader—Distinctive words on trade-mark—Injunction—Patents, Designs and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 105.—The plaintiffs, a firm of distillers and wine and spirit merchants, had used a label with a cat and barrel depicted thereon since 1849.

In 1879 they registered their mark in class 43 for fermented liquors and spirits as an old mark. There are two other cat and barrel marks on the register in the same class, one scarcely used in England by traders who sold in bulk or used a label without a cat and a barrel; the other was a barrel and three cats, and no user in this country was proved.

The plaintiffs' goods were well known as the "Cat and Barrel Brand" or the "Cat Brand."

The defendant in 1899 commenced to sell sloe gin under a label whereon part of a cat and part of a barrel was depicted with the words "Cat Brand" underneath.

The plaintiffs did not manufacture sloe gin at the date of the registration of their mark.

Held, that the plaintiffs were entitled to (1) an

injunction to restrain the defendant, his agents and servants, from infringing the plaintiffs' registered trade-mark; and (2) an injunction to restrain the defendant, his agents and servants, from selling or passing off sloe gin not of the plaintiffs' manufacture as and for the goods of the plaintiffs in any way whatsoever, and in particular by using the words "Cat Brand" in connection with the representation of a cat and a barrel, or any words, signs, figures, or devices which were calculated to enable the defendant's sloe gin or other liqueurs or goods of the defendants to be passed off as and for the goods of the plaintiffs.—BOORD *v.* HUDDART, *Ch.D. Swinfen Eady, J.*; 89 L. T. 718.

3. *Registration—Motion to rectify—Fancy word "Tabloid"—Presumption from long user—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64.—Before 1884, B. & W. made and sold drugs of solid form and biconvex shape as "Tablets," and had registered "Tablets" as a trade-mark. In 1884 they coined and registered the word "Tabloid" as a trade-mark for substances used in pharmacy. They had since made and sold as "Tabloids" solids drugs of the same shape and size.

In 1903, T. applied to have the word "Tabloid" expunged from the register.

Held, affirming the decision of Byrne, J., (*ante*, p. 205), that, having regard to the long period of time during which the word stood unimpeached on the register, the presumption was that "Tabloid" was, at the date of its registration, a distinctive fancy word.—WELLCOME *v.* THOMPSON & CAPPER, *C.A.*, 581; [1904] 1 Ch. 736; 73 L. J. Ch. 474.

TRADE NAME:—

1. *Imitation—Whether calculated to deceive—Descriptive name.*—The plaintiffs, who were large manufacturers of corsets in the United States of America, in May, 1900, adopted as a new descriptive designation for their corsets the term "Erect-Form." In March, 1901, they introduced these corsets into the United Kingdom. They advertised them extensively as "W. B. Erect-Form Corsets," the words "Erect-Form Corsets" being printed in a particular manner, so as to form a scroll. The letters "W. B." were the initials of the plaintiffs' firm, but having been warned that the initials "W. B." had been for some time used by another firm, they abandoned those initials, and substituted therefor, in ordinary type, the words "America's Leading."

In October, 1901, the plaintiffs' corsets having then acquired a substantial sale and reputation in this country, the defendants determined to apply the title "Erect-Form Corsets," together with the scroll, to goods of their manufacture, and they proceeded to sell corsets of their own make, some being of a style imitated from those of the plaintiffs, but many others totally different, in boxes, practically of the same size and shape, being such boxes as were generally used in connection with the sale of corsets, and having upon the lid the words "Erect-Form" printed as a scroll, but with the addition of one of their own trade-marks, consisting of the letters "C. B." They also distributed in connection with the sale of their corsets show cards displaying a similar scroll. Before the user by the defendants of the term "Erect-Form Corsets" they gave notice in the trade journals of what they were going to do.

Held (*dissentiente* Romer, L.J.), that the plaintiffs were not entitled to any relief, what the defendants had done not being intended to deceive nor calculated so to do.

Decision of Joyce, J. (88 L. T. Rep. 168), reversed.—WEINGARTEN *v.* BAYER, *C.A.*; 89 L. T. 56.

2. *Local name—"Caledonia Springs"—Words calculated to deceive—Onus of showing that goods are distinguished.*—The appellants supplied mineral waters taken from their springs, at a local spa called Caledonia Springs, to agents and others in Ontario and Quebec, and these waters had acquired in the market the name of "Caledonia Water." The respondents obtained other waters, but of similar properties, from borings not far from some of the appellants springs, and sold them under the description of "Natural Saline Water from the New" (or) "from New Springs at Caledonia" and as "Beaver Brand," with a picture of a beaver on their labels as a trade-mark.

Held, that the respondents were entitled to indicate the local source of the water sold by them, and had sufficiently distinguished their goods from those of the appellants.—GRAND HOTEL CO. OF CALEDONIA SPRINGS *v.* WILSON, *P.C.* 286; [1904] A. C. 103; 73 L. J. P. C. 1; 89 L. T. 456.

3. *Merchandize marks—"Natural mineral water"—Water subjected to process—Water identical—False trade description—Merchandize Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 2 (2).—The description "natural mineral water" applied to water, which has been subjected to a process for the purpose of making it fit for sale and consumption, which when offered for sale is in all essentials identical to the water as it exists in the spring from which it comes, is not a false trade description.—DAVENPORT *v.* APOLLINARIS CO., *K.B.D.*; 89 L. T. 19.

TRADE UNION:—

1. *Action, cause of—Inducing persons not to employ another—Object—Payment of debt.*—If a person, who, by virtue of his position or influence has power to carry out his design, endeavours to prevent, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, or would-be employers, and the design was to carry out some spite against the man, or had for its object to compel him to pay a debt, or any similar object not directly connected with the acts against the man, then that person is liable to the man for the damage consequently suffered.

Per Romer, L.J.: It is not essential in order for the plaintiff to succeed in such a case that he should establish a combination of two or more persons to do the acts complained of.

Two officers of a trades union, who, by virtue of their position, had control over the men of the union, and consequently power to influence employers by calling out or threatening to call out the men unless the demands of those officers were complied with, in order to compel the plaintiff to pay a sum of money due from him to the union, combined to prevent him from obtaining or retaining employment by threatening the employers that they would call out their men if the plaintiff were employed, and caused injury to the plaintiff.

Held, that these acts having been done in the service and for the benefit of the union, the two officers and the union were liable for damages to the plaintiff.—GIBLAN *v.* NATIONAL AMALGAMATED LABOURERS' UNION, *C.A.*; [1903] 2 K. B. 600; 72 L. J. K. B. 907; 89 L. T. 386.

2. *Application of funds to provide benefits to members—Principal object of society—Divisibility of objects—Rules in restraint of trade—Illegal society—Action by member to enforce benefit rules—Trade*

Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 4.—A society registered under the Trade Union Acts was governed by rules some of which made provision for benefits to members, and the others were illegal as being in restraint of trade.

A member brought an action against the officers of the society to enforce a rule of the society under which he claimed to be entitled to a superannuation allowance.

Held, upon the consideration of all the rules of the society, that the main object of the society was illegal at common law as being in restraint of trade, and that those rules which made provision for benefits to members were merely ancillary to that main object, and could not be separated from it.

Held, therefore, affirming the judgment of the Divisional Court (88 L. T. Rep. 686), that under section 4 of the Trade Union Act, 1871, the action must fail.—CULLEN *v.* ELWIN, *C.A.*; 90 L. T. 840.

3. *Master and workman—Procuring breach of contract of service—Malice*—Bonâ fide *advice—Just cause.*—Interference with contractual relations known to law is a violation of legal rights, which is actionable unless there is sufficient justification for what was done. In deciding what will constitute sufficient justification, regard must be had to the circumstances of each case. Where a third person has procured a breach of contract between master and servant, he is not justified of necessity merely by showing that he had no personal *animus* against the master or that it was to the advantage of the servant that the contract should be broken.

In 1901 the South Wales Miners' Federation issued a manifesto ordering the men to stop work on certain days known as "stop days." This action occasioned great loss to the employers, but was occasioned by a *bonâ fide* belief that the workmen would be benefited by reason of the rise in the price of coal thereby caused. In an action by the employers for damages,

Held (by Romer and Stirling, L.JJ., Vaughan Williams, L.J., *dissentiente*), that the action would lie, although there was no malicious intention on the part of the federation to injure the employers, and the federation *bonâ fide* believed that they were bound to act as they did in the interest of the men.

Decision of Bigham, J. (51 W. R. 59), reversed.—GLAMORGANSHIRE COAL CO. *v.* SOUTH WALES MINERS' FEDERATION, *C.A.*, 165; [1903] 2 K. B. 545; 72 L. J. K. B. 893; 89 L. T. 393.

TRAMWAY:

1. *Contract—Clearing snow from track.*—By agreement between the corporation of M. and a tramway company running tramcars through the streets it was agreed that "the company shall, under instructions from the city, keep their track free from ice and snow."

Held (affirming the judgment of the court below), that the company were not bound to remove from the streets altogether the snow and ice cleared off the tramway track; and that the words "under instructions from the city" only applied to the extent of the work to be done, not to the particular method to be adopted for doing it.

Ogston v. *Aberdeen District Tramways Co.*, 75 L. T. Rep. 633, [1897] A. C. 111, distinguished.—MONTREAL CITY *v.* MONTREAL STREET RAILWAY CO., *P.C.*; [1903] A. C. 482; 72 L. J. P. C. 119; 89 L. T. 30.

2. *Purchase by local authority — Depot outside district of local authority—"Used with and suitable to" the undertaking—Liability of local authority to pay for—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 43.—By section 43 of the Tramways Act, 1870, it is provided: "Where the promoters of a tramway in a district are not the local authority, the local authority . . . may" (within certain specified times) " . . . by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value . . . of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district."

The tramway company was the owner of a large depot situated some distance outside the boundary of the district council, but found by an arbitrator to be "used with and suitable to" the undertaking of the tramway company within the council's district.

The district council having given notice to the tramway company that they were required to sell to the council under the conditions and in the manner provided by section 43 of the Tramways Act, 1870, so much of their works and undertaking as were within the council's district.

Held, that the council were bound to pay for this depot.

Held, further, that the words "within such district" applied to the "undertaking," and not to "all lands, buildings, works, materials, and plant of the promoters."—MANCHESTER CARRIAGE CO. *v.* SWINTON UBBAN COUNCIL, *K.B.D.*; 90 L. T. 795.

TRANSVAAL, LAW of:—

Proclamation No. 14 *of* 1902—*Final decree of High Court—Jurisdiction in appeal—Transvaal Patent Act, No.* 6 *of* 1887.—The Supreme Court of the Transvaal has no jurisdiction to entertain an appeal from a decision of the High Court which before the war was final, for section 16 of the proclamation gives no right of appeal where none existed before.

Held, also, that the High Court had power to cancel a patent in an action to which the Attorney-General was not a party.—AFRICAN GOLD RECOVERY CO. *v.* HAY, *P.C.*; [1904] A. C. 438.

TRESPASS:—

Ditch and fence—Presumption of ownership—Acts of ownership—Rebuttal of presumption.—The plaintiff and defendant were adjoining owners of land, the lands being bounded by a bank with a fence, with a ditch on the defendant's side.

For nearly fifty years the defendant had trimmed the fence, pollarded the trees, and cleaned the ditch, but there was no evidence of knowledge on the part of the plaintiff.

Held, that these acts of ownership did not rebut the presumption that the bank and fence were the property of the plaintiff.—HENNIKER *v.* HOWARD, *K.B.D.*; 90 L. T. 157.

TRINIDAD, LAW of:—

Deed of concession—Construction of covenant—Lands in possession of Crown.—A restrictive covenant by the Crown in a deed of concession affected certain lands situated within three miles of the subject of concession "which now are or at any time during the said term shall come into the possession of His Majesty."

Held, that the covenant related only to lands in the actual possession, and not merely subject to the control, of the Crown.—NEW TRINIDAD LAKE ASPHALT CO. *v.* ATTORNEY-GENERAL, *P.C.*; [1904] A. C. 415.

TRUST:—

Will—Denuding—Vesting.—A testator directed

that the income of his property (consisting of movable and real estate) be divided between his children; that in the event of any child dying leaving issue his or her share of income should be paid to the issue; and if a child left no issue the deceased child's share should be divided among the survivors; and he finally directed that "on the death of all" his children his estate should "be winded up and converted into money . . ." and divided among the children of his sons and daughters *per stirpes*.

The testator was survived by four children—Andrew, who died unmarried, George, who died in 1880, survived by the appellant (who became of age in 1898), Mary, and Jane; the two latter were still alive and had families. The appellant claimed payment of one-third of the *corpus* of the testator's estate.

Held, affirming the decision of the Second Division of the Court of Session ((1900) 2 F. 749), that the appellant was not entitled to immediate payment on the ground that the third of the income of the *corpus* was not by any means the same as the income of a severed portion of the estate; and it did not follow that if the estate was now divided that the remaining portion of the estate left undivided would represent in the future the present value.

Miller's Trustees v. *Miller*, (1890) 18 R. 301, and *Yuill's Trustees* v. *Thomson*, (1902) 4 F. 815, affirmed.—MACCULLOCH *v.* ANDERSON, *H.L.*; [1904] A. C. 55.

TRUSTEE:—

1. *Liability—Mortgage by beneficiary—Inquiry as to prior charge—Trustees induced to sign incorrect statement by concealment of facts—Security deficient—Trustees not liable—Estoppel.*—M., donee of a power, appointed £1,000 to her son C., and £1,400 to her son E. E. mortgaged this sum, and notice of the charge was given to the trustees, a fact which they entirely forgot. M., by her will, forgetting the appointment to E., appointed to her two sons and her daughter such further sums as, with C.'s £1,000, exhausted the fund. E. applied to X., one of the plaintiffs, for a loan on his interest under M.'s will, concealing the former appointment. X. required a memorandum from the trustees that they had no notice of a prior charge. He applied for this to P. & A., solicitors to the trust, who informed him they never advised trustees to give such assurance. They, however, authorized X. to call on Dr. M., one of the trustees, to obtain from him a declaration of C.'s identity. X. sent his clerk, who took advantage of the visit to induce Dr. M. to sign the memorandum as to notices. Dr. M. was unwilling to sign without legal advice, but gave way on being informed that P. & A. had been seen and their assent obtained. The sight of Dr. M.'s signature led the other trustee to sign. X. completed the mortgage without informing P. & A. of the signatures he had obtained. E.'s interest, after paying the prior charge, was not sufficient to meet the plaintiffs' mortgage, and they claimed the deficiency from the trustees to whom the receipt of notice of the prior charge had been brought home.

Held, that the circumstances under which the signatures to the memorandum had been obtained precluded the plaintiffs from praying it in aid to estop the trustees from setting up the prior charge as a defence, and that the trustees were therefore not liable.—PORTER *v.* MOORE, *Ch.D. Swinfen Eady, J.*, 619.

2. *Power to appoint new trustees—Donee of power appointing himself—Sanction of court.*—The fiduciary character of a power to appoint new trustees renders it improper for the donee of the power to appoint himself, save in exceptional circumstances; it does not in itself exclude him from the class of persons capable of being appointed. Accordingly, where it is beneficial to the trust that he should be appointed, and provided that he is not excluded by the language of the instrument creating the power, it is competent for the donee to appoint himself and for the court to confirm the appointment so made.

Tempest v. *Lord Camoys*, 58 L. T. N. S. 221, 36 W. R. Dig. 207, followed.

In re Skeats' Settlement. 42 Ch. D. 522. 38 W. R. Dig. 202, and *In re Newen*, [1894] 2 Ch. 297, explained. — MONTEFIORE *v.* GUEDALLA, *Ch.D. Buckley, J.*, 151; [1903] 2 Ch. 723; 73 L. J. Ch. 13; 89 L. T. 472.

3. *Will—Construction—Power—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 10 (3), 22, 37.—A power given to trustees, which enables them to deal with trust property, is *primâ facie* given them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being. The mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the *primâ facie* presumption. The testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language. SMITH, RE, EASTWICK *v.* SMITH, *Ch.D. Farwell, J.*, 104; [1904] 1 Ch. 139; 73 L. J. Ch. 74; 89 L. T. 604.

See also Company, 18, 29; Married Woman, 6; Practice, 26; Vendor and Purchaser, 4.

UNDUE INFLUENCE:—

Husband and wife—Guarantee—No consideration—Want of knowledge of effect—Independent advice.—F., who was indebted to B., obtained from his wife, the defendant, a guarantee in favour of B. to cover his debts then due to B., a present advance of £500 and future credits, the total liability being limited to £1,500.

The defendant was a trader on her own account, and had on previous occasions given F. small amounts of financial aid. The defendant was aware of F.'s financial position and of his indebtedness to B.

B., B.'s solicitor, F., and the defendant were the only persons present when the guarantee was signed, and the defendant had no independent advice.

The guarantee, a very complicated document, was twice read over by the solicitor, who suggested to B. that the defendant should be separately represented.

Held, (1) that the defendant did not sufficiently understand the nature of the guarantee; (2) that the relationship of husband and wife was one where in the case of a large voluntary benefit influence was presumed to exist; (3) that the transaction being challenged, the burden was on the donee to prove that the giving of the guarantee was free from the influence of the husband, and that, in the absence of independent advice, this had not been discharged; (4) that B. was sufficiently put on inquiry to be affected with the equitable flaws in the transaction.

Cook v. *Lamotte*, 15 Beav. 234; *Hoghton* v. *Hoghton*, 15 Beav. 278; *Cobbett* v. *Brock*, 20 Beav. 524; *Turnbull* v. *Duval*, [1902] A. C. 429, 87 L. T. Rep. 154, considered and applied.

Observation of Parker, V.C., in *Nedby* v. *Nedby*, 5 De G. & Sm. 377, not followed.—BISCHOFF'S TRUSTEE *v.* FRANK, *K.B.D.*; 89 L. T. 188.

See also Probate, 8.

VENDOR AND PURCHASER:—

1. *Assignment of lease—Notice of unusual covenants—Constructive notice—Fair opportunity—Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 3.—In the course of negotiations for the assignment of a lease by the plaintiff to the defendant the defendant's solicitor had an interview with the plaintiff's agent. The agent offered to show the solicitor a lease similar in terms to the lease proposed to be assigned. The solicitor being pressed with other business could not then examine the document. Without any further inquiries or any further information as to the terms of the lease, a contract for assignment was executed. The defendant, having subsequently discovered that the lease contained unusual covenants, repudiated the contract.

Held, in an action for breach of the contract, that the plaintiff had not discharged the onus which lay upon him of either disclosing or giving the defendant a fair opportunity of ascertaining the terms of the lease.—MOLYNEUX *v.* HAWTREY, *C.A.*, 23; [1903] 2 K. B. 487; 72 L. J. K. B. 873; 89 L. T. 350.

2. *Contract for sale and purchase—Conditions of sale—"Remarks"—Form of conveyance.*—Provisions in a contract for sale and purchase, stating that something should be done either by vendor or purchaser after the estate has been vested, should be inserted as a covenant in the conveyance.—COOPER AND CRONDACE, RE, *Ch.D. Kekewich, J.*, 441; 90 L. T. 258.

3. *Freeholds subject to restrictive covenants—Covenants to be entered into by purchaser.*—In an agreement for sale of freehold land, it was stated that the property was subject to restrictive covenants. The vendor had covenanted with his vendor to observe and perform these covenants, and to indemnify his vendor.

Held, that the purchaser ought to enter into a similar covenant with the vendor, but that the covenant should be prefaced with the words "with the object and intention of affording to (the vendor) his heirs, executors, and administrators a full and sufficient indemnity in respect of (the restrictive covenants), but not further or otherwise."—POOLE AND CLARKE'S CONTRACT, RE, *C.A.*; [1904] 2 Ch. 173.

4. *Power of sale—Will—Executor—Constructive trustee.*—A testatrix by her will, dated the 3rd of March, 1849, appointed R. J. and U. M. executors, and gave them powers to apply income in maintenance and to sell certain hereditaments after the death of the survivors of her daughters.

The testatrix died on the 25th of December, 1850. R. J. alone proved the will, and died, leaving J. W. and M. W. his executors.

In 1873 a petition was presented by all parties beneficially interested, and new trustees of the will were appointed under the Trustee Act, 1850.

After the death of the survivor of the daughters the trustees contracted to sell the hereditaments.

The purchaser required the concurrence of the beneficiaries.

Held, that the concurrence of the beneficiaries could not be required.—PERROTT AND KING, RE, *Ch.D. Swinfen Eady, J.*; 90 L. T. 156.

5. *Receiver—Real estate—Purchaser's interest in land—Judgment creditor of purchaser—Equitable execution—Notice to vendor—Rescission of contract on money payment to purchaser—Secured creditor—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 13.—In June, 1901, the purchaser under a contract for the sale of land paid a deposit, and was let into possession. The purchaser did not complete, and litigation ensued between him and the vendor. In August, 1902, a judgment creditor of the purchaser obtained by way of equitable execution an order appointing himself, upon giving security, receiver of the purchaser's interest in the land under the contract for sale, and at once gave notice of this order to the vendor, but did not perfect his security as receiver until May, 1903. In the meantime—in January, 1903—the purchaser being unable to complete, the litigation between him and the vendor was, without notice to the judgment creditor, compromised by the contract for sale being rescinded and the vendor paying the purchaser £110, not in part repayment of the deposit, but to give up possession of the property.

Held, that the £110 was not paid in respect of any interest which the purchaser had in the property, but as the price for getting him out of possession, and that the action failed.—RIDOUT *v.* FOWLER, *C.A.*; [1904] 2 Ch. 93; 73 L. J. Ch. 579.

6. *Specific performance—Vendor's motion to rescind contract—Form of order—Costs.*—Form of order on motion for rescission of contract with costs of the motion and stay of all further proceedings, except such as might be necessary for recovery of the costs in an action for specific performance.—OLDE *v.* OLDE, *Ch.D. Farwell, J.*, 260; [1904] 1 Ch. 35; 73 L. J. Ch. 81; 89 L. T. 604.

7. *Specific performance—Vendor's title—Adverse claim—Practice.*—When a *bonâ fide* claim has been made by a third party affecting the vendor's title, although no action to enforce such claim is actually pending, the court will not make a decree for specific performance of a contract for sale against the purchaser, but will order the vendor's action for specific performance to stand over for a reasonable interval, to see whether the third party will meantime institute proceedings to enforce his claim.

On a sale of house property the vendor represented that rates were payable by the tenant. At the date of the sale the vendor knew that the tenant claimed that rates ought to be paid by the landlord. Before completion of the purchase the tenant brought an action against the vendor to enforce his said claim, but this action was dismissed on a technical ground. The tenant, however, expressed an intention of taking further proceedings in the matter against the vendor. The purchaser refused to complete on the ground that the vendor did not show a good title. In an action for specific performance brought by the vendor,

The Court refused to make an immediate decree for specific performance, and ordered the case to stand over for a definite period in order to see whether the tenant would in the meantime institute new proceedings to enforce his claim.—GEORGE *v.* THOMAS, *Ch.D. Swinfen Eady, J.*, 416; 90 L.T. 505.

8. *Title—Equitable estate in copyholds—Sale by administratrix—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1.—The equitable estate in copyholds vests, under the Land Transfer Act, 1897, in the personal representative, and not in the customary heir.—SOMERVILLE AND TURNER, RE, *Ch D. Kekewich, J.*, 101; [1903] 2 Ch. 583; 72 L. J. Ch. 727; 89 L. T. 405.

9. *Vendor receiving rents while in possession after time for completion—Arrears of rent—Trusteeship.*—A vendor remaining in possession after the day fixed for completion of the sale by no default of the purchaser, and receiving the rents of the property after electing to take interest in lieu of rents, is not at liberty as against the purchaser to allocate

any part of such rents to arrears of rent due to himself from tenants either at the date of the contract or subsequently before the day fixed for completion.—PLEWS *v.* SAMUEL, *Ch.D. Kekewich, J.*, 410; [1904] 1 Ch. 464; 73 L. J. Ch. 279; 90 L. T. 533.

See also Local Government, 15.

WATER:—

1. *Pollution—Solid matter—Prohibition against putting into river—Deposit in mill dam—Cleaning out dam—Deposit mixed with water and turned into river—Offence.*—Section 5 of the West Riding of Yorkshire Rivers Act, 1894, makes it an offence for any person to put or cause to be put or knowingly permit to be put into any river or stream within the jurisdiction of the rivers board (after enumerating certain specified solid matters) "any deposit in a mill dam, or any sludge, or any solid sewage matter"; and "solid matter" was defined as not including "particles of matter in suspension in water." The respondents, who were manufacturers, were owners and occupiers of a mill and a large mill dam into which flowed through a goit the water of a certain river; and polluting trade effluents from several mills and the sewage of several hundred houses also passed into the river above the respondents' mill and thence through the goit into the respondents' dam, and, in consequence of the waters being impounded in the dam by the respondents, a quantity of mud, sludge, and deposit had been formed in the basin of the dam; but there had been no discharge into the dam by the respondents themselves of any effluent or any polluting matter, solid or otherwise. The respondents, in order to clean out the dam, turned the whole waters of the river into the dam, while men with spades conveyed the mud and deposit into the current as it flowed through the dam, and by this operation the mud, sludge, and deposit in the dam became admixed with water and was carried in suspension through the outlet from the dam into the river below the mill, rendering the river muddy and turbid for a considerable distance. The effluent, as it went from the dam into the river, consisted of over 99½ per cent. of liquids, and less than ½ per cent. of solids.

Held, that the respondents had committed no offence against section 5 of the Act, either in unlawfully causing to be put, or in knowingly permitting to be carried, in the river the mud, sludge, and deposit from the dam, as the stuff sent out into the river, being in a liquid state and containing less than ½ per cent. of solid matter, could not then be described as mud, sludge, and deposit, and that it was immaterial that it may have been so in the dam before the operation of cleaning began.—WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* RAWSON, *K.B.D.*; 89 L. T. 363.

2. *Riparian owner—Obstruction of water for purposes unconnected with riparian tenement.*—The owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement, and there consume it for purposes unconnected with the tenement.—MCCARTNEY *v.* LONDONDERRY RAILWAY, *H.L.*; [1904] A. C. 301.

WATERWORKS:—

1. *Compensation — Lands compulsorily taken—Natural and special adaptability of land for purposes of undertaking—Right of arbitrator to take this into account—Aspatria, Silloth, and District Water Act,* 1901 (1 *Ed.* 7, *c. lvii.*), *ss.* 23, 24, 29, 30.—In estimating the value of land and easements to be acquired by a water board for the purposes of constructing thereon a reservoir, the natural and peculiar adaptability for that purpose is a fit and proper matter for consideration by an arbitrator as an element in the value thereof in assessment of compensation.

Semble, that the claimant in such a case need not give evidence that there were other customers who would be willing to purchase his land for such a purpose.

The decision of the Court of Appeal (Bramwell, Brett, and Cotton, L.JJ.) in *Riddell* v. *Newcastle and Gateshead Waterworks Co.*, reported in Browne and Allen's Law of Compensation (2nd ed.), p. 672, considered and approved.—GOUGH AND ASPATIA, SILLOTH, AND DISTRICT WATER BOARD, RE, *C.A.*, 552; [1904] 1 K. B. 417; 73 L. J. K. B. 228; 90 L. T. 43.

2. *Dividend—"Prescribed rate"—Preference stock—"Paid-up capital in the company"—Dividend not prescribed in special Act—Waterworks Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 17), *ss.* 2, 75—*Companies Clauses Act,* 1863 (26 *&* 27 *Vict. c.* 118), *s.* 13.—By section 75 of the Waterworks Clauses Act, 1847, "the profits of the undertaking to be divided among the undertakers in any year shall not exceed the prescribed rate, or, where no rate is prescribed, they shall not exceed the rate of ten pounds in the hundred by the year on the paid-up capital in the undertaking, which in such case shall be deemed the prescribed rate, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend." By section 2, "prescribed" means prescribed in the special Act. By section 13 of the Companies Clauses Act, 1863, where any company is authorized by a special Act to be thereafter passed to issue any preference stock, the company may issue such stock at a rate of dividend not exceeding 5 per cent. per annum.

A waterworks company was authorized by its special Acts of 1864 and 1875, which incorporated the Waterworks Clauses and the Companies Clauses Acts, to issue preference stock. No rate of dividend was specified in either of the special Acts. The company issued preference stock bearing interest at the rate of 4½ and 5 per cent. per annum respectively.

Held, that the "prescribed rate" for the preference stock, within the meaning of section 75 of the Waterworks Clauses Act, 1847, was 4½ and 5 per cent. respectively.—CHELSEA WATERWORKS CO. *v.* METROPOLITAN WATER BOARD, *C.A.*, 449; [1904] 2 K. B. 77; 90 L. T. 831.

3. *Dividend—Prescribed rate—Profits—Deficiencies in previous years—Incorporation of Waterworks Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 17), *s.* 75.—The appellant company was incorporated in 1809, and for some years paid dividends of less than 10 per cent. per annum, though there was no limit to the amount they might pay. In 1864 it obtained an Act of Parliament, which incorporated the Waterworks Clauses Act, 1847, by section 75 of which Act no larger dividend than 10 per cent. in any year was permissible "unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate.

Held, that the company were not entitled to pay a larger dividend than 10 per cent. per annum in order to make up any deficiencies which fell short of that rate prior to the year 1864, when the Waterworks Clauses Act was first incorporated.

Decision of the Court of Appeal (51 W. R. 53; [1903] 1 Ch. 575) affirmed.—KENT WATERWORKS

Co. *v.* LAMPLOUGH, *H.L.*, 401; [1904] A. C. 27; 73 L. J. Ch. 96; 89 L. T. 704.

4. *Gratuitous use of water for extinguishing fire—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 42.—By section 42 of the Waterworks Clauses Act, 1847, the undertakers shall at all times keep charged with water all their pipes to which fire-plugs shall be fixed, and shall allow all persons at all times to take and use such water for the purpose of extinguishing fire without making compensation for same.

Held, that this power was confined to take water from the undertakers, pipes to which fire-plugs were fixed, and did not apply to a fire-plug affixed to a private pipe which took water (by agreement) from the defendants' main for agricultural purposes.—WEARDALE AND CONSETT WATER CO. *v.* CHESTER-LE-STREET CO-OPERATIVE CO., *K.B.D.*, 684; [1904] 2 K. B. 240; 73 L. J. K. B. 659.

5. *House-owner's communication pipes lawfully connected with company's main—Communication pipes cut off by company—Trespass—Action for damages and injunction—Right of action—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 43, 53.—The builder and owner of a row of houses laid down communication pipes for the supply of water to the houses from the main of a waterworks company which had been incorporated by special Act. The special Act incorporated the Waterworks Clauses Act, 1847. The pipes were laid down with the approval of the company. The company afterwards refused to make the connection between the pipes and the main. The house-owner thereupon lawfully made the connection, which was then immediately cut off by the company.

In an action by the house-owner against the company claiming damages and an injunction to restrain the company from preventing him from again connecting the pipes with the main, and from severing such connection if so made again by the plaintiff,

Held, that there was nothing in sections 43 and 53 of the Waterworks Clauses Act, 1847, which disabled the plaintiff from bringing such an action. —GALE *v.* RHYMNEY AND ABER GAS AND WATER CO., *C.A.*; 89 L. T. 399.

6. *Pauper school—Supply of water for domestic purposes—Trade, manufacture, or business—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 35, 53—*Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *s.* 12.—Although the maintenance and education of pauper children by guardians of the poor is a "business" within section 12 of the Waterworks Clauses Act, 1863, yet, inasmuch as the premises wherein such business is carried on constitute a "dwelling-house" within section 53 of the Waterworks Clauses Act, 1847, the guardians are entitled to demand a supply of water to the premises for domestic purposes, provided that they put themselves into a position to confine the user of the water so supplied to purposes which are domestic.

The meaning of the term "domestic purposes" discussed.

Observations on *Barnard Castle Urban District Council* v. *Wilson*, 50 W. R. 92, 51 W. R. 102, [1901] 2 Ch. 813, [1902] 2 Ch. 746.—SOUTH-WEST SUBURBAN WATER CO. *v.* ST. MARYLEBONE GUARDIANS, *K.B.D.*, 378; [1904] 2 K. B. 174.

7. *Penalties—Statutory duty to supply compensation water to mill-owners—Breach of duty—Right to maintain action in High Court for penalties—Recovery of penalties "otherwise provided for" than before justices —Huddersfield Water Act*, 1869 (32 & 33 *Vict. c. cx.*) *s.* 32—*Waterworks Clauses Act*. 1847 (10 & 11 *Vict. c.* 17), *s.* 85—*Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 145.—Under a local water Act a corporation were bound to supply certain compensation water as compensation for the waters taken by them for the purposes of the Act, and in case of neglect to supply such compensation water they were for every day on which such neglect occurred to "forfeit and pay to the occupiers of each of the mills and works affected thereby (who may sue for and recover the same) the sum of five pounds," and were also to make compensation for any loss sustained by such occupiers in respect of which the penalties were not a sufficient compensation, and such compensation might be sued for in any court of competent jurisdiction.

Section 145 of the Railway Clauses Consolidation Act, 1845, which was incorporated in the local Act, provides that every penalty or forfeiture, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices.

Held, affirming the decision of Wright, J., that the £5 penalties imposed by the local Act were intended in the main to be a mode of compensation to the injured occupiers of the mills, and therefore the mode of recovering penalties which is prescribed in section 145 of the Railway Clauses Consolidation Act, 1845, did not apply, and an action to recover the penalties was rightly brought in the High Court.—MELTHAM SPINNING CO. *v.* HUDDERSFIELD CORPORATION, *C.A.*; 89 L. T. 403.

8. *Pipes—Defective communication pipe—Non-repair by occupier of premises—Waste of water—Right to cut off supply—Right to receive supply—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 29, 30, 43, 52—*Metropolis Water Act*, 1871 (34 & 35 *Vict. c.* 113), *ss.* 28, 29, 32.—A communication pipe from the plaintiff company's main pipe to certain stables in the metropolis in the occupation of a servant of the defendant became defective, and thereby there was a leakage and waste of water. The communication pipe was the property of the defendant. The company served notice to repair, and intimated that unless the pipe was repaired they would cut off the supply of water. The defendant failed to repair the pipe, and the plaintiffs cut off the supply. The defendant thereupon preferred an information against the plaintiffs for penalties under section 43 of the Waterworks Clauses Act, 1847, for refusing to furnish a supply of water.

Held, that the plaintiffs were entitled to cut off the water and cease to supply the defendant, as the duty to repair a defect in a communication pipe being cast by section 28 of the Metropolis Water Act, 1871, upon the owner or occupier of the premises, he had, after notice to repair, permitted the pipe to remain in a condition in which it would cause waste of water, and had wrongfully failed to prevent the waste within the meaning of section 32 of the same Act.—GRAND JUNCTION WATERWORKS CO. *v.* RODOCANACHI, *K.B.D.*, 508; [1904] 2 K. B. 230; 73 L. J. K. B. 441; 90 L. T. 819.

9. *Supply—Right of support for pipe—Private Act —Presumption.*—By the Edinburgh Water Act, 1819 (59 Geo. 3, c. cxvi.), the respondents' predecessors in title were empowered to lay a pipe for bringing water from a certain spring into the city of Edinburgh, and in 1823 a pipe was laid down, and has since been continuously used. In 1898 the respondents brought an action against the appellants, who were the owners of the minerals under some of the land through which the pipe passed,

for a declaration that they were entitled to support for their pipe so that it might serve as a conduit for water, and that the defendants were not entitled so to work the minerals as to injure it. The defendants denied that the plaintiffs had acquired a right of support.

Held, that, after the period of time which had elapsed, it must be assumed that the respondents' predecessors in title had done all that was required by the Act of 1819, and that they had acquired a right of support for the pipe.—CLIPPENS OIL CO. *v.* EDINBURGH WATER TRUSTEES, *H.L.*; [1904] A. C. 64; 73 L. J. P. C, 32; 89 L. T. 589.

10. *Value of land taken—Proximity to other land—Land taken not of itself adaptable to reservoir—Assessment of value—Education of children of workmen constructing reservoir—Remoteness.*—The T corporation were empowered by their special Act to take certain land for the construction of a reservoir, which included land belonging to the Duke of N. The land was not of itself adaptable for a reservoir, but with other land belonging to other owners, which other land by itself was not so adaptable, was adaptable for a reservoir.

The arbitrator, in determining the value of the land of the Duke of N., had regard to its natural character and position, and to its proximity to the other parcels of land, and to the probability that if any other persons required all the lands for a reservoir the land of the Duke of N. would have some enhanced value owing to its natural character and position and proximity to the other parcels of land.

Held, that the arbitrator was right.

Owing to the construction of the reservoir and an influx of workmen who would reside there for a considerable period, it was reasonably certain that there would be an additional population of children who would require education. The Duke of N. was the owner of fourteen-fifteenths of the land in the township where the land taken by the corporation was situate.

Held, that no claim was maintainable in respect of expense which might be incurred for educating these children, as it was merely an uncertain and remote possibility of a burden being imposed in respect of something which was not the use of the land itself.—TYNEMOUTH CORPORATION AND NORTHUMBERLAND (DUKE) RE, *K.B.D.*; 89 L. T. 557.

11. *Water rate—Supply of water—Differentiation of rates—Corporation of borough—"Rates"—Northampton Waterworks Act*, 1861 (24 & 25 *Vict. c. xlvii*), *s.* 59—*Northampton Corporation Waterworks Act*, 1884 (47 & 48 *Vict. c. ccviii.*), *ss.* 10, 25, 36—*Northampton (Extension) Order*, 1900, *art.* 36.—By section 59 of the Northampton Waterworks Act, 1861 (which incorporated the Waterworks Clauses Act, 1847), the waterworks company might from time to time supply any person with water for such remuneration and on such terms and conditions as should be agreed upon. By the Northampton Corporation Waterworks Act, 1884, the waterworks undertaking was transferred to the corporation, with all the authorities, rights, powers, and privileges of the company. By section 36 of the Act "the corporation may thenceforward charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per centum per annum on the net rateable value of such dwelling-house, as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable, or, if there be no such list, then on the net rateable value of such dwelling-house as the same is assessed to the last poor rate." There was no section in any of the Acts which gave any specific directions or powers as to either equality or differentiation of rating. The defendants' dwelling-house was, until 1900, situated in Kingsthorpe, a district outside the borough of Northampton, but within the corporation's area of water supply. By the Northampton (Extension) Order, 1900, the area of the borough was extended so as to include that part of Kingsthorpe where the defendants' house was situated, and, by article 36 of the order, the general district rates to be levied in the added part of Kingsthorpe were not in any one year for ten years to "exceed such an amount as, when added to the poor rate and the borough rate, and any other rate made by the corporation in the same year," would make up a total rate of 5s. 6d. in the pound on the rateable value of such hereditament. The rates levied in the added part of Kingsthorpe (other than the water rate) always amounted to 5s. 6d. in the pound. The corporation had, down to June, 1901, been paid a water rate of 7½ per cent. from all domestic consumers in the old borough and the added part In June, 1901, the corporation reduced the water rate to 5 per cent. in the case of consumers in the old borough, but retained it at 7½ per cent. in the case of consumers in the added part.

Held, (1) that there was nothing in the Acts to prevent the corporation from differentiating the water rate as above set forth; and (2) that the words "any other rate" in article 36 of the Northampton (Extension) Order, 1900, did not include a water rate, and that the corporation were entitled to charge a water rate from the defendant, though the rate payable by him, exclusive of the water rate, amounted to 5s. 6d. in the pound.—NORTHAMPTON CORPORATION *v.* ELLEN, *C.A.*, 305; [1904] 1 K. B. 299; 73 L. J. K. B. 329; 90 L. T. 71.

WEIGHTS AND MEASURES:—

1. *Beam scale—Weight indicated exceeding true weight of article sold—Paper bag placed in scoop in which tea is weighed at request of customer—Metal clip fastened to machine—Having in their possession a scale which is false or unjust—Weights and Measures Act*, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.—The respondents, who were wholesale tea merchants, received orders from certain customers to supply them with tea in quarter-pound packets weighed in customers' own bags, the net weight of each packet to be a quarter of a pound. In order to meet the wishes of their customers the respondents set aside one of their weighing machines, on one arm of which they attached a metal disc as nearly as possible corresponding in weight with the weight of a bag. The respondents were summoned under section 25 of the Weights and Measures Act, 1878, for having in their possession a scale which was false and unjust.

Held, reversing the decision of the magistrate, that the respondents should have been convicted, because there was evidence that the beam scales in question could not weigh accurately, and were therefore false and unjust within the meaning of the section.—LONDON COUNTY COUNCIL *v.* PAYNE, *K.B.D.*, 299; [1904] 1 K. B. 194; 73 L. J. K. B. 192; 89 L. T. 632.

2. *Sale of coal—"Cause the weight of the vehicle . . . to be previously ascertained"—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 22.—By section 22 (1) of the Weights and Measures Act, 1889: "Where any quantity of coal exceeding two hundredweight is conveyed for delivery on sale in a vehicle in bulk, the seller of the coal

shall . . . cause the weight of the vehicle to be previously ascertained. . . ."

Held, that the true test was whether the vehicle had been weighed so recently and under such circumstances that its correct weight had been ascertained.

Semble, that weighing at reasonable intervals was not the proper test, but that the waggon need not be weighed before every delivery.—BEARDSLEY *v.* PIKE, *K.B.D.*; 90 L. T. 652.

WILL:—

1. *Attesting witness — Gift to daughter or her children—Attestation by daughter's husband—Failure of a gift to daughter's children—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 15 —A testator who died in 1886 by his will, which was attested by the husband of one of his daughters, directed that after the death of his wife, which happened in the lifetime of that daughter, half of his freehold estate should go to that daughter or her children.

Held, that as the gift to that daughter was void by virtue of section 15 of the Wills Act, 1837, the gift to her children also failed.—APLIN *v.* STONE, *Ch.D. Swinfen Eady, J.*; [1904] 1 Ch. 543; 73 L. J. Ch. 456; 90 L. T. 284.

2. *Codicil confirming will—Unattested alteration made before execution of codicil—Construction—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 21.—Where unattested alterations have been made in a will after the execution thereof, and the testator has afterwards executed a codicil confirming the will, it is in all cases a question of the construction of the codicil whether he has confirmed the will as originally executed or as subsequently altered. A "will" means an instrument executed in conformity with the requirements of the Wills Act; consequently, where the codicil purports to confirm the "will," no effect is to be given to the subsequent alterations.

A testatrix gave legacies to A., B., C. Afterwards, by her directions, the legacies were crossed out. The obliteration was not executed in the manner required by the Wills Act for the execution of the will. Subsequently she executed a codicil to her "will" revoking the legacy to B., and in other respects confirming her said will.

Held, that the legacies to A. and C. were valid, and payable to them.—HAY, RE, KERR *v.* STINNEAR, *Ch.D. Buckley, J.*, 92; [1904] 1 Ch. 317; 73 L. J. Ch. 33.

3. *Condition—Marriage with consent of mother—Withdrawal of consent.*—Where a testator regulates the enjoyment of property given by his will according as the beneficiary shall or shall not marry with the consent of her mother, but prescribes no particular form of consent, the court will treat such consent as a matter of substance rather than of form; it will not allow such consent, if once given, to be capriciously withdrawn.—BROWN, RE, INGALL *v.* BROWN, *Ch.D. Byrne, J.*, 173; [1904] 1 Ch. 120; 73 L. J. Ch. 130; 90 L. T. 220.

4. *Construction—Advancement—Duty to account.*—A testator's will gave his widow a power of appointing his residuary estate among his children, and also contained advancement and hotchpot clauses. Four children survived him. During his widow's lifetime, advances, which purported to be made under the advancement clause, were made to one of the children. The widow, by the will, appointed the estate among her children equally.

Held, that the hotchpot clause had no application, and that there was no intention that the advanced sums should be brought into account by the advanced child.—FOX, RE, WODEHOUSE *v.* FOX, *Ch.D. Byrne, J.*, 229; [1904] 1 Ch. 480; 73 L. J. Ch. 314; 90 L. T. 477.

5. *Construction—Ambiguity—Codicil—Explanation by reference—Gift to a class—Common characteristic.*—It is permissible to refer to a codicil to clear up an ambiguity in a will where the recital of the will in the codicil is not obviously erroneous.

Darley v. *Martin*, 13 C. B. 683, and *Groves* v. *Raper*, 5 W. R. 134, followed.—VENN, RE, LINDON *v.* INGRAM, *Ch.D. Joyce, J.*, 603; [1904] 2 Ch. 52; 73 L. J. Ch. 507; 90 L. T. 502.

6. *Construction—Bequest of "all securities for money standing invested in my name."*—A testatrix made a bequest of "all securities for money standing invested in my name." Her personal property comprised the following items: Mortgage bonds, India Stock, perpetual debenture stocks, perpetual preference stocks, and shares in a limited company. After the testatrix's death a list in her handwriting containing the above items and headed "Securities" was found.

Held, that the words in question referred to the investments generally which were standing in the testatrix's name at the time of her death, the word "invested" relating to the word "money"; and that therefore all the stocks and shares were included in the bequest.

Decision of Kekewich, J. (89 L. T. Rep. 84), affirmed.—JOHNSON, RE, GREENWOOD *v.* GREENWOOD, *C.A.*; 89 L. T. 520.

7. *Construction—Bequest to voluntary schools—Education Act*, 1902 (2 *Ed.* 7, *c.* 42).—By his will in 1886 testator bequeathed shares in a bank to the managers of voluntary schools upon trust to pay the income thereof to the said schools so long as they should be supported by voluntary subscriptions, but, in the event of the said schools ceasing to be so supported or becoming subject to the control of a school board, a gift over.

Held, that the schools had not ceased to be supported by voluntary subscriptions, and that the gift over had not taken effect in consequence of the Education Act, 1902.—BEARD'S TRUSTS, RE, BUTLIN *v.* HARRIS, *Ch.D. Byrne, J.*, 312; [1904] 1 Ch. 270; 73 L. J. Ch. 176; 90 L. T. 274.

8. *Construction—Estate tail*—Cy-près—*Perpetual succession of life estates—Distribution* per stirpes.—In a devise to A. for life, and after her death to her child or children, equally between them share and share alike if more than one, and if but one to such only child for life, and so to be continued and distributed in a descending line *per stirpes* from issue to issue for life so long any issue should be living descendant from A., the children of the parent dying taking their parents' share equally between them in all cases of decease, there being no gift over on failure of the issue of A.,

Held, that no estate tail, by the operation of the doctrine of *cy-près*, was given to A., and that the limitations subsequent to the life estate of A. being void for remoteness, there was an intestacy on the death of A.

Seaward v. *Willock*, 5 East 198, applied.

Mortimer v. *West*, 2 Sim. 274; *Forsbrook* v. *Forsbrook*, 16 W. R. 290, L. R. 3 Ch. App. 93; and *Parfitt* v. *Hember*, L. R. 4 Eq. 443, distinguished.—RICHARDSON, RE, PARRY *v.* HOLMES, *Ch.D. Buckley, J.*, 119; [1904] 1 Ch. 332; 73 L. J. Ch. 153.

9. *Construction—Gift to class of children—Period for ascertaining class—Prior trust for accumulation of income—Remoteness—Provision for raising portions—*

Thellusson Act (39 & 40 *Geo.* 3, *c.* 98), *s.* 2.—The rule that, where there is a gift to a class of children, the class shall be incapable of being increased, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, does not apply where there is a direction to accumulate for a period extending beyond the time fixed for distribution.

A testator directed that out of the income of his estate there should be accumulated a yearly sum of £24 while there should be a child of S. B. for the time being under twenty-one, and that the accumulated fund should be in trust for the children of S. B. who should attain twenty-one in equal shares, the shares of such children to be vested in and payable to them at twenty-one. Subject thereto he gave the income of his estate to S. B. for life.

Held, (1) that the period directed for accumulation was so long as there should be any child of S. B. for the time being under twenty-one, irrespective of the date when such child was born; (2) following *Beech* v. *Lord St. Vincent*, 3 De G. & Sm. 678, that the direction to accumulate was a provision for raising portions within section 2 of the Thellusson Act, and that, consequently, it was not rendered void by that Act; (3) that the class of children could not be ascertained until the termination of the period directed for accumulation, and, consequently, that until that date the accumulated fund did not become divisible.

Watson v. *Young*, 33 W. R. 637, 28 Ch. D. 436, followed.—STEPHENS, RE, KILBY *v.* BETTS, *Ch.D. Buckley, J.*, 89; [1904] 1 Ch. 322; 73 L. J. Ch. 3.

10. *Construction—Gift "to the eldest son of my sister"—Intestacy.*—A testator by his will made in 1822 devised real estate in strict settlement, and, in the event of the failure of the previous limitations, which happened, "to the eldest son of my sister, F. M. G., and his heirs for ever." The testator died in 1860. At the date of the will F. M. G. had two sons, both of whom died in the lifetime of the testator intestate and without issue. Two other sons, born after the date of the will, survived the testator. One died intestate and without issue before the failure of the previous limitations. The fourth born son of F. M. G. was her eldest surviving son at the time of the failure of the previous limitations.

Held (reversing the judgment of the court below), that there was an intestacy.—AMYOT *v.* DWARRIS, *P.C.*; [1904] A. C. 268; 73 L. J. P. C. 40; 90 L. T. 102.

11. *Construction—Gift to tenant for life with remainder to a class, their children to take by substitution—Occurrence of events not contemplated by testator.*—A gift by will to a class to take effect after a life estate, with a substitutional gift to the children of deceased members of the class, expressed in words of futurity, does not let in the children of a member of the class in a case where, he having survived the tenant for life, both die after the date of the will during testator's life.—KINNEAR, RE, KINNEAR *v.* BARNETT, *Ch.D. Kekewich, J.*; 90 L. T. 537.

12. *Construction—"In the event of either of my two sons dying before his brother."*—A testator by his will left the residue of his estate "to be divided equally between" his two sons, and continued: "In the event of either of my two sons dying before his brother without legitimate issue, then his share shall become the property of his surviving brother."

Held, that the words pointed to the death of either of the sons without issue at any time, and should not be confined to the event of the death of either in the lifetime of the testator.—DUFFILL *v.* DUFFILL, *P.C.*; [1903] A. C. 491; 72 L. J. P. C. 97; 89 L. T. 82.

13. *Construction — Investment — "Securities" — Evidence.*—A testator gave all his property, real and personal, to trustees upon trust for conversion, and continued: "I declare that all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit. And I authorise my trustees to continue or leave any moneys invested at my death in or upon the same securities."

Held, that the testator had not used the word "securities" in its strict and primary sense of "money secured on property," but in its popular sense, so as to include railway stocks and shares.

Per Vaughan Williams, L.J.—The meaning of a word is relative to the circumstances and occasion and date on which the word is used, and it is the duty of a judge to inform his mind, not only by reference to dictionaries, but also by evidence, of the meaning ordinarily given to such a word.—RAYNER, RE, RAYNER *v.* RAYNER, *C.A.*, 273; [1904] 1 Ch. 176; 73 L. J. Ch. 111; 89 L. T. 681.

14. *Construction — Personalty — Local situation—Bequests of property in United Kingdom and in South Africa—Separate trusts and trustees—South African debtors by specialty and simple contract—Shares in South African companies transferable both there and in London—Certificates at London banks.*—For the purpose of construing a will which disposes of "personalty in the United Kingdom" in one way, and "personalty in South Africa" in another way, the debts owing to testator, whether on simple contract or by specialty, are to be considered as locally situated where the debtors are, the distinction made between simple contract and specialty debts in relation to probate duty not holding good in questions of construction.

In construing such a will, shares in companies constituted according to the law of a South African state, but having offices both there and in London, in either of which places transfers can be registered and certificates issued are to be considered as locally situated in that one of the two countries in which the share certificates are kept at the date of the testator's death.—CLARK, RE, MCKECHNIE *v.* CLARK, *Ch.D. Farwell, J.*, 212; [1904] 1 Ch. 94; 73 L. J. Ch. 188; 89 L. T. 736.

15. *Construction—Settlement—Successive life estates and successive estates tail.*—W. P. H. by his will devised as follows: "I devise all my real estate to my godson P. C. H. for his life with remainder to his first and other sons successively in tail, with remainder to the eldest and every other son of the said Sir C. H. for life, with remainder to the first and other sons of such sons of Sir C. H. in tail, with remainder to my own right heirs."

The testator died on the 20th of February, 1859.

Sir C. H. had several sons, of whom P. C. H. was the second and Sir J. W. H. the eldest. P. C. H. died on the 14th of July, 1902, without ever having been married. Sir J. W. H. thereupon became entitled to the estates for his life. C. J. H., the eldest son of Sir J. W. H., had disentailed, his father joining in the deed, and, by virtue of that deed and of a transfer of the life interest of his father, he now claimed to be entitled in fee simple in possession to the hereditaments comprised in the testator's will, and asked for a declaration accordingly.

Held, that, applying the reasoning of *Lewis* v. *Waters*, 6 East, 336, and *Cradock* v. *Cradock*, 4 Jur.

N. S. 626, the eldest and every other son of Sir C. H. took successive life estates, and that the first and other sons of such sons of Sir C. H. took successive estates in tail, but that the limitations did not enable the first and other sons of the eldest son of the said Sir C. H. to take until after the death of all the tenants for life.—HONYWOOD *v.* HONYWOOD, *C.A.*; 89 L. T. 378.

16. *Construction — Specific devise of freeholds—Direction to pay "my duties"—Estate and settlement estate duties—Freeholds exonerated - Finance Acts,* 1894 (57 & 58 *Vict. c.* 30), ss. 5 (1), 6 (2), 8 (3) (4), 9 (1)(4), *and* 14 (1); *and* 1896 (59 & 60 *Vict. c.* 28), s. 19—*Direction to pay incumbrances—Mortgage on freeholds—Further security—Apportionment—Locke-King's Acts* (17 & 18 *Vict. c.* 113 (30 & 31 *Vict. c.* 69). —A testator devised freeholds in trust for his daughter and her children, and gave the residue of his estate, both real and personal, in trust for sale and conversion, the clear residue to be divided, after payment of his debts, funeral and testamentary expenses and duties, and any incumbrances charged on his said estate.

Held, a direction to pay all duties arising by reason of the dispositions of the will, and therefore to pay estate and settlement estate duties on the freeholds.

The same freeholds were subject to a mortgage, for which a life policy (which formed part of the residue) had been deposited as further security.

Held, that the mortgage debt must be apportioned according to the respective values of the properties charged, and that the proportion on the policy moneys should alone be paid out of residue.

In re Athill, 29 W. R. 309, 16 Ch. D. 211, followed.—PIMM, RE, SHARPE *v.* HODGSON, *Ch.D. Farwell, J.*, 648.

17. *Construction—Tenant for life and remainder-man—Specific gift—Property of a wasting nature or involving onerous obligations — Gift of business—Profits arising from business pending sale—Enjoyment* in specie.—A specific bequest to a tenant for life of property of a wasting nature or involving onerous obligations entitles the tenant for life to enjoy the property *in specie*; it is immaterial whether the bequest be that of a leasehold or of a business. To enable executors in such a case to carry on a business, it is not necessary to find in the will a distinct authority for that purpose; the authority may be inferred from the general terms of the will.

A testator gave to his wife, during her widowhood, all his real and personal estate, and at her death all to be divided amongst his children, also his shares in certain businesses. There was no express trust for conversion or power to carry on the businesses. The shares were not converted during the tenancy of the widow. The question arising whether the whole of the profits earned during the tenancy belonged to the widow or only such proportion as represented £4 per cent. per annum on the capital value of the shares,

Held, that the gift of the shares to the widow during her tenancy was specific, that she was entitled to enjoy them *in specie*, and, consequently, that the whole of the profits belonged to her.

Kirkman v. *Booth*, 11 Beav. 273, distinguished.

In re Chancellor, 32 W. R. 465, 26 Ch. D. 42, followed. — STAINER *v.* HODGKINSON, *Ch.D. Buckley J.*, 260.

18. *Forfeiture—"Alienate or incumber"—Bankruptcy—Petition by debtor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52).—Property was given under a will to life tenants with a gift over in the event of any of them "alienating or incumbering, or agreeing to alienate or incumber" their shares or interests. One of the life tenants presented a petition in bankruptcy, which was followed by adjudication on his own application.

Held, that this constituted an alienation, and that the gift over took effect.

In re Amherst, 20 W. R. 290, 13 Eq. 464, followed.—COTGRAVE, RE, MYNORS *v.* COTGRAVE, *Ch.D. Kekewich, J.*, 411; [1903] 2 Ch. 705; 72 L. J. Ch. 777; 89 L. T. 433.

19. *Forfeiture—Construction—"Become payable" —Equitable charge—Cancellation of charge.*—B., being entitled under a will to a life interest in a share of the testator's estate, executed a document charging his interest with the repayment to the lenders of a sum advanced. The will contained a clause that B. should not have power to dispose of his share by way of anticipation, and that if he did anything whereby his share, or any part thereof, "would become payable to or vested in some other person," it was to go to his son. Upon becoming aware of the forfeiture clause, and before any payment of capital or interest had been made by B., under the charge, B , and the lenders cancelled it.

Held, that some part of B.'s share became payable to other persons immediately upon the execution of the charge; that the forfeiture took effect, and that the subsequent cancellation made no difference. —BAKER, RE. BAKER *v.* BAKER, *Ch.D. Buckley, J.*, 213; [1904] 1 Ch. 157; 73 L. J. Ch. 172; 89 L. T. 742.

20. *Forfeiture clause — Marriage of a son or daughter prohibited within certain degrees—Applicable after death of testator—Alienation or bankruptcy—Words of futurity.*—A testator devised all his real and personal estate to trustees upon trust for sale, and to be divided, after certain payments, among his children, sons and daughters (other than A., a daughter), in equal shares; he then inserted a clause to the effect that if any child should contract a marriage with any person of any degree of kindred, unless more remote than third cousin, and also in the case of a daughter, without the previous written consent of the trustees or trustee of his will, then he or she should forfeit his or her right to the share in his trust estate. Subsequently the plaintiff, another daughter, married her first cousin, and on her father's death claimed to be entitled to a share in his trust estate.

Held (by Vaughan Williams and Stirling, L.JJ.; Cozens-Hardy, L.J., dissenting), that there was sufficient in the will to show that the testator intended that these acts of forfeiture should take effect only after his death, and as the plaintiff had married within the prohibited degrees during the lifetime of the testator, she had not forfeited her interest in his trust estate.

Metcalfe v. *Metcalfe*, [1891] 3 Ch. 1, 40 W. R. Dig. 280, discussed and distinguished.

Decision of Kekewich, J., reversed.—CHAPMAN, RE, PERKINS *v.* CHAPMAN, *C.A.*, 467; [1904] 1 Ch. 431; 73 L. J. Ch. 291; 90 L. T. 339.

21. *Gift in satisfaction of debt—General power of appointment—Lapse.*—Where, under a general testamentary power, a sum of money is appointed in satisfaction of a debt, such appointment will not fail owing to the death of the appointee in the testator's lifetime.

The trustee of a marriage settlement made certain over-payments to the tenants for life of the settled fund. In compliance with an order of the court the tenant for life by her will appointed a sum equal to the amount overpaid to her in favour

of the said trustee, who subsequently died in her lifetime.

Held, that there was no lapse, and that the sum appointed as aforesaid became payable to the estate of the deceased trustee on the death of the tenant for life.

Williamson v. *Naylor*, 3 Y. & C. Ex. 208, and *In re Sowerby's Trust*, 2 K. & J. 630, followed.—STEVENS *v.* KING, *Ch.D. Farwell, J.*, 443; [1904] 2 Ch. 30; 73 L. J. Ch. 535; 90 L. T. 665.

22. *Name and arms clause—Direction to "lawfully assume" arms—Meaning of—Condition subsequent—Impossibility of performance.*—A person cannot "lawfully assume" a coat of arms by mere user, or otherwise than by obtaining a grant of the arms in one or other of the ways recognized by the custom and usages of society with regard to arms—viz., by an Act of Parliament, a grant from the College of Heralds, or a Royal License.

As to the meaning of "assume" standing alone, *quære.*

A testator directed that every person becoming entitled under his will to his settled real estates should in certain events "lawfully assume" a coat of arms used by the testator (but being in fact the arms of certain ancient families with which the testator could not be proved to be connected), and in default should (in effect) forfeit his estate. Upon evidence being given as to the impossibility of obtaining a grant of the arms from the Heralds' College to the plaintiff, who was devisee of the settled estates,

Held, that the direction in his will was void as a condition subsequent which was impossible of performance, and that the plaintiff's estate was not forfeited.—CROXON, RE, CROXON *v.* FERRERS, *Ch.D. Kekewich, J.*, 343; [1904] 1 Ch. 252; 73 L. J. Ch. 170; 89 L. T. 733.

23. *Precatory trust—Absolute gift followed by expression of desire.*—The decisions of the Court of Appeal in *In re Diggles*, 39 Ch. D. 253, *In re Hamilton*, [1895] 2 Ch. 370, and *In re Williams*, [1897] 2 Ch. 12, are not inconsistent with the rule laid down by Lord Alvanley in *Malim* v. *Keighley*, 2 Ves. 333, 335, as to what creates a trust in the case of a gift, which was approved of by the House of Lords in *Knight* v. *Broughton*, 11 Cl. & F. 513, 548.

Testatrix bequeathed all her real and personal property equally amongst her two daughters as tenants in common for their own absolute use and benefit, and appointed them her executrixes. She then continued: "My desire is that each of my said two daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the moneys and investments under this my will."

Held, that the expression of the testatrix's desire was not sufficient to cut down the former absolute gift, and no trust was created in favour of the son.

Decision of Kekewich, J., affirmed.—OLDFIELD, RE, OLDFIELD *v.* OLDFIELD, *C.A.*; [1904] 1 Ch. 549; 73 L. J. Ch. 433; 90 L. T. 392.

24. *Precatory trust—Gift beneficial or in trust—Absolute gift to wife "in confidence"—Gift over in default—Power of appointment—Absolute donee.*—A testator gave, bequeathed, and devised to his wife the whole of his real and personal estate absolutely "in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces." The testator died childless, leaving a widow and seven nieces surviving him.

Held (by Vaughan Williams and Stirling, LJJ., Cozens-Hardy, L.J., dissenting), that the widow took the property absolutely for her own benefit, and that no trust was created in favour of the nieces.

Per Cozens-Hardy, L.J.—Upon the construction of the will as a whole the widow took more than a life interest, and if all the nieces died before her the absolute gift would remain. But it was clear the testator intended that the nieces should take a share, either as she should determine or in default in equal shares.

Decision of Kekewich, J., affirmed.—HANBURY, RE, HANBURY *v.* FISHER, *C.A.*, 662; [1904] 1 Ch. 415; 73 L. J. Ch. 222; 90 L. T. 66.

25. *Remoteness—Limitations in strict settlement—Contingent remainders or executory devises—Failure for remoteness.*—A will, dated in 1854, contained a series of limitations in strict settlement under which, on the death of A. without issue in 1891, B. became tenant for life in possession, with remainder to the plaintiff, his eldest son, an infant, as tenant in tail, with divers remainders over, including a remainder to C., the plaintiff's uncle, who was born in 1860, for life, with remainders over.

By a codicil, dated in 1868, the testator directed and declared that no devisee of any of his real estates devised under or by virtue of his will should have a vested interest therein or be entitled to the possession of the same until the attainment of the age of twenty-four years, anything contained in his will or any law or usage to the contrary notwithstanding.

The testator died in 1879.

Held, that, regard being had to the terms of the codicil, the limitations of the will took effect by way of executory devise and not by way of contingent remainder, and had failed for remoteness.

Decision of Farwell, J., affirmed.—WRIGHTSON, RE, BATTIE-WRIGHTSON *v.* THOMAS, *C.A.*; [1904] 2 Ch. 95; 90 L. T. 748.

26. *Rent-charge—Excepted gift—Residuary gift—Codicil—Intestacy—Rent-charge issuing out of leaseholds—Chattel real—Vendor's lien for unpaid purchase-money — Next-of-kin — Locke-King's Act, 1854 (17 & 18 Vict. c. 113), s. 1—Amending Act, 1867 (30 & 31 Vict. c. 69)—Amending Act, 1877 (40 & 41 Vict. c. 34), s. 1.*—When in a will property is specifically excepted from a general gift and is afterwards specifically bequeathed, but the bequest fails by lapse or otherwise, then it is to be taken that the object of the testator in making the exception was simply to give the property to the specific legatee, and, that being the sole object, upon the failure of the bequest it will be held to be included in the residuary gift. If, however, the testator makes no disposition by will of the excepted property, this reasoning does not apply, and the property passes as on an intestacy. Where, therefore, a testator having made a bequest of his personal estate except chattels real, and bequeathed the chattels real to a legatee who predeceased him subsequently made a codicil in which he referred to the death of the legatee and confirmed his said will, without making any disposition of the chattels real,

Held, that the chattels real passed to the next-of-kin, and did not fall into residue.

Held, also, that a rent-charge issuing out of

leaseholds is a chattel real. A rent-charge of this nature is within the provisions of Locke-King's Act, 1854, read together with the Amending Acts of 1867 and 1877. Consequently where a testator, who has contracted to purchase such a rent-charge dies intestate in respect thereof, it passes to the next-of-kin subject to the vendor's lien for unpaid purchase-money.

Decision of Byrne, J. ([1904] 1 Ch. 111), on this point affirmed.—FRASER, RE, LOWTHER *v.* FRASER. *C.A.*, 516; [1904] 1 Ch. 726; 73 L. J. Ch. 481.

27. *Substitutional gift—Gift to the children of A.—"Die without leaving children"—Vested interests.*—A testator gave his property in trust for his wife for life and upon her death to his daughter A., but if she should be then dead to any child or children of A., and "failing such issue of" A. to his daughter B., but if she should be then dead to any child or children of B.; but should A. and B. be then both dead "leaving no issue," then, in case of each or either of them being married leaving a husband or husbands them surviving, to the husbands or survivor of such husband.

B. was dead, leaving one child.

A. was still living, and had three children.

Held, that the case fell within the rule that where a vested interest was given to children it was not to be divested by a gift over if the parent died without leaving children.

Treharne v. *Layton*, L. R. 10 Q. B. 459, at p. 463, considered and applied.

In re Ball, Slattery v. *Ball*, 59 L. T. Rep. 800; 40 Ch. Div. 11, distinguished.

Decision of Kekewich, J., affirmed.—BRADBURY, RE, WING *v.* BRADBURY, *C.A.*; 73 L. J. Ch. 591; 90 L. T. 824.

28. *Testamentary expenses—Settlement estate duty—Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19, *sub-section* 1.—A mere direction in a will that the executors are to pay testamentary expenses out of residue does not extend to settlement estate duty and is not an express provision that it is not to be borne by the settled property within the meaning of sub-section 1 of section 19 of the Finance Act, 1896 (59 & 60 Vict. c. 28).—KING, RE, TRAVERS *v.* KELLY, *Ch.D. Swinfen Eady, J.*, 230; [1904] 1 Ch. 363; 73 L. J. Ch. 210; 90 L. T. 281.

29. *Wasting security—Notional conversion—Tenant for life and remainderman—Rate of interest—Interest upon surplus income.*—Where there is a notional conversion of a wasting security, as in *Meyer* v. *Simonsen*, 5 De G. & Sm. 723, interest thereon should now be allowed to the tenant for life at the rate of 3 per cent. only.

The surplus income of the wasting security, after providing for the 3 per cent., goes to capital, but the interest thereon to the tenant for life.—WOODS, RE, GABELLINI *v.* WOODS, *Ch.D. Kekewich, J.*; [1904] 2 Ch. 4; 73 L. J. Ch. 204; 90 L. T. 8.

WORKMAN.—See Master and Servant.

WRIT OF POSSESSION.—See Receiver, 4.

[THE END.]

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